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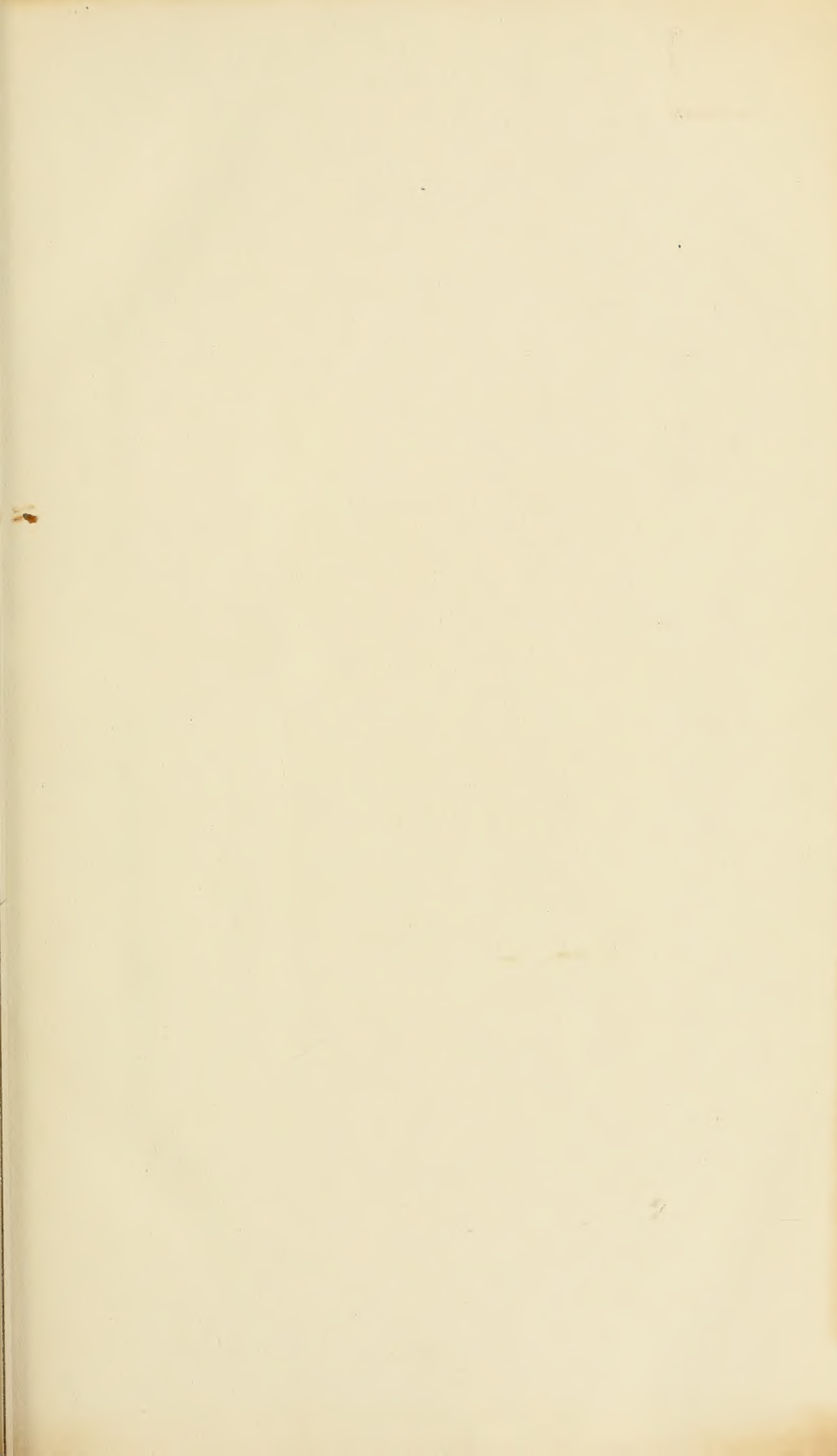


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THE
ENGLISH REPORTS

VOLUME XX

PRIVY COUNCIL

IX

CONTAINING

MOORE, INDIAN APPEALS, VOLUMES 11 to 14

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LIST OF THE JUDICIAL COMMITTEE OF THE MOST HON. PRIVY
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REPORTS OF CASES heard and determined
by the Judicial Committee and the Lords
of the Privy Council, on Appeal from the
Supreme and Sudder Dewanny Courts in
the East Indies, 1866-67. By EDMUND F.
MOORE, Barrister-at-Law. Vol. XI.

GOREE MONEE DOSSEE, and Others,—*Appellants*: JUGGUT INDRO NARAIN
CHOWDERY, and Others,—*Respondents* * [June 18, 1866].

On petition from the High Court at Fort William, Bengal.

It is incumbent upon a party applying for special leave to appeal, to set out in the petition a full statement of the facts and legal grounds, to show that there is a substantial case on the merits, and a point of law involved, proper to be determined by the appellate Court.

A petition for special leave to appeal contained a general statement of the proceedings in India, and an averment that they were irregular and contrary to law. Such petition ordered to be dismissed or to stand over for amendment as being too general and vague.

On the amended petition, stating in detail the facts and specifically showing legal grounds of objection to the decrees and Order of the Court below refusing leave to appeal, special leave to appeal was granted.

This was a petition for leave to appeal from certain Orders and decrees of the Civil Judge and Sudder Ameen of the Zillah Rungpoor, affirmed upon appeal [2] by the High Court of Judicature at Fort William, Bengal, which Court refused leave to appeal to Her Majesty in Council on the ground, as it appeared from the petition, that it was only a decision in a Miscellaneous case, and not a final judgment, decree or Order, within the meaning of sec. 39 of the Charter, dated the 14th of May, 1862, constituting the High Court of the Presidency at Fort William, or the previous Order in Council of the 10th of April, 1838, relating to appeals.

The petition set forth the proceedings taken in India under a decree of the Zillah Court of Rungpoor, of the 26th of June, 1837, and in which the ancestors of the Respondents were interested, and stated generally the facts of the case, submitting that the proceedings and Order of the High Court refusing leave to appeal were irregular and contrary to law.

Mr. Wood, in support of the petition.

The Lord Justice Knight Bruce.—Their Lordships are of opinion, that the statements, both of law and fact, contained in the petition are of too general a character

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Justice Knight Bruce, the Right Hon. the Lord Justice Turner, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

to enable them to judge of the propriety of granting the special leave to appeal prayed for. The petition, therefore, must be either dismissed, with liberty to present another petition, or stand over to amend the petition. In either case the facts alleged in the petition must be verified by an affidavit.

The petition was amended, and, after fully detailing the proceedings in the Courts in India and the decrees of the Principal Sudder Ameen and Zillah Judge of Rungpoor and the High Court, [3] alleged that the Petitioners, feeling aggrieved by the decrees, presented a petition for leave to appeal, which was rejected by the High Court (the Hon. G. Loch and the Hon. F. A. Glover present), the Court saying, "The Order passed on the petition of Bamundass Mukerjee, No. 265 of 1865, is applicable to this petition, which is rejected" (a). That [4] the Petitioners were precluded by the practice of the

(a) The judgment in the case of Bamundass Mukerjee referred to and set out in the petition was as follows:—

"This is an application for permission to appeal to the Privy Council against the Order of the High Court passed in the execution of a decree of the Privy Council. Notice was ordered to be issued to the opposite party to come in and show cause against this application within one month from the date of service of notice. Subsequently, both parties having appeared, and as the case involved a new point of considerable importance, it was ordered on the 26th August, 1865, to be brought up before the miscellaneous Bench of Judges. It accordingly came before the Court (present, Justices Loch and Glover) on the 13th September, 1865. Mr. Justice Loch delivered judgment and an Order was passed by this Court on the 27th April, 1865, confirming an Order passed by the Principal Sudder Ameen in execution of a decree for a sum above Rs. 10,000, and application is now made to the Court for permission to appeal to the Privy Council under section 39 of the Charter of the High Court. The words of the Charter quoted in support of the application are from any 'final judgment, decree, or Order' of the said High Court made in appeal. The words, no doubt, are very wide: we think that they are not intended to extend the privilege of appealing to the Privy Council in miscellaneous cases, or to alter the present rules which restrict an appeal to 'judgments, decrees, or decretal Orders.' In Regulation XVI. of 1797, the word 'judgment' was alone used, but, notwithstanding, parties had been allowed to send miscellaneous cases to the Privy Council: the practice was put a stop to in 1837 by a construction of the late Sudder Court, dated the 18th August, 1837, No. 1102. In 1838 an Order in Council was passed, bearing date the 10th April, issuing rules for the admission of appeals to the Privy Council: and in the first of these rules we have the words 'judgment, decree, or decretal order,' all of which words, we think, are intended to have one and the same meaning, viz., 'the judgment or decisions come to in a suit,' and that they do not refer to Orders passed in execution of a decree. Such has been the interpretation put upon the words by the public, for up to the present time no application has been made to submit miscellaneous appeals to the Privy Council through this Court since the rules of 1838 were promulgated. In the Charter of the High Court the same words are used, with the omission of the word 'decretal' before 'Order': no doubt it is a remarkable omission, but reading it with the assistance we have from the letter of the Secretary of State for India, of the 14th May, 1862, par. 37, we do not think that so material a change in the past practice of the Courts as the permission to appeal from miscellaneous Orders would have been passed by without comment, when he notices very particularly the introduction of a section in the Charter allowing of appeals from interlocutory Orders with the permission of a Judge of the High Court. In the paragraph of the letter referred to it is distinctly stated, that in regard to appeals to the Privy Council the object has been to avoid unnecessary innovation: that the existing rules which regulate these appeals are, therefore, left in force, with one or two additions only: and the writer proceeds to instance the introduction of a section permitting appeals from interlocutory Orders: and we think that there is a very great and sufficient reason why an appeal from Orders passed in execution of a decree should not be allowed, which is, that if allowed it would open a fresh door for harassing an Opponent who has already had to fight his battle perhaps up to the Privy Council, and deprive him of the power of executing his decree without further trouble and vexation. We think, therefore, that this and such like appeals cannot be received, and we reject the application."

Court and their interpretation of the Order in Council of the 10th April, 1838, and of the Charter of the High Court, from obtaining the leave of such Court to appeal to Her Majesty in Council; that the value of the subject matter in the original decree of the 26th June, 1837, was, at the date of the judgment of the High Court sought to be appealed against, considerably in excess of Rs. 10,000, the appealable amount, [5] the sum which was sued for in the original suit being Rs. 9,925, and the amount awarded by the decree being Rs. 5800, with interest at the rate of 12 per centum per annum to the date of payment; that the grounds on which the Petitioners applied for special leave to appeal were, amongst others: First: that the construction put by the High Court upon the Order in Council of the 10th April, 1838, and the Charter of the High Court was incorrect. Second; that by Ben. Reg. of 1814, and by the express terms of the Act, No. VIII. of 1859, ss. 207 to 217, it is rendered obligatory that applications for execution should be made to the Court which passed the decree; and it had been repeatedly adjudged by the Indian Courts, that applications for execution to a Court without jurisdiction were void, and, therefore, wholly insufficient to prevent execution being barred by limitation. Third: that the Indian law requires, in order to enable another Judge than the one who passed the decree to execute it, that an execution case should be referred to such other Judge by the Judge who passed the decree, and when such execution case has been struck off the file of the Judge to whom it has been referred, his jurisdiction is ended, and to revive it a new reference is required. Fourth: that according to decided cases of Indian law and the principles of jurisprudence the process of a Court not having jurisdiction can in no case be legalized by the subsequent sanction of the Judge having jurisdiction, but new process must be issued. Fifth: that the proceedings in the Court of the Principal Sudder Ameen were, therefore, wholly void from the 19th June, 1844; and that, consequently, any money recovered thereunder was illegally exacted, and would [6] not prevent the operation of the rule of Limitation; and that under the old law of Limitation the execution is void. Sixth: that the execution was also barred, under the provisions of the Act, No. XIV. of 1859, ss. 20 and 21, no proceedings having been taken in a competent Court within three years from the passing of that Act. Seventh: that the decision contained in the judgment of the High Court was at variance with both previous and subsequent decisions of the Sudder and High Courts respectively, and if unreversed would cause great uncertainty and confusion as to the limits of the jurisdiction of the inferior Indian Courts, and also as to the law of Limitation of executions, and the construction and operation of the Acts hereinbefore referred to, which it is of the greatest importance to have accurately defined, maintained, and settled; and prayed for special leave to appeal from the decrees of the Civil Judge and the Principal Sudder Ameen of the Zillah Rungpoor of the 9th of June, 1864, and the 22nd of June, 1864, and also from the decrees of the High Court of Judicature at Fort William in Bengal, of the 9th of January, 1865, the 29th of April, 1865, and the Order of the 13th of September, 1865, rejecting the petition of special appeal.

(Nov. 3, 1866) Upon this amended petition special leave to appeal was granted.

[7] ESHENCHUNDER SINGH,—*Appellant*; SHAMACHURN BHUTTO, KOILASHUNDER SINGH, and Others,—*Respondents* * [Nov. 2, 3, 1866].

On appeal from the High Court of Judicature at Fort William, in Bengal.

A decree of the High Court of Judicature at Calcutta was founded on an assumed state of facts, contradictory to the case alleged in the plaint and of the evidence adduced in support of it; upon appeal such decree reversed with costs. The Judicial Committee holding (1) that it was incorrect to conclude parties

* Present: Members of the Judicial Committee,—The Right Hon. the Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

by inferences of fact, not only inconsistent with the allegations in the plaint, constituting the case the Defendants had to meet, but which were in reality contradictory to the case made by the Plaintiff in the Court below : and (2), that the legal conclusions deduced by the High Court were from assumed facts, which were not consistent with settled principles of law or equity.

This was a suit for specific performance of an agreement brought by the Respondents, the Bhuttos, against the Appellant and the Respondent, Koilaschunder Singh. The object of the suit was to recover possession of a four annas undivided share of Putnee Talook, called Mouzah Balooka, and Mouzah Sreerampoore, appertaining to Pergunnah, Ookra, the Zemindary of the Respondent, Sutteeschunder Roy Bahadur (usually designated as the Maharajah of Kishnagur), and to have a deed of conveyance of [8] the Talook executed in the Plaintiff's favour by the Defendants.

The plaint stated to the effect, that it was agreed between the Appellant and his co-Defendant, of the one part, and the late Kistomohun Bhutto, the father of the Respondents, Shamachurn Bhutto, Kalichurn, and Bhowaneechurn, and of Oomachurn Bhutto, deceased, of the other part, that the Putnee should be taken jointly by them from the Maharajah, the Zemindar, in the following proportions, viz., a twelve annas share by the Appellant and his co-Defendant, and the remaining four annas share by their father, at a certain annual rent of Rs. 756, exclusive of establishment expenses; the consideration being the sum of Rs. 11,000, payable to the Zemindar : and that an Ekrar (written agreement) to the above effect was executed on 15th Kartick, 1265 (31st October, 1858). The plaint then stated the cause of action to be that the Defendants in violation of the terms of the Ekrar, had fraudulently got a Putnee lease executed in their own names on the 28th Kartick of that year, and had taken possession of the property ; and had refused to make over to them the four annas share, or to take the consideration-money (*i.e.* the price payable to the Zemindar) for the same.

The Ekrar in question was filed with the plaint, and purported to have been signed by the Respondent, Koilaschunder Singh, alone. The translation of this instrument was as follows :—

"To the adorable Kristomohun Bhutto. I, Koilaschunder Singh, do hereby execute this Ekrar to the following effect :—It having been arranged between you and me that a Putnee settlement of Mouzah, Balooka, together with Julkur and Tulkur, [9] as well as all Beels and Koothee, etc., and Mouzah, Srirampore, on an annual rental of Rs. 756, exclusive of establishment expenses, will be taken by us, *i.e.* four annas share by you and twelve annas share by me, from the Zemindar of the said Mehal, the Maharajah of Kishnagur, for a consideration of Rs. 11,000 ; I have paid to the said Maharajah a sum of Rs. 2000, in the shape of earnest-money, and have got a 'Byna Puttro' executed in my favour on the 12th Kartick of the present year. According to the terms of the 'Byna Puttro,' the balance of the consideration-money must be paid on the 12th Aughran next. I do, therefore, promise by this agreement, that on your accompanying me in the presence of the said Maharajah, before the said 12th Aughran, with your four annas share of the consideration-money, namely, Rs. 2750, and on paying the other expenses in proportion to your said share, we will get a joint deed of the Putnee executed. If, however, you do not pay the money within the prescribed time, then you shall have no claim to that share of the said Mehal : and if the Maharajah, according to the conditions of the Byna Puttro, execute a deed for the entire sixteen annas only in my name, and do not execute a Putnee Pottah specifying therein your share, still I will execute in your favour a separate deed after receiving from you your share of the consideration-money of the Putnee, and make you my co-sharer to the extent of four annas. If I wilfully refuse to do so, then this deed will be a deed of your purchase of the said four annas share of the Putnee, and you will take possession of that share of that Mouzah as Putneedar, and my objections against that will be rejected ; for this purpose I execute this [10] Ekrar. Dated 15th Kartick, 1265 B.S. Written by Nilcomul Dutt, inhabitant of Balooka. Witnesses—Sree Haradhun Bose, inhabitant of Balooka. Sree Baneemadhub Ghosaul, inhabitant of Balooka."

Koilaschunder Singh, by his answer, submitted first, that the Ekrar, on which the claim was based, was an agreement without any consideration : secondly, that it was a forgery, and moreover was neither drawn on a stamp nor registered ;

thirdly, that he got a Byna Puttro (earnest Bond or deed) executed by the Maharajah to take the property claimed, in Putnee, with or by means of his brother's (the first Appellant) self-acquired money; and fourthly, that the money belonged to his brother; but that nevertheless, as he (Koilaschunder) was living in commensality with him, was entitled to a share therein.

The answer of the Appellant stated, first, that he sent Koilaschunder as his Agent for negotiating the Putnee settlement, which he wanted to take for himself with his own funds, consequently he had no power to dispose of any part of the same; secondly, that Koilaschunder got the Byna Puttro executed in his own behalf, with the object of getting a share of the property; that when he came to learn of this, he procured the cancelment of the same, and got the Putnee Pottah executed in his own name, and was then in possession of the Putnee; that Koilaschunder had no right or interest in the property in question; and thirdly, that the Ekrar propounded by the Plaintiffs was a fabrication; and even if it were genuine, he was not bound by it.

The Respondents, the Bhuttos, afterwards presented a petition in the suit, to the Principal Sudder Ameen, which stated, that the Maharajah having [11] taken the earnest-money, Rs. 2000, from Koilaschunder, he executed the Byna Puttro in Koilaschunder's name; and that the Maharajah having, in contradiction to the terms and condition thereof, executed a Putnee Pottah of the whole sixteen annas in favour of the Appellant alone, it was necessary to include the Maharajah in the suit. The petition then prayed that an Order might be passed for bringing in the Maharajah as a Defendant, according to secs. 29 and 73 of Act, No. VIII. of 1859. The Principal Sudder Ameen, on this petition, ordered the Maharajah to be made a Defendant. The Maharajah did not appear or file any answer in the suit.

The Appellant made a deposition in the suit, wherein he stated, that he carried on trade in Calcutta by means of money given to him by his Mother-in-law, and that he took the Balooka Putnee with that money, which was his self-acquired money, and none other had any right to it; that he, being absent in Calcutta, sent the Rs. 2000, as Byna through the Respondent, Koilaschunder, and afterwards went himself personally, with the remainder of the consideration-money, to the house of the Zemindar, and got from him the Putnee lease in question executed in his own name; and, lastly, that one Birressur Mookerjee was subsequently appointed his general Mochtar. In reply to a question put to him on behalf of the Plaintiffs, the Appellant stated:—"I am not aware whether any proposals about this Putnee were made or not between Birressur and Plaintiffs, Shamachurn and Koilaschunder before taking the Putnee." He then, after being questioned as to the handwriting of some letters, deposed as follows:—"My Brother Koilaschunder never mentioned to me about giving [12] the Ekrar: I know nothing about it. Balooka is my property, and I am in possession of it; neither did I send for and take the father of the Plaintiffs with me at the time of taking possession of the Putnee Pottah; nor was there any such condition that I should do so."

The Respondent, Koilaschunder, also made a deposition, wherein he stated that he never gave the Ekrar, nor signed it; that the Putnee was taken with Eshenchunder's self-earned money; and that before it was taken he had no proposals with any one about the Putnee; and that he did not go along with the Plaintiff to take the Putnee.

The Respondent, Shamachurn Bhutto, made a deposition after the above Defendant's two depositions had been taken. In that deposition he stated, that it was settled between Eshenchunder Birressur, Mookerjee, and himself, on the part of his Father, that the three should take the Putnee of the villages; that afterwards, at the time of making the Putnee settlement, he and Koilaschunder went to the Maharajah's house and settled, as above in the plaint alleged; but he admitted that the earnest-money, Rs 2000, was paid by Koilaschunder, and also that the Byna Puttro (earnest Bond or deed) was taken in the name of the latter alone from the Maharajah; and also that the Ekrar was not executed until two or three days after the execution of the above Byna Puttro. He then proceeded in his deposition as follows:—"A long time before the expiration of the period allowed in the Byna Puttro, Eshen and Koilas (meaning this Appellant and the above Respondent) went to the Rajbatty (the house of the Maharajah) and got a Pottah of the entire 16 annas executed in [13] the name of Eshen, by paying the consideration-money.

This was done without my knowledge. This just having come to my knowledge, I remitted the consideration-money to my Father for payment to Eshen and Koilas, in accordance with the condition of the Byna Puttoo and Ekrar. I am personally acquainted with these facts only; but subsequently I have learned that my Father went to the house of Koilaschunder and the Maharajah with money, and requested them to execute the deed; that they, however, having refused to execute the deed, the said money and the Ekrar were produced before the Judge in the Court. The Judge notified this fact to the Singhs, Defendants by an Etiah (notice)." To a question put by the Court, he said that the money was offered within the period limited in the Byna Puttoo; and to a question put by the Pleader of the Appellant, in order to show that there was no consideration for the alleged Ekrar, he answered that when the first proposal was made between himself, Eshen, and Birressur Mookerjee, no question with regard to the money was raised.

In addition to the depositions of the parties to the suit, they respectively adduced evidence. The Plaintiffs produced certain documentary proofs, consisting of a Proclamation of the Judges of the Civil Court of Zillah Nuddea, dated the 26th of November, 1858, which recited a petition of Kristomohun Bhutto, since deceased, in which a different story was told respecting the alleged proposal on the part of Koilaschunder, the above Respondent, and the above-named Respondent Shamachurn Bhutto, to buy the Putnee aforesaid, stating that it was to the effect that he and the Petitioner, Kristomohun (only), [14] should jointly take the Putnee, and not averring in any part of the petition that the Appellant had ever been a party to the alleged proposal, or was in any way privy to it; but only alleging that before the Petitioner had gone to Koilaschunder and the Maharajah about getting the Putnee in the last-mentioned joint names, he, Koilaschunder, and the Appellant had gone together and paid the balance, and caused a Pottah to be executed in the name of the Appellant; and also a petition of the Appellant, in answer to the last-mentioned petition of the Plaintiffs recited in the Proclamation. In that petition the Appellant again insisted that Koilaschunder had no right or interest in the Putnee; that the Petitioner had not been able even to allege that the Appellant had entered into any engagement to give him a share; that there was no reason or object shown for Koilaschunder gratuitously executing an Ekrar, the Appellant too, having paid the earnest-money, unless it was the object of Koilas to fraudulently set up at some future time a claim to a share of the Appellant's self-acquired property, and so far act in collusion with the above-named Respondent, Shamachurn Bhutto, who was stated to be a Pleader of the Civil Court of Moorshedabad: also a petition of Koilaschunder, filed in answer to the before-mentioned petition and Proclamation, in which he denied that he had bound himself by any engagement to deliver to Bhutto the four annas share of the Putnee aforesaid; and stated that he did not execute the Ekrar; and denied that he acted in collusion with either Bhutto or his son.

Witnesses were examined. The first stated, that at the time when the Ekrar was executed the Appel-[15]-lant was not present, and that he was resident in Calcutta, where his employment was, and that he could not say whether the Ekrar was executed by Koilas with the consent of the Appellant. The two other witnesses to the Ekrar did not say anything to show that the Appellant was in any manner an assenting party to the execution of the Ekrar. The other witnesses spoke to different matters, and, amongst others, to some conversations between Koilaschunder and the Plaintiff, Shamachurn Bhutto, but at the same time proved that the money was a part of this Appellant's self-acquired property, but failed to prove anything which could show that the Appellant was in any manner bound by the Ekrar, or by anything Koilaschunder might have said or done; or in any other manner that the Appellant had ever agreed to give Kristomohun Bhutto, deceased, any share in the Putnee.

The hearing of the suit took place before the Principal Sudder Ameen of Zillah Nuddea on the 17th of February, 1862, when a decree was made, dismissing the suit, with costs to the Appellant, who was to recover his costs from Plaintiffs; but the other Defendant was ordered to pay his own costs. In the judgment delivered at the hearing, the points for determination were stated by the Principal Sudder Ameen, who found and declared, that the Ekrar was executed by Koilaschunder,

but that the Plaintiffs were not entitled to get a conveyance or possession of the disputed four annas share on the strength of that Ekrar, for the following reasons:—first, because there was no lawful consideration for the Ekrar which was received by Plaintiffs from Koilas, the same having been made gratuitously; second, that [16] it was clear from the depositions of Plaintiffs' own witnesses, that the Putnee was taken by Koilas on behalf and with the money of the Appellant, and that the latter was not bound by the act of Koilas; third, that the Plaintiffs were aware that Koilas was merely a nominal purchaser, and that he had made the bargain for the Appellant, and that the Ekrar was taken by Plaintiffs under those circumstances; fourth, that there was not sufficient evidence to show that the Plaintiffs were ready to pay the consideration-money (namely, the price of the Putnee) within the period specified in the Ekrar, but that it was not necessary to take the matter into consideration, for, as had been already shown, the Plaintiffs' claim fell to the ground: and it was declared that the Maharajah was not bound to the Plaintiffs, he being no party to the agreement.

The Plaintiffs appealed from this decree to the Judge of Zillah Nuddea.

The hearing of the appeal took place on the 12th of December, 1862, before Mr. Rivers Thomson, the Zillah Judge, when a decree was made affirming the decree of the Court below, and dismissing the appeal with costs. The Judge stated, that he had examined the Ekrar and found that it bore no stamp, and it was a question whether it could be received in Court; but, waiving that point, it was clear from the document itself, and also from the plaint, that one of the conditions essential to the validity of an agreement was wanting, namely, a consideration in law: that Koilaschunder did nothing more than promise, and that he had broken his promise, which he was bound to by a voluntary obligation merely, and that as no legal consideration was moving from the Plaintiffs; it was only [17] binding in honor, and did not impose any legal responsibility; and that, therefore, the Ekrar was void in law, and could not be enforced in the suit against Defendants.

The Plaintiffs brought a special appeal in the High Court of Judicature at Fort William against this decree. The hearing of the appeal came on before Messrs. Kemp and Campbell, two of the Judges of that Court, on the 4th of August, 1863, when the Court delivered the following judgment:—"In this case it is found that certain Putnees being offered for competition, the Plaintiff and the Defendant, Koilas (the Respondent), appeared to bid; but they then agreed that, instead of bidding against one another, they should take certain properties jointly. Accordingly, the properties were taken by the Defendant, and he shortly after executed a written agreement, binding himself to convey a quarter share of the Putnees to the Plaintiff. Subsequently, without any default of the Plaintiff's, he went before the time agreed on, paid the purchase-money, and had the Putnees registered in the name of his brother, Eshenchunder. The second Defendant repudiated his agreement with the Plaintiff. The Plaintiff now sues for specific performance of that agreement. The Judge, finding the facts as above stated, considered that the agreement was without consideration, and on that ground dismissed the Plaintiff's suit. But we think that abstaining from competition for the Putnee under the verbal agreement with Koilas was a sufficient consideration, and that this consideration affected and gave validity to the subsequent written agreement. The Judge's decision is, we think, opposed both to equity and to law. Eshenchunder [18] pleads that he is the real purchaser; that Koilas was only his Agent, and that he is not liable for Koilas' acts. But we think that, as the Plaintiff has accepted and been benefited by the act of his alleged Agent in respect to the purchase, he is bound by that Agent's stipulations in connection with the purchase, more especially as it does not appear that the agency was disclosed to the Plaintiff, but, on the contrary, it is clear that in his dealings with the Plaintiff, Koilas acted himself as the purchaser. We, therefore, allow the appeal, reverse the decision of the lower appellate Court, and decree the Plaintiff's claim for specific performance of the written agreement."

The present appeal was brought from this decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants.—This decree cannot be maintained. It proceeds and is based upon assumptions not found or declared as facts by, or proved in, the lower Courts, within whose province and jurisdiction the

trial and finding of the facts exclusively lay, the High Court, on a special appeal, being confined to points of law merely. The plaintiff alleges an original agreement with Eshenchunder as to a share or interest in the Putnee, but, first, there is no allegation of undisclosed agency, or, secondly, any allegation that what took place at the auction was not to be binding. That being so, what authority had the High Court to change the case by assuming a new equity, and adjudicate upon a case not alleged in the pleadings, and which we were not called on to answer.

Upon the merits we submit, that the Appellant was not in any manner bound by the Ekrar of the Respondent, Koilaschunder, which was voluntary, and without [19] consideration, and, therefore, not binding in law, and ought not to have been enforced in the suit. That instrument, moreover, contains no such terms or consideration as those referred to and relied on in the decree appealed from. No agreement containing such terms was proved; but, even if it had been, such were not contained in the Ekrar, declared and sued on by the Plaintiffs.

Mr. Piffard, for the Respondents.—The objection to the finding of the High Court ought not to be sustained, as the Court can look at the whole record. [Lord Westbury:—Can you carry it so far as that? Can the High Court substitute a different state of facts not contained in the plaint, or the evidence in the Court below, and so introduce a new equity? If so, it would be a Court deciding questions of fact, whereas it has only jurisdiction to determine questions of law, on the special appeal.] The plaint alleges sufficient to warrant the judgment of the High Court. By the decree of that Court it was held, first, that abstaining from competition at the auction for the Putnee, under the verbal agreement with Koilaschunder, was a sufficient consideration, and affected and gave validity to the subsequent written agreement; and, secondly, that as the Appellant, Eshenchunder, had accepted and been benefited by the acts of Koilaschunder, he was bound by Koilaschunder's stipulation in connection with the purchase; and I submit that such decision was a just one, as it is manifest from the evidence that Koilaschunder, whose bidding was accepted by the Maharajah, and who secured the Putnee for the Appellant, Eshenchunder, induced Shamachurn Bhutto to desist from [20] bidding against him by a promise that in case his Koilaschunder's bid should be accepted, it should be considered and treated as a joint bid for both parties, in the proportion of twelve annas and four annas respectively. The Ekrar put in evidence and relied upon by the Plaintiff was good evidence of such agreement, and was, moreover, not without consideration, but a valid contract resting on the same consideration as the original agreement. The agreement between Shamachurn and Koilaschurn being a valid agreement, Eshenchunder could not take advantage of Koilaschunder's acts without himself becoming subject to the obligations contracted by Koilaschunder. It appears, moreover, that Koilaschunder, in making the arrangement he made with Shamachurn, was in fact only carrying out the already expressed views and wishes of Eshenchunder, who before and at the time when he obtained the Putnee in his own name had notice and was fully cognizant of the contract made by Koilaschunder with Shamachurn. There was no default on the part of the Plaintiffs, or their ancestor: the money payable to Koilaschunder under the provisions of the Ekrar was tendered in due time.

The Right Hon. Lord Westbury.—This case is one of considerable importance, and their Lordships desire to take advantage of it, for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. Unfortunately, in the present instance the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated [21] in the plaint by the Plaintiff, and void not only of allegation, but also of evidence in support of it.

The case made by the Plaintiff alleges a distinct agreement between the Plaintiff and two brothers (whose names have been pronounced in a short manner—the one Koilas and the other Eshen), that the three should be joint purchasers and joint owners—owners in common, at all events—of a certain lease which was put up by a Zemindar to be taken by public tender at a particular time. The plaint proceeds upon the allegation that that lease was taken by Koilas on his own behalf, and on behalf of Eshen, and on behalf of the Plaintiff, and that in conformity with the

agreement between the three, Koilas subsequently executed an instrument for the purpose of giving effect to the agreement. The allegations, therefore, in the plaint are inconsistent with the hypothesis of Koilas having no interest and acting in the transaction as Agent only of Eshen. The plaint also proceeds upon a clear and well-defined ground of relief, namely, contract and agreement between the parties interested. The decision proceeds upon what is set forth as an equity resulting from the relation between Koilas and Eshen of principal and agent, and from the alleged fact of Koilas, in the execution of his authority, having given certain rights and interests to the Plaintiff without which his principal (Eshen) would not have been able to obtain the property in question. But the difference between the two grounds of relief and between the two kinds of case is plain.

The decision of the Court of First Instance, that of the Principal Sudder Ameen, of the 17th of February, 1862, found the facts of the case to be in direct contradiction to the allegations contained in the plaint. [22] It was found that Koilas had no interest at all; that the money paid to the lessor was not money in which Koilas had any interest or right; that Koilas acted from the beginning under the authority and as the Agent only of Eshen; that the contract was completed with the money of Eshen; and that there was nothing at all to show that Eshen in any manner was made aware of or was party or privy to the alleged transactions between Koilas and the Plaintiff. These facts being established by the judgment, and being, therefore, binding upon the High Court, which is not a Court at liberty to collect facts anew, it is very much to be regretted that the High Court should have departed altogether from the case made by the plaint, and should have founded their conclusion upon an assumed case wholly inconsistent with the recorded findings contained in the original judgment. That original judgment was the subject of an intermediate appeal, which, however, does not vary the matter, because the Judge of the first Court of appeal thought it right to dismiss that application and to affirm the original judgment.

We now come to consider the assumed state of facts, which is the basis of the decision of the High Court. The High Court takes it that Koilas was nothing more than the Agent of Eshen; but the High Court appears to have in some manner or other arrived at this conclusion, which does not appear to their Lordships to be warranted either by allegation or evidence, viz., that at the auction, or previous to the auction, there was an agreement between the Plaintiff and Koilas that the Plaintiff should abstain from bidding; and that, in consequence of that abstinence on the part of the Plaintiff, Koilas [23] succeeded in obtaining the estate at a less sum of money than otherwise he would have had to give; and that the Defendant, Eshen, took possession of the property with the knowledge of that transaction on the part of Koilas. It is obvious that every one of these propositions of fact is a statement which it was incumbent on the Plaintiff to have distinctly alleged, in order that it might be the subject of direct testimony. It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the Defendant has to meet, but which are in reality contradictory of the case made by the Plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the Plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove.

It is unnecessary, therefore, to say that it is impossible for their Lordships to accept anything like those conclusions of fact as furnishing a *ratio decidendi* in the present case. Without adverting further to its being incompetent to the Court of appeal to substitute a new statement of facts for that originally contained in the record, their Lordships further observe that, even if the case substituted were admitted to be true, and to be the competent subject of judicial inquiry, the legal conclusion which is attempted to be derived from those facts is not consistent with the settled principles of law or equity. Supposing it to be the case that a man sends an Agent with direct authority and positive directions to bid at an auction and to purchase an estate, and the Agent [24] accordingly goes to the auction, and in the execution of that authority, he does bid, and the estate is knocked down to him; but collaterally, and in a bye manner, he enters into a distinct and separate

contract with an individual, that, in consequence of something to be done or to be forborne, he will pledge his principal to pay to that individual a certain sum; it is quite plain that, upon every consideration of justice, the principal cannot be bound by this bye transaction on the part of the Agent. If the Agent makes a contract on the part of the principal, having a definite authority, and he exceeds that authority by inserting a term in the contract itself, it would not be competent to the principal to say, "I will repudiate the inserted term in the contract, as being *ultra vires* and unauthorized, but I will obtain performance of the rest of the contract." In such a case, although the Agent had no authority for the additional term, yet, as it is an integral part of the contract itself, and the party selling was not aware of the want of authority, the principal could not enforce that contract without giving effect to the additional term. But, in the other case, the act of the Agent, if effect were given to it, would subject the principal not only to the contract which he authorized, and which he may be required by the vendor or lessor to fulfil, but also to an additional liability which he never contemplated.

Their Lordships are obliged to disapprove of the decision that has been come to by the High Court. They desire to have the rule observed, that the state of facts, and the equities and ground of relief originally alleged and pleaded by the Plaintiff, shall not be departed from; and they could not concur in the conclusion of law which has been drawn by the [25] Court below, even if they were at liberty to take into consideration the state of facts which that Court assumed.

Their Lordships, therefore, will advise Her Majesty to reverse the decree that has been appealed from, thereby confirming the original decree, and the decree of the Zillah Court; and to give the Appellant the costs of this appeal, the application to the High Court being directed to be refused with costs.

[See *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, 1868, 12 Moo. Ind. App. 189; *Ameeroonissa Khatoon v. Abedoonissa Khatoon*, 1875, L.R. 2 Ind. App. 100; *Syed Nurul Hossein v. Sheosahai*, 1892, L.R. 19 Ind. App. 225.]

BABOO REWUN PERSHAD,—Appellant; JANKEE PERSHAD,—Respondent *
[Nov. 14, 1866].

On Appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

In a suit raising issues of fact, it did not appear from the record transmitted from India that the Judge of the Zillah Court had, in conformity with Code of Civil Procedure, Act, No. VIII. of 1859, secs. 139, 140-1, settled or recorded the issues in the suit, although he allowed evidence in the cause to be taken. In such circumstances the Judicial Committee postponed the hearing of the appeal until a certified copy of the proceedings in the cause should be transmitted, and, in the alternative of no such issues being settled, set aside the decree of the Sudder Dewanny Court at Agra, with directions to that Court to remand the suit to the Lower Court, to be tried upon issues to be settled and recorded in conformity with the provisions of the Act, No. VIII. of 1859.

In this suit, which was instituted by the Appellant against the Respondent in the Court of the Principal Sudder Ameen of Zillah Allahabad, the Appellant claimed certain property, consisting of two villages, [26] judgment debts, bonds, and liabilities, estimated at Rs. 14,307, and also sought to set aside two several deeds of gift alleged to have been made by one Mussumut Mithoo Bebee, deceased, in favour of the Respondent. The Respondent, by his answer, denied the Appellant's right to the property, and submitted that the deeds of gift impeached were genuine. It did

* Present: Members of the Judicial Committee,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

not appear in the record transmitted from India that the Zillah Court had settled and recorded the issues in the suit in conformity with the provisions of sections 139, 140, and 141 of the Code of Civil Procedure, Act, No. VIII. of 1859; it appeared, however, that the Principal Sudder Ameen had allowed evidence as to the validity of the instruments in question to be entered into, and dismissed the suit with costs: which decree, upon appeal to the late Sudder Dewanny Adawlut at Agra, was affirmed. Hence this appeal.

Mr. J. Anderson, Q.C. (with whom was Mr. Downing Bruce), for the Appellant, and Sir R. Palmer, Q.C., Mr. Leith, and Mr. Bell, for the Respondent.

On the appeal being opened the Appellant's Counsel was stopped.

The Right Hon. Lord Westbury observing, that the proceedings before the Principal Sudder Ameen appeared to be wholly irregular, [27] as he ought not to have gone into evidence without having first settled and recorded the points or issues in the suit, in conformity with the provisions of the Act, No. VIII. of 1859, which from the record transmitted did not appear to have done, and that in those circumstances the appeal must stand over for the production of the certified proceedings, in order to show whether this had been done, or, in the alternative that the cause should be remitted back to India to be heard upon regular issues so framed.

By the Order in Council made thereon, it was ordered that the further hearing be postponed, and the High Court of Judicature for the North-Western Provinces was directed to inquire and certify forthwith to the Registrar of the Privy Council whether the Zillah Judge did, in conformity with the provisions of Act, No. VIII. of 1859, settle and record any and what issues in the suit, and if so the Court was to transmit forthwith a copy of the proceeding in which such issues were recorded; and if no issues were settled and recorded, then it was ordered, that the decree of the late Sudder Dewanny Adawlut of the North-Western Provinces at Agra, dated the 26th of May, 1862, be set aside, and that the High Court do remand the case to the Zillah Court, with directions that the suit be forthwith tried on issues there to be settled and recorded, in conformity with the provisions of the above Act, and to direct and hear evidence on such issues.

[See *Mussumat Mitna v. Syud Fuzl Rub*, 1870, 13 Moo. Ind. App. 573.]

[28] SREEMANCHUNDER DEY,—Appellant; GOPAULCHUNDER CHUCKERBUTTY, DOORGAPERSAUD DEY, RUSSICKLOLL DEY, and PROSONOMOYE DOSSEE,—Respondents * [Nov. 14, 1866].

On Appeal from the High Court of Judicature at Fort William in Bengal.

A. purchased a Talook at a sale, in execution of a decree obtained by a judgment-creditor. The Assignee of another judgment-creditor, who had obtained a decree in a separate suit against the estate, brought a suit against the purchaser to set aside the sale, on the ground that the purchase was not *bona fide*, being made in collusion with the judgment-debtors. Held, on a review of the evidence, that there was not sufficient evidence to warrant the decree of the High Court at Calcutta that it was a *benamiee* transaction; or that the purchaser was acting as an Agent for the judgment-debtors; and the decree of the Court below reversed [11 Moo. Ind. App. 49].

Held further, that the *onus probandi* was on the Plaintiff to establish the affirmative issue that the money for the purchase of the Talook was supplied by the judgment-debtors, or a third party for them, and not by the purchaser. Evidence showing circumstances which may create suspicion is not enough to

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justify the Court making a decree resting on suspicion only [11 Moo. Ind. App. 43, 44].

On an appeal to the High Court, that Court, acting under the power conferred by section 355 of the Code of Civil Procedure, Act, No. VIII. of 1859, *ex mero motu*, called for and examined fresh witnesses. Held that such power should be cautiously exercised, and the reasons for exercising it recorded or minuted by the High Court on the proceedings; as, first, the witnesses may be such as the parties to the suit do not wish to call; and, secondly, the new evidence may not be sufficiently extensive to satisfy the ends of justice [11 Moo. Ind. App. 48, 49].

The principal question in this suit and on appeal, was, whether the Talook known as Lot Satgachia, in the Zillah of East Burdwan, which had been sold in execution of a decree obtained against judgment-debtors, in a suit, No. 4 of 1857, was the property of Gopaulchunder Chuckerbutty, the first Respondent, or whether it was the property of the other Respondents, Doorgapersaud Dey, Russickloll [29] Dey, and Prosonomoye Dossee, who was the widow and heiress of Chundermohun Dey, the judgment-debtors and made benamee, or in secret trust, in the name of the first Respondent in order to protect it from the creditors of the judgment-debtors.

The circumstances which gave rise to this question were as follows:—

In the year 1858, a Talook called Lot Satgachia, in the Zillah of East Burdwan in Bengal, whereof one Sreenath Dey was the ostensible owner, was put up for sale by auction, at the instance of one Juggomohun Saha, in execution of decree in a suit, No. 4 of 1857, against Doorgapersaud Dey, Chundermohun Dey, and Russickloll Dey, for whom the Talook had been held benamee by Sreenath Dey; when Petumber Mookhopadhy, or Moorkerjee, purchased it for Rs. 19,125, and paid into Court the deposit, amounting to Rs. 2868. 12a., but being unable to pay the balance of the purchase-money, Petumber Mookhopadhy transferred the purchase to Sreemanchunder Dey, the Appellant, who repaid him the amount of his deposit, and having been substituted for him as purchaser, was let into possession of the Talook, and received a Bill of sale thereof in his own name.

Some time after taking possession the Appellant caused the estate to be measured, and he served notice upon many of the Ryots (including Gopaulchunder Chuckerbutty, the first Respondent) for increase of rent, and instituted suits to attach lands, which had been held as La-khiraj, or exempt from payment of revenue to the owner of the Talook.

The first Respondent subsequently took an assignment to himself from a judgment-creditor in another suit, No. 7 of 1861, against Doorgapersaud Dey, Russickloll Dey, and Prosonomoye Dossee, and he took [30] out execution thereon against the judgment-debtors, Doorgapersaud Dey and Russickloll Dey, and also against Prosonomoye Dossee, and caused the Talook to be attached with a view of selling it in execution of the decree, as being their property, though held in the name of the Appellant.

The Appellant, on the 14th of August, 1861, filed his petition of claim in the Court of the Principal Sudder Ameen of the Zillah of East Burdwan, representing that the Talook was his own property, and praying that it might be released from attachment.

The Principal Sudder Ameen, after examining several witnesses on both sides, issued a Perwannah addressed to one Gooroodos Dutt, an Ameen for local investigation, requiring him to investigate through the inhabitants of the Talook itself, and the villages contiguous to it, as to what party was then in possession of the Talook, and for how long, and in what manner.

The Ameen proceeded to the spot, when the decree-holder, the first Respondent, attended in person, and the Appellant (whose chief employment was in Calcutta) attended by his general Agent, and in their presence the Ameen took the depositions of several persons, including the Appellant. By his report, he stated, in effect, that the Appellant had shown in his examination such a want of acquaintance with matters connected with the Talook, as was inconsistent with the supposition that he was the real owner of it; that his ownership had not been established by the witnesses who deposed to it, but that other witnesses had proved that the Talook was in the possession of the judgment-debtors, who held it in the name of the Appellant.

This report was submitted to the Principal Sudder [31] Ameen (Nobinkishen Paulit), who pronounced judgment on the 16th of November, 1861, to the effect, that it was established that the Appellant had purchased the Talook; had obtained a Bill of sale in his own name, managed all his suits; and had also obtained Kaboo-leats from the tenants, and was personally in possession of the Talook; and that the first Respondent had not been able to show that the judgment-debtors had paid the purchase-money, and caused it to be purchased in the name of the Appellant. Accordingly the Principal Sudder Ameen, under sec. 246, of Act, No. VIII., of 1859, ordered that the property should be released from sequestration, and the Appellant's application admitted; and that the first Respondent, the decree-holder, should pay the Appellant's costs with interest, and that the Respondent's costs should be paid by himself.

On the 22nd of November, 1861, the first Respondent instituted a regular suit in the Court of the Principal Sudder Ameen, against the Appellant and the judgment-debtors, Doorgapersaud Dey, Russickloll Dey, and Prosonomoye Dossee, for the sale of Lot Satgachia, in execution of the decree in the suit, No. 7 of 1861 (the decree of which the first Respondent had become the holder for reversal of the above Order of the Principal Sudder Ameen, of the 16th of November, 1861), and for a declaration that such Lot was the property of the judgment-debtors. The plaint alleged that the judgment-debtors had purchased at auction, the Talook of Satgachia, benamee, in the name of the Appellant, and were still in possession thereof as proprietors.

The Appellant, by his answer, stated the circumstances under which he had purchased the property, [32] and that he had, irrespective of anybody else, been in possession of the Talook as proprietor, and registered it in his name.

The principal Sudder Ameen fixed the following issue in the cause:—"Is the Talook that was released, by the summary decision complained of, the property of the judgment-debtors, and, therefore, saleable in reversal of the Order, or is it that of the Claimant, Defendant?"

The suit was afterwards removed to the Civil Judge of the Zillah of East Burdwan. Both parties entered into evidence. The testimony of the three principal witnesses for the first Respondent, Nocoorchunder Gossaamee Ramtaruck Ghosamee, and Brojonauth Bundopadhyia, was to the general effect, that the judgment-debtors had originally been proprietors of the Talook, and, although it had been repeatedly sold in execution, had contrived to buy it in the name of one Trustee after another; that on the last occasion, when, as they alleged, the secret trust was detected, and the Talook was sold at the instance of Jugomohun Saha, in execution of a decree against them, they had caused it again to be purchased on their own account in the name of the Appellant, whom these witnesses declared to be a very poor man, and nearly connected with the judgment-debtors, and that since his purchase, as also before it, the judgment-debtors had been in the habit of attending openly at the Cutcherry or business-room of the estate, where they received rent and openly exercised the powers of proprietors, although the receipts were given in the name of the Appellant. According to two of the witnesses, one Moheschunder Dey, a cousin-german of Doorgapersaud Dey, but not joint with [33] him, was also in the habit of attending at the Cutcherry, and he, as well as the judgment-debtors, received rents, and gave orders connected with the estate. They stated that when the Talook was sold in execution at the instance of Jugomohun Saha, Moheschunder Dey caused it to be bid for in the benamee name of Petumber Mookhopadhyia, and afterwards, having no faith in Petumber Mookhopadhyia, he caused it to be made benamee in the name of the Appellant. None of these witnesses alleged that he had any knowledge of the transaction at the time when it occurred. They admitted that the receipts for the rent were made out in the name of the Appellant. Evidence was given to show that Moheschunder Dey instructed Petumber Mookhopadhyia to bid for the Talook, and advanced part of the deposit-money, which was paid into Court by Petumber, and which was afterwards repaid to him by the Appellant, and that Petumber's brother procured part of such deposit-money; but no attempt was made to show that Doorgapersaud Dey or any of the judgment-debtors had anything to do with the money alleged to have been advanced by Moheschunder, or that the latter advanced the rest of the purchase-money, or to trace any portion of it to Doorgapersaud, or to any person except the Appellant; or to show that the Appellant ever

agreed to hold the Talook, benamtee, or admitted that he did so hold it. Four witnesses were examined on behalf of the Appellant, and he was himself also examined. He deposed that the Talook was his own, and not held by him as benamtee; that he himself collected the rents by his Gomastah, and transacted all the business of the Talook; he gave an account of his property and in-[34]-come, and stated how he had paid the purchase-money of the Talook in Bank-notes, nearly all of which he received from his Bankers in Calcutta, representing cash at the Bankers and plate and jewels pawned to them.

The Appellant's account of the manner in which he had obtained the purchase-money was corroborated by a Gomastah in the service of the Bankers, who were related to the first Respondent, and was also corroborated by one Jodoonath Dutt.

The statements of the witnesses on behalf of the first Respondent were contradicted on many important points by the evidence adduced by the Appellant and by his own deposition taken in the suit.

The suit came on for hearing before Mr. Pierce Taylor, the Judge of the Zillah Court of East Burdwan, who, by a decree, dated the 10th of March, 1862, decided in favour of the first Respondent, assigning the following reasons:—First, because it was proved in the previous case of Juggomohun Saha, in 1858, that the judgment-debtors at that time held the disputed estate in the Furzee name of one Sreenath Dey, who was a distant connection of the (Claimant) Defendant, Sreemanchunder Dey, and both these facts had been acknowledged by the Defendant and his witnesses; second, because it had been proved by the Plaintiff, and not denied by the (Claimant) Defendant, that the latter is a distant connection of the judgment-debtors, and lives close to them in Satgachia; third, because it had not been proved by the (Claimant) Defendant's witnesses that he and the judgment-debtors were on bad terms, whereas the witnesses of the Plaintiff had solemnly declared the parties to be on good terms with each other, which would hardly [35] have been the case, if the (Claimant) Defendant, connection and neighbour of the judgment-debtors as he was, had actually purchased Lot Satgachia with his own funds; fourth, because the Plaintiff's witness, Gungagobind Mookerjee, who was the brother of the late Petumber Mookerjee, the first bidder for the Mehal, has, though evidently from other parts of his deposition favourable to the interest of the (Claimant) Defendant, acknowledge that his late brother had in his opinion bid for the Mehal as Furzee for Mohesh Dey, a near connection of the judgment-debtors, and it had been proved that this witness paid part of the earnest-money for Mohesh; fifth, because the near relationship of the Mohesh to the judgment-debtors had been acknowledged by the (Claimant) Defendant, and his witnesses, while they had failed to prove that there was any enmity between them; sixth, because under such circumstances, and as the (Claimant) Defendant, declared himself to have been a most intimate friend of Petumber, it appeared quite unlikely that he would, for the first time in his life, have purchased a Mehal, in which he resided close to the former Talookdar thereof, with the knowledge that he must have had that the latter was endeavouring to purchase it through a Furzee; seventh, because it was well known that no one but an enemy would prevent a former Talookdar from purchasing his estate back benamtee at an execution sale, and it had been shown that the (Claimant) Defendant, could not afford to make the judgment-debtors his enemies; eighth, because the (Claimant) Defendant, when examined on solemn declaration, had not been able to prove that he was, from the antecedents of himself and family, likely to have been rich enough to pawn [36] Rs. 8500 worth of silver plate, gold ornaments, and diamond and pearl jewellery, for the obtainment of a portion of the money wherewith to purchase Lot Satgachia; ninth, because he had not been able to prove that the residual Rs. 9000, he ostensibly paid, was his own money, and it was unlikely, for reasons before given, that he should have so much cash in his possession at the time of the sale; tenth, because the Hath-chitta said to have been signed by Ramkanye Ghosaul (meaning the document No. 17) for the money the (Claimant) Defendant took from him, was no evidence of that money being his; eleventh, because the great difficulty the Court had in getting the Plaintiff's unwilling witness, Gungagobind, before mentioned, to say whether he thought the (Claimant) Defendant, able to pay Rs. 19,000 for his estate, led to the conclusion that he must have been aware that he was unable to do so; twelfth, because the antecedents of the judgment-debtors, and the circumstances of the case warranted the conclusion,

that if any ornaments were pawned with Ramkanye to Bunkhoebharry in Calcutta, and any money paid into their hands for the obtainment of Bank-notes, both must have been the property of the judgment-debtors, and that the negotiation regarding them was merely conducted by the (Claimant) Defendant; thirteenth, because the depositions of the (Claimant) Defendant's witnesses bore traces of instruction and collusion when compared with that of the (Claimant) Defendant, himself, whereas those of the Plaintiff's witnesses, who were respectable inhabitants of Satgachia, who must have known everything about it, were straightforward and credible, and supported by all the circumstances of the case, which were so much against the (Claimant) Defendant, [37] as to be almost sufficient to support a decision against him without any other evidence at all; and lastly, because the fact of the accounts and Dakhillas of Lot Satgachia being drawn up in the name of the (Claimant) Defendant, was no proof of his being the actual proprietor of the estate. It is true that the Plaintiff had not been able to prove some things alleged by him, such as the amount of property possessed by the judgment-debtors, etc., in all their entirety, but it was almost impossible for him to do so. On all these grounds, and as the (Claimant) Defendant obviously told a falsehood when he said (in answer to a question by the Court) that he had consulted in Calcutta, about the purchase of the estate in dispute, his witness, Jodoonath Dutt, a man who had acknowledged that he knew nothing about its value and capabilities whatever, the Court decreed the suit to the Plaintiff, and ordered that the Mehal of Satgachia be brought to sale in execution, case No. 7, of the Plaintiff's decree, No. 99, in the reversal of the summary decision of the Principal Sudder Ameen of the 16th November, 1861, without delay. The Plaintiff's costs of both Courts to be borne by the (Claimant) Defendant, and the judgment-debtors, also Defendants, who will also bear their own costs in Court."

From this decree the Appellant appealed to the late Sudder Dewanny Adawlut, and on its abolition, the appeal was transferred to the High Court of Judicature at Fort William in Bengal. That Court, after hearing the arguments, and the evidence taken before the Court below, at its own instance, called for and examined four additional witnesses. The first of these witnesses, Lollbeharry Dutt, a silk Merchant, deposed that the Appellant was in his [38] service as Cashier, receiving Rs. 12 a month wages, besides per-centage allowances, amounting to Rs. 1500 a year, and that he was a trustworthy man, and of a respectable family. The next witness, Moheschunder Dey, already mentioned, confirmed the Appellant's account of the purchase of the Talook, and contradicted the witnesses for the first-named Respondent on many points, stating (among other things) that he himself had never been told by the judgment-debtor, Doorgapersaud, to buy the Talook; that he had desired Petumber Mookhopadhyaya to buy it, and had advanced part of the deposit-money, which he had received back; that he had intended to give Rs. 10,000 or 12,000 for the Talook, but thought the actual price too high; that the Appellant was in possession, and collected the rents; that Doorgapersaud and Russicklohl were in a poor condition at the time of the sale, and that the Appellant had sufficient property to make the purchase. Kartick Seth, a Broker in jewellery, proved that he had sold for the Appellant certain valuable ornaments which were in pledge at the shop of the Bankers above mentioned. Gooroodoss Dutt, the Ameen, who had conducted the local investigation in the execution suit, was examined, and verified his seal and signature attached to his report.

Two of the Judges of the High Court, Mr. Justice Trevor and Mr. Justice Jackson, on the 31st of December, 1862, pronounced the decree now appealed from; the material part of which was as follows:—"After hearing the arguments and the evidence taken before the Court below, we had some doubt of the correctness of that Court's decision, but having called for and examined the additional witnesses, Moheschunder Dey, Lollbeharry Dutt, Partick Seth and Goo-[39]-roodoss Dutt, we are of opinion, though we do not adopt the reasons of the Zillah Judge, that his decision was substantially correct, and that Sreemanchunder has really held this property benamee for the judgment-debtors. The Plaintiff has called witnesses (Nookrorchunder Gossain, Ramtaruck Gossain, and Brojonath Bannerjee), who gave direct evidence on this point, and whose testimony, if it could be believed, would prove, in every detail, the allegations of the plaintiff. But we find it impossible to believe these witnesses, and the nature of their evidence has afforded a fair subject of attack to the Appellant's Counsel, who re-

marked, with justice, on the absolute improbability of their statements. This, however, is not the ground on which the present case has to be decided. In a case of this nature, if the Plaintiff succeeds in showing just ground for suspecting the good faith and reality of the title, which is interposed between the creditor and the realization of his dues, the Court will require the ostensible owner to do that which he alone can do, and which he can easily do if he is *bona fide* owner, namely, to place beyond a doubt the reality of his ownership. In this case we think there is ample ground for putting the Defendant, Sreemanchunder, to such proof. It is clear that, on two former occasions, the judgment-debtors, having closed their trading concerns with heavy outstanding claims against them, had resorted to benamee arrangements to stay the sale of this estate. It appeared also that Sreemanchunder Dey was a member of the same family, and lived in a part of the same original family premises, though the different branches are now separated, and the Civil Court Ameen, who was deputed to make a local inquiry in the execution proceedings, re-[40]ported that the judgment-debtors were in possession. These are circumstances, in our opinion, effecting the Defendant's possession sufficient to make it necessary that he should satisfy the Court that he has the beneficial as well as the proper title to the Putnee. This being so, we are bound to say, that so far from being satisfied by the evidence on this point for the Defendant, we see the strongest reason to believe that his purchase was fictitious, and that the name of Sreemanchunder Dey has been used merely as a cloak for the real possession and enjoyment of the judgment-debtors. Various witnesses have been called, and especially the Defendant, Sreemanchunder Dey, himself, who has been examined at extraordinary, and we think needless, length by the Judge himself, as well as by Counsel on either side. His evidence looks at first sight candid, and in some respects convincing; but it happens that he was before examined in this matter by the Court Ameen, his evidence before that Officer being on the record, and that he then betrayed his ignorance of details connected with the property which he affected to enjoy. All defects observable in his evidence then recorded were made good before his second examination in the Judges' Court; but even there he failed to give anything like a satisfactory account of the source from whence he derived the large funds (over Rs. 19,000) required for the purchase of this property. On the contrary, it appeared to us that, although a person of respectability and good repute, and in comfortable circumstances for a person of his class, he was not rich, and by no means likely to have raised at short notice the considerable sum above mentioned. And whatever doubt we might previously have felt with the mode [41] in which the purchase had been arranged and effected, was wholly dissipated on our examination of Moheschunder Dey, the person for whom Petumber Mookerjee was said to have been employed to bid, and who was alleged to have made over his bargain to Sreemanchunder Dey. Upon the whole, we are fully satisfied that Sreemanchunder Dey's purchase was benamee, and as it is admitted that the Talook, if not Sreemanchunder Dey's, was the property of the judgment-debtors, we feel bound to affirm the judgment of the Court below, declaring the Talook liable to be sold in execution. The appeal is consequently dismissed, with costs."

The present appeal was from this decree.

Mr. Baggallay, Q.C., and Mr. Macpherson, for the Appellant.—The finding of the High Court was not warranted by the evidence before them. There is nothing in the deposition of Moheschunder Dey tending to support the view taken by that Court, that the Talook was purchased benamee by or for the judgment-debtors. The report of the Civil Court Ameen, that the judgment-debtors were in possession was expressly overruled, and the contrary affirmed by the judgment of the Principal Sudder Ameen, which judgment was conclusive as to the fact of the Appellant's possession; and against that judgment no appeal was interposed, although the Zillah Judge thought fit to direct its reversal. We submit, that the decree of the Court below cannot be sustained. The burthen of proving that the judgment-debtors purchased benamee and paid for the Talook, Lot Satgachia, at the auction sale, lay on the first Respondent, and he [42] failed to prove by evidence that such was the case. [Lord Westbury: Did the High Court, under the provisions of the Code of Civil Procedure, Act, No. VIII. of 1859, sec. 355, in the circumstances, properly exercise a discretion, *ex mero motu*, in taking additional evidence, when the burthen of proof was on the Plaintiff, and he, in their opinion, failed to make out his

case?] Such a course as the High Court adopted operated most prejudicially on the Appellant, and was contrary to all known principles of jurisprudence, as well as the spirit and intention of that section of the Act. The Plaintiff was bound, in the Court of first instance, to establish the case alleged in his plaint.

Sir R. Palmer, Q.C., and Mr. Paterson, for the Respondent, Gopaulchunder Chuckerbutty.—Although the course pursued by the High Court in calling for further evidence may not be in accordance with the procedure of Courts in England, yet, under the Code of Civil Procedure, Act, No. VIII. of 1859, sec. 355, the Court had express power to do so. No objection to such course was taken by either side, nor is it noticed in the printed case of the Appellant; and we apprehend it is too late now to insist on such an objection.

Upon the merits we submit, first, that the decision of the Zillah Judge, of the 10th of March, 1862, was substantially correct and that he was warranted by the evidence before him in finding that the Talook, Lot Satgachia, was not actually the property of the Appellant. There is no satisfactory evidence to show how he got the purchase-money; a large sum for a person of his limited means. So, secondly, the decision [43] of the High Court of Judicature made thereon was correct and just upon the evidence before that Court. Upon a question of fact only, this Court will not disturb such finding. *Mudhoo Soodun Sundial v. Suroop Chunder Sirkor Chowdry* (4 Moore's Ind. App. Cases, 431).

Their Lordships' judgment was pronounced by

The Right Hon. Lord Westbury.—The Appellant in this case became the purchaser of the Talook under a decree for sale obtained by judgment-creditors of the owners.

A summary application to set aside the sale having been refused, the Respondent brought the present suit for the purpose of having it declared that the purchase did not affect any transfer of the ownership of the Talook.

The Respondent is not himself a judgment-creditor, but he is the Assignee of a judgment-creditor. It appears that the Respondent is a tenant upon the estate, and that, after some dispute had arisen between the tenants and the Appellant, he purchased this outstanding judgment, and, by virtue of that purchase and transfer of the judgment, has taken the present proceedings. The issue which was raised in the action so brought by the Respondent, and the affirmative of which he has to maintain, is that the Talook in question is still the property of the judgment-debtors, and not the property of the Appellant, who was the purchaser. The affirmative lies upon the Respondent; he is to prove his case.

Undoubtedly there are in the evidence, circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by [44] the Appellant; but in matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony.

The case relied upon by the Respondent is mainly this,—that the purchase-money, which appears to have been actually paid by the Appellant, was not in reality the money of the Appellant.

In considering a case of alleged fraud in the purchase of an estate, it is material to inquire what relation the purchase-money paid bore to the value of the estate. We have here a statement made by the Respondent himself, that the Talook was worth about Rs. 19,200 or Rs. 19,300, and we find that it was sold at the sale, at which the Appellant (being the Assignee of the original bidder) became the purchaser, for Rs. 19,000, which was actually paid.

That circumstance is not conclusive proof of a *bona fide* purchase; but it is a strong circumstance, in considering a case which consists of allegations, that there was a collusive agreement between the judgment-debtors, the original owners of the estate, and the Appellant, to buy in the estate for the benefit of the judgment-debtors.

The transaction appears to have been this:—A person of the name of Petumber attended the sale as the Agent of another person, who appears to be a man of property, of the name of Moheschunder. Petumber was declared the highest bidder, and consequently the purchaser. It seems from the evidence that Petumber exceeded

the authority which had been given to him by Moheschunder, his principal. Moheschunder had limited the price to be given to a sum of money less than the amount which Petumber had [45] bid; Moheschunder, therefore, either repudiated the contract or was desirous of getting rid of it. In that state of things Petumber applied to the Appellant to take a transfer of the contract, and the Appellant agreed so to do. The reason for the Appellant purchasing the property does not appear. It does not appear, nor is there any testimony that would warrant at all the inference, that Moheschunder, in sending Petumber to the auction, was acting as the Agent or on behalf of the judgment-debtors. It is said that Moheschunder was a distant relation of the judgment-debtor, but there is nothing like testimony to warrant the conclusion that Moheschunder was acting on behalf of the judgment-debtors.

No doubt that would not be material, if it were proved that the Appellant, the Assignee of Petumber, was himself the Agent or Trustee of the judgment-debtors. If he was so, of course the estate in the hands of the Appellant might be made available for the satisfaction of judgment-debts existing unsatisfied.

To prove this, the circumstances relied on by the Respondent are, first, the fact, which it is alleged appears on the judicial proceedings under which the sale was made, that two previous sales had been effected of this property, in both of which the real, though not the apparent, purchasers were the judgment-debtors, and that those sales had consequently been set aside. The Courts below and the Respondent here appear to have considered that those facts justified the inference that the judgment-debtors had formed the design in the present case, for the third time, to acquire the property through the instrumentality of a person acting apparently on their own behalf.

[46] Although the fact of these former sales may be referred to, as they appear on the proceedings in the cause in which the sale was made, yet no legal inference affecting the integrity of the present proceeding can with any propriety be drawn from them.

The next circumstance relied upon by the Respondent is this: that the Appellant and the judgment-debtors appear to live still on good terms together; that they are not open and avowed enemies, which it is said would have been the necessary consequence if the Appellant had in reality been the purchaser of the judgment-debtors' estate for his own benefit.

That is a circumstance, again, from which we are of opinion that no legal inference results.

The next thing relied upon by the Respondent, and which is one of the main grounds of his case is this: that the Appellant is unable to give a satisfactory account—nay, may be supposed perhaps to have given a false account in part—as to the manner in which he became possessed of the money in question.

Their Lordships have been much struck with the unsatisfactory character of the account given by the Appellant of the manner in which he alleges he obtained the money, but we cannot help feeling, that it is an inquiry upon which it is not very difficult to suppose that the person who becomes the purchaser of an estate may be unwilling to give a very full statement. But this circumstance, although it may excite doubt, is not a thing from which we can legitimately infer that the Appellant was a bare Trustee of the purchase so made by him.

And, if it inclined us to doubt the Appellant's ownership of the money, there is still a great interval [47] between that doubt and the conclusion that it was the money of the judgment-debtors, or that the Appellant acted in the matter on his behalf.

It is for the Plaintiff to prove that the money was the money of the judgment-debtors, or that it was supplied or found by some third person for the benefit of the judgment-debtors; but we find nothing which can be accepted either as direct proof of the fact, or as materials from which any such inference can be justly drawn. Two witnesses, called by the Respondent himself, state that, as far as their knowledge extends, the circumstances and the condition of the judgment-debtors were such, that they had not the means of supplying the money in question. The other evidence given by the Respondent is, that a person of the name of Moheschunder, some time after the transfer of the contract to the Appellant, raised a sum of Rs. 19,000, and

that Moheschunder was a friend and second cousin of the judgment-debtors, and, therefore, the Respondent would have us infer that the Rs. 19,000 so raised by Moheschunder, being about the amount of the purchase-money for the Talook, was raised by him on behalf of the judgment-debtors for the purpose of completing the purchase of the Talook, or of repaying the money which it appears the Appellant obtained from certain Bankers at Calcutta, in order to complete his purchase.

We are asked, therefore, to hold that the distant connection between Moheschunder and the judgment-debtors, and the equality in amount of the sums, are sufficient grounds for the conclusion that the purchase-money was in reality the money of Moheschunder, and that he found and advanced it for the benefit of the judgment-debtors. If we were to take away men's [48] estates upon inferences derived from such circumstances as these, it would be impossible that any property could be safe.

It is material that this purchase is not really challenged by the judgment-creditors. They have not originated this action, but it is the fruit of the angry feeling of a tenant on the estate, who has sought out a judgment-creditor, and got a transfer of his interest for the purpose of bringing forward this claim; and, therefore, the origin of the action and the circumstances under which it is brought or to be taken into account, when we are considering the truth and reality of the purchase by the Appellant.

It is natural to suppose, that if this purchase, had been generally felt not to be a *bona fide* purchase, it would have been questioned by the judgment-creditors themselves, and that they would not probably, for a small consideration, have parted with their judgments to another person, but would have instituted the suit themselves.

In the conduct of the suit, there is a circumstance which their Lordships think it right to advert to.

When the matter came up by appeal to the High Court, the High Court was dissatisfied with the reasons given by the Court below, and with the evidence taken in it; and the High Court, acting apparently *ex mero motu*, and not at the instance of the parties, determined to take original evidence anew, by the examination of other witnesses. It is a power given by the Code to the High Court, which may be very wholesome; but it is desirable that the reasons for exercising that power should always be recorded or minuted by the High Court on the proceedings. A power of that character should be [49] exercised very sparingly; because, where it is done not at the instance of the parties, but at the suggestion of the Court itself, witnesses may be called who are not the witnesses that the parties themselves would have thought fit to adduce; and it is possible (which appears to be the case here) that the new original inquiry by the High Court may be in itself imperfect, and not sufficiently extensive to answer the purposes of justice.

The opinion of their Lordships is, that the evidence which has been given, (there having been the fullest opportunity of giving evidence against the Appellant,) is not sufficient to warrant the conclusion that the Appellant was acting as the Agent of the judgment-debtors.

It is easy to suppose a case in which the Appellant might not in reality be the *bona fide* purchaser on his own account, and yet in which there would be no ground for holding that the estate was the property of the judgment-debtor. It is possible to suppose that some of the family of the judgment-debtors might have been willing to find, either wholly or partly, the money for the purchase; but if it were established that the money was not the property of the Appellant, we could not derive from that, the conclusion that the estate was, therefore, the property of the judgment-debtors.

It was said by the Counsel for the first Respondent that no other owner was suggested by the Appellant. There was no obligation upon him to suggest any other owner. He was under no obligation to show whence the money was derived; but, taking everything against the Appellant upon that point, there is still a great chasm between that inference and the [50] conclusion which alone would support the suit of the Respondent, viz., that the estate is the judgment-debtors' property,

both at law and in equity. That is neither established, nor can be legitimately inferred from any of the facts which have been proved.

We are, therefore, of opinion that the decree of the Court below must be reversed: and we shall humbly advise Her Majesty to order that it be reversed accordingly, and that the suit of the Respondent in the Court below be dismissed, with costs. It follows that the Appellant must have the costs of this appeal.

[See *Moonshee Buzloor Buksem v. Shumsoonissa Begum*, 1867, 11 Moo. Ind. App. 602; *Fazl Buksh Chowdry v. Fukeeroodeen Mahomed Ahassun Chowdry*, 1871, 14 Moo. Ind. App. 234.]

SRIMUT RAJAH MOOTTOO VIJAYA RAGANADHA BODHA GOOROO SAWMY PERIYA ODAYA TAVER,—*Appellant*: KATAMA NATCHIAR, *alias* COOLUNDAPOORY, Zemindar of Shivagunga, and ARMOGA TAVER.—*Respondents* * [Nov. 6 and 7, 1866].

On appeal from the High Court of Judicature at Madras.

Suits were brought in 1832 to recover possession of a Zemindary, the principal question being, whether the Zemindary was a divided or undivided estate. A., one of the parties, claimed under an alleged testamentary disposition of the Zemindar last seized. The decisions of the Courts in India were against the validity of the testamentary disposition. On appeal the Judicial Committee, in 1844, held, that the requirements of Mad. Reg. XV. of 1816, in recording the points at issue, had not been complied with, and that the question of division or no division had not been properly tried, and remitted the case to India, with liberty to bring a new suit to try that issue. Fresh suits were in consequence brought in India, in which the question of the genuineness of the alleged Will was again raised, but the party claiming under that instrument rested his case on the assumption of the Zemindary being undivided property. These suits were also appealed to the Judicial Committee in 1863, when their Lordships held that the question of division or no division was immaterial, as the Zemindary was self-acquired by the first Zemindar. On the hearing of this appeal A. abandoned his claim under the alleged Will. The decision of the Judicial Committee being adverse to him, he instituted a fresh suit for the purpose of establishing the Will. The Courts in India decided that the judgment of the Judicial Committee in 1863, operated as *res judicata*, and came within the provisions of sec. 2, Act, No. VIII. of 1859, as a suit heard and determined by a Court of competent jurisdiction. Such judgment on appeal affirmed; the Judicial Committee being of opinion, that the validity of the Will being properly at issue in the appeals in 1844 and 1863, and having been abandoned on the latter hearing, the decision was final so far as respected the Will between the parties.

The suit was brought to recover possession of the Zemindary of Shivagunga. The plaint sought to establish the genuineness and validity of a Will, alleged to have been executed by Gowery Vallabha Taver, [51] the father of the Respondent, the former Zemindar of Shivagunga, a Hindoo, who died without leaving male issue, by which it was alleged the Zemindary had been devised to Moottoo Vadooga Taver, the Appellant's grandfather, the Testator's nearest male relative, to be possessed and enjoyed from generation to generation, subject to a trust thereby declared for the maintenance of the family of the Testator and his servants.

* Present: Members of the Judicial Committee,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor:—The Right Hon. Sir Lawrence Peel.

The right to the possession of the Zemindary had been the subject of very extensive litigation.

The original suit was brought in 1832, by Velli Natchiar, on behalf of her son, Moottoo Vadooga Taver, in the Provincial Court for the Southern division of Madras, against Bodha Gooroo Taver, the son of Moottoo Vadooga, deceased, the nephew and alleged devisee of Gowery Vallabha Taver, who was in possession of the Zemindary as successor to his father, to recover possession of the Zemindary, on the ground that her son was the senior grandson of the [52] first wife of Gowery Vallabha Taver, and as such was entitled to succeed in preference to nephews and widows, and alleging that Gowery Vallabha Taver and his brother, Oodya Taver, were divided in estate, and that the alleged Will of Gowery Vallabha Taver was a fabrication.

Bodha Gooroo Taver by his answer contended, among other things, that the Will was valid, and that in the case of partible estates, nephews were preferred to daughters, daughters' sons, and widows.

The points recorded in this suit were, that the Plaintiff should prove the alleged combination respecting the fabrication of the Will, by means of which the Defendant's father got possession of the Zemindary, and the Defendant produce the Will and prove its execution. Evidence having been given on these points, the Provincial Court passed a decree in favour of Bodha Gooroo Taver, on the ground that the self-acquisition of an undivided brother descended to his nephew in preference to his widow and daughters' sons: and as regarded the Will, the Court expressed an opinion that the evidence respecting it was not to be relied upon.

In the year 1833, another suit was brought by Anga Moottoo Natchiar, the surviving widow of Gowery Vallabha Taver against Bodha Gooroo Taver, claiming the Zemindary as heir of her husband, and charging that the Defendant had forged the alleged Will. The Defendant denied the charge of forgery, and relied upon his title under the Will; and the Provincial Court held that the Zemindary was the self-acquired estate of Gowery Vallabha Taver, and (assuming that the brothers were undivided) decided that the self-acquired estate of an undivided brother, dying without male [53] issue, descended to his nephew in preference to his widow. In this view of the Court the issue on the Will, though properly raised, became immaterial.

The several Plaintiffs in these two suits appealed to the Sudder Dewanny Adawlut at Madras, and among their grounds of appeal was the genuineness of the Will, relied upon by Bodha Gooroo Taver, which was impeached by the other party.

In the year 1837, the Sudder Court made one decree in the two appeals, in which it determined that Gowery Vallabha Taver and his brother were divided, and that the self-acquired property of a divided brother descended to his widow in preference to his brother's son, and that the Will in question was not a valid, but was a fabricated instrument.

Bodha Gooroo Taver appealed to Her Majesty in Council from the above decree. He died pending the appeal, which was revived by Gowery Taver, his brother. In his case the Appellant relied, among other reasons, as his title to the Zemindary, upon the Will of Gowery Vallabha Taver.

By the judgment of the Judicial Committee and Order in Council made thereon in June, 1844, the decree of the Sudder Court made in 1837 was reversed, on the ground that no points had been recorded, as required by Mad. Reg. XV. of 1816, sec. 10 (see Cases reported, 3 Moore's Ind. App. Cases, 278) by the Court below on the question of division or no division; leave was, however, given to Anga Moottoo to bring a new suit within three years, the Judicial Committee intimating their opinion that the question of division was the most substantial question, and appeared to be the only point on which the main question of title would ultimately depend.

In pursuance of the leave thus given, Anga [54] Moottoo, in 1845, brought a suit *in forma pauperis*, against Gowery Taver, who had been put into possession of the Zemindary, and his younger brother, Nama-sirava Taver, to recover possession of the Zemindary, claiming to be heir of her deceased husband, shaping her case in a twofold manner; first, on the assumption that her husband and his brothers were divided; but secondly, contending that the question of division or no division was immaterial, on the ground that the Zemin-

dary was the self-acquired estate of her husband, and so descended to her as his heir, whether he was a divided or undivided brother. Gowery Taver by his answer relied upon the Will; but contended that the Plaintiff ought to have confined herself to the question of division or no division, and denied the title set up by her as to the descent of self-acquisitions of an undivided brother.

On the 27th of December, 1847, the Civil Court made a decree by which it was declared, first, that the family was undivided; secondly, that the alleged forgery of the Will by Moottoo Vadooga Taver, ought not to be urged against him as betraying any consciousness of a want of title; and thirdly, as to the Will itself, the Court stated that it was a mere nullity, which the Court need not look at or regard, and, moreover, that it was not a devise, but was a mere declaration of right.

Anga Moottoo appealed to the Sudder Court at Madras. Pending the appeal Gowery Taver died, leaving the present Appellant, a minor, his heir. The appeal was heard by the Sudder Court, and judgment reserved, but before its delivery, Anga Moottoo herself died childless, in consequence whereof the appeal abated. Several Claimants to the Zemin-[55]-dary presented themselves as heirs in remainder, claiming to carry on the appeal, but they were referred to the Civil Court to institute suits to establish their respective claims.

Accordingly, on the 5th of December, 1856, the present Respondent brought a suit *in forma pauperis*, in the Civil Court of Madura, for the recovery of the Zemindary, against the guardian of the present Appellant, and the Collector, as Agent of the Court of Wards, and in it she urged the forgery of the Will. The Appellant, by his guardian, filed his answer, but did not set up any claim under the Will.

Sowmea Natchiar, one of the daughters of Vallabha Taver, also brought a suit in the year 1857, claiming, as heiress in remainder, to the same effect as the Respondent's suit.

By a decree of the Civil Court, made in the two suits, dated the 25th of August, 1859, both suits were dismissed, the Court being of opinion that the decree of the 27th of December, 1847, was a judgment *in rem* on the fact of division. The Sudder Court confirmed this judgment on appeal on the 5th of November, 1859, on the ground that the question of division had been finally set at rest by the decree in 1847.

The Respondent appealed to the Privy Council from these decisions, relying on the division between the Respondent's father and his brother, and contending that the self-acquisition of an undivided brother descended to his widows and daughters in preference to brothers and their sons, and insisting that the Will relied on was a forgery. The Appellant in his case did not rely upon the Will, but supported the decrees on the ground, first, that the Zemindary was not the self-acquired property of Gowery Vallabha [56] Taver, but was ancestral property; secondly, that Vallabha and his brother were undivided; and, thirdly, that the heir of an undivided brother was his brother and not his widow and daughters. In the argument before the Privy Council, the Appellant urged upon the Court the forgery of the alleged Will, and the Counsel for the Respondent did not reply upon, but virtually abandoned it (9 Moore's Ind. App. Cases, 586).

By the judgment of the Judicial Committee, dated the 30th of November, 1863, it was decided that the Respondent and her sisters were entitled to recover the Zemindary, irrespective of the question of division, on the ground that the self-acquisition of an undivided brother passed to his widow and daughters in preference to his brothers and their issue; and with respect to the Will, the judgment contained this passage: The Respondent "seems to have set up an instrument, which in the proceedings is called a Will. On the Appellant's side this is treated as a forgery. The Respondent, denying the forgery, does not now treat the document as a testamentary disposition, or as material to his title, and it may, therefore, be dismissed from consideration" (*ib.* p. 594).

Consequent upon the Order in Council made on the above judgment, the Respondent was put in possession of the Zemindary.

On the 25th of April, 1864, the Appellant brought a suit in the Civil Court of Madura, against the Respondent and Anga Taver, the husband and representative of the Respondent's deceased sister, Bootaka Natchiar, to recover the Zemindary. The plaint, after stating the before-mentioned facts, and that, in the suits brought

in 1832 and 1833, the Appellant's ancestor had pleaded the Will; alleged that in [57] neither of those suits was any decision given upon it; though in the Sudder Court's decree of 1837, that Court incidentally stated its opinion that the Will was a fabrication, but this opinion, so far as related to the Will, was extra-judicial and unnecessary to the decision of the case; that in the suit in 1845, the Appellant's father had relied on the Will, but was not allowed to prove it, or produce documents in support of it, and the Respondent, in the suit of 1856, had also relied on the Will; that no decision was given on the merits; and that on the appeal before the Privy Council the Will was not and could not be adjudicated upon, as it formed no part of the record, and he founded his claim under the Will, and a Razinamah or agreement in July, 1830, alleged to have been entered into by the three widows of Gowery Vallabha Taver, as giving him a good title, notwithstanding the last-mentioned judgment of the Judicial Committee of the Privy Council.

On the 4th of May, 1864, Mr. C. R. Pelly, the Acting Civil Judge, made an Order, under sec. 2 of Act, No. VIII. of 1859, as follows:—The question of the title to the property referred to in the plaint, as between the Plaintiff and Defendants, having been disposed of by the judgment of the Lords of the Judicial Committee of the Privy Council, delivered on the 30th November, 1863, it cannot now be revived on the ground set forth in the plaint. The plaint is accordingly rejected.

The Appellant appealed to the Sudder Court, on the ground that the Order of the Acting Civil Judge of Madura was strong in law, as the Plaintiff's case, as made out in his suit, had not been before adjudicated upon by the Judicial Committee of the Privy Council.

The appeal was heard before the High Court of [58] Judicature at Madras, and the following judgments were delivered on the 11th of July, 1864. The Chief Justice Scotland:—The parties to this suit and to the suits in which judgment upon appeal was recently given by the Judicial Committee of Her Majesty's Privy Council are the same. The question to be considered is, whether the cause of action upon which the present suit is brought was finally concluded by the judgment and decree in the appeal; for, if so, the Civil Judge was right in refusing to take cognizance of the suit; and, I am of opinion, that the present cause of action was concluded. It can make no difference in the consideration of the question that the party, now Plaintiff, was Defendant in the former suit; what we have to be satisfied of is, that the ground of legal right upon which the Plaintiff sues was a point raised and open for decision in the former suit, and that it was finally dealt with by the judgment and decree. Now, the cause of action in this suit is, the right of the Plaintiff to recover possession of the Zemindary as the legal representative of Moottoo Vadooga Taver, the devisee under the alleged Will of Gowery Vallabha Taver, the former Zemindar, in whom, under the Sunnud i Milkeat istimrar, the Zemindary vested as his self-acquisition. The whole foundation of the suit clearly is the validity of the alleged devise to Moottoo Vadooga Taver; for as a ground of action, no effect, it seems to me, can now be given to the statements in the plaint as to the agreement of the 29th of July, 1830. Then what was the nature of the case made by the parties in the former suits, and what were the questions raised in those suits and involved in the final decision of her Majesty in Council in the appeal? The appeal appears to have been against the decrees and orders in the suit [59] brought in 1845 by Anga Moottoo, one of the widows of the Zemindar, Gowery Vallabha Taver, and in the suit brought in 1856 by the present Defendant, his second daughter, and we must look, I think, to the plaint and proceedings forming the record in both those suits. In the first, the widow in her plaint rested her claim to recover the Zemindary from the principal Defendant, the father of the present Plaintiff, upon the grounds, first, that a division had taken place between her husband and the Defendant's father, Odaya Taver; and secondly, that the Zemindary had become the separate self-acquisition of her husband, under the grant made to him by the Government. In answer, the Defendant pleaded a denial of the alleged division, and distinctly set up and relied upon his preferable right to the Zemindary, as the next heir male, in the undivided family; and also under the terms of the Will of the Plaintiff's husband, giving the Zemindary to the Defendant's father in default of male issue. The reply and rejoinder it is unnecessary to refer to, further than to remark that, although, as pointed out by the Appellant's Counsel, it was urged in one passage of the reply

that the suit should be heard and decided upon the point of division only, yet the Defendant in the rejoinder repeated and insisted upon the grounds of title set forth in the answer. In the second suit of 1856 against the guardian of the present Plaintiff, who had succeeded on the death of his father, the Plaintiff claiming in succession to Anga Moottoo rested her title upon the same grounds. The Answer of the guardian impeached the Plaintiff's right as heir, and referring to many of the facts set forth in the suit of 1845, stated a number of circumstances as showing that the infant Plaintiff was the rightful [60] heir. It does not appear to have contained express mention of the alleged Will; but in the rejoinder, the arzi to the Collector is referred to, and it is stated that under the arzi and the Will the Zemindary had been held by those through whom the infant claimed. Upon these pleadings it sufficiently appears, I think, that the claim of title under the gift by Will to Moottoo Vadooga Taver was raised and made in defence as much a distinct question for decision as it is conceded it had been in the earlier suits. It is true that the parties were restricted in the first suit to evidence upon the point of division, and that in the second suit no points or issues were settled. But the course of proceeding in both cases appears to have resulted from the Civil Judge's opinion, that division or non-division was the only ground upon which the widow's right could be questioned. The parties were not thereby precluded from afterwards relying upon the other questions raised by the pleadings. It was quite open to the present Plaintiff, as Respondent in the appeals in both suits, to put forward the right claimed under the Will, and to have his case upon that point fully heard and determined, just in the same way as it was open to the Appellant to rely (as she did successfully) upon her right to the Zemindary, as her husband's self-acquired property, though there had been no division. Further, as the case for the Appellant was presented before the Privy Council, it became obviously most material for the Respondent, alleging the genuineness of the Will, to rely, if he could, upon its validity to pass the Zemindary, being the Testator's separately acquired property, from the female heirs, and if this had been done, their Lordships who heard the appeal would necessarily have given judgment expressly upon the question before [61] deciding in favour of the Appellant's right as heir. Looking, then, to the proceedings in the two former suits, it appears to me that the claim which is now made a cause of action, was a question fully open to the Plaintiff upon the appeal in those suits, and that it rested upon precisely the same circumstances as those upon which the Plaintiff seeks to support the present suit; that his case as regards the Will is in truth one and the same in this and the former suits. But it was urged that, as there was no direct decision expressed by the Privy Council upon the Will, the Plaintiff was not concluded. What we find is, that on the part of the Plaintiff the alleged Will was not relied upon. Not, however, it appears, because the question of right under it was not open, but because, as a Will, it was considered and admitted to be quite untenable. Their Lordships observe, in their judgment, that "the Respondent, denying the forgery, does not now treat the document as a testamentary disposition or as material to his title, and it may, therefore, be dismissed from consideration;" and so disposing of all questions of disposition by Will, their Lordships decide against the Plaintiff's right to the property then in litigation, and which is now sought to be made the subject of another suit. Under these circumstances, I think the judgment and final order in the appeal involved the decision of all claim of title under the Will, and must now be considered between the parties as tantamount to an express adjudication upon such claim. As a rule, a party, I think, is bound to bring forward his whole case in respect of the matter in litigation and open to him upon the points for decision in the suit. He is not at liberty to abstain from relying upon, still less to abandon (as in this case) a ground of claim which is [62] in question and proper for consideration and decision in the suit, and afterwards to make it a cause of fresh suit in respect of the same subject-matter of litigation. This rule was acted upon in the case of *Henderson v. Henderson* (3 Hare, 115). Several other cases were cited from the English Reports, as to which I need only observe that some of the cases turn upon questions of English pleading, and none of them, I think, can be usefully applied as authorities to the circumstances here, except so far as they point out the principle and grounds upon which the defence of *res judicata* rests. The grounds are very clearly stated in the recent case of *Hunter v. Stewart* (31

Law Journ. Ch. 346), and applying the conditions which the Lord Chancellor Westbury there refers to from the commentary of Vinnius as necessary to the validity of such a defence, I think there is in this case *idem corpus eadem quantitas, idem jus, eadem causa petendi, eademque conditio personarum.* For these reasons I am of opinion, that the final decision upon appeal in the two former suits must be considered as an adjudication in respect of the claim under the alleged Will as well as the other questions raised, and that the Plaintiff is concluded from bringing the present suit, and consequently, that the plaint was properly rejected under section 2 of the Civil Procedure Code, Act, No. VIII. of 1859. The appeal, therefore, must be dismissed, and with costs. In the course of the argument, I alluded to another objection as arising upon the face of the plaint, namely, that its subject-matter did not constitute a cause of action, this Court having in two recent cases (See 1 Stoke's Mad. High Court Reps. pp. 141, 349), decided that a Zemindar holding under a permanent Settlement could not make any alienation of his Zemindary binding upon his [63] legal successors, otherwise than as provided by Regulation XV. of 1802. It has become unnecessary to consider this objection, but I ought to observe that it is one which, under section 32 of the Civil Procedure Code, the Court, I think, would have been bound to decide before the case could properly have been remanded for trial in the Civil Court, and if the decision just referred to be correct, it seems difficult to see how the statements in the plaint could be held to constitute a cause of action.

Mr. Justice Holloway delivered his judgment in these terms:—It is unnecessary to repeat the nature of the pleadings, but I will first consider the decree and then the record upon which it was made. Secondly, the judgment of the Lords of the Privy Council is, that the Plaintiff is entitled as against the present Appellant, then the Defendant in possession, to recover the Shivagunga Zemindary. There is no question here as to the technicalities flowing from the nature of the English action of ejectment. The decree could be arrived at only by affirming all matters necessary to the proof of Plaintiff's title, and by negativing all matters, perhaps, whether pleaded or not, which would enable the Defendant to resist such a decree. It is unnecessary, however, in justification of my judgment, to push the proposition so far, for it is quite clear that the Will was pleaded by the Defendant at every stage in the Court below. Then it is sought to avoid the effect of the decree by showing that the Court, following the former judgment of the Privy Council, wholly excluded the question of this Will. This is so, and if the Defendant's case was substantially prejudiced by this proceeding, it would have been a good ground for an application to the Superior Court for further inquiry. That Counsel in not pressing the point [64] were mistaken, is answered by the passage of Nerutius, quoted by me during the Advocate-General's argument:—*Cum de hoc an eadem res est quæriatur, hæc spectanda sunt, personæ id ipsum de quo agitur causa proxima actionis; nec jam interest qua ratione quis eam causam actionis competere sibi existimasset; perinde ac si quis, postea quam contra eum judicatum esset, nova instrumenta causæ suæ reperisset.* That the law as to a cause of action applies with at least equal force to a possible exception, whether taken or not, there exists no doubt. As to the law of the subject, and the rule derivable from the numerous cases cited, there is, I believe, no difference of opinion between the Bar and the Court. *Hunter v. Stewart* followed naturally from the nature of equitable pleadings. A Plaintiff cannot say generally, I am entitled to such relief, but he must allege the particular grounds upon which he seeks it, and he must further state everything which he intends to prove. The matter in that case was not *res judicata*, because 'the allegations and equity of the one Bill are different from the allegations and equity of the other.' This decision is, however, supposed to have overruled that of the Vice-Chancellor Wigram, in *Henderson v. Henderson*; but, if the actual decision in that case had been in conflict with that of the Lord Chancellor in *Hunter v. Stewart*, his Lordship would scarcely have said, "but I find no authority for this position in civil suits, and no case was cited at the Bar, nor have I been able to find any, in which a decree of dismissal of a former Bill has been treated as a bar to a new suit asking the same relief, but stating a different case, giving rise to different equity" (31 L.J. Ch. 350). Undoubtedly there are, in *Henderson v. Henderson* (3 Hare, p. 115), some general *dicta*, [65] which, unless read, as we are bound to read them with reference to the facts of that case, would conflict with the

decision in *Hunter v. Stewart*. The decision itself, however, discloses no conflict whatever. The Plaintiff in equity sought relief on account of various irregularities, alleged by him to have been committed by the Court in Newfoundland, from which an appeal lay to the Privy Council, which Tribunal had power to stay execution pending the appeal, and to remedy in appeal the irregularities, if any such had been committed. It was quite clear, therefore, that the Plaintiff had made no case for an injunction against an action upon the Colonial Court's judgment. Thirdly, *Seddon v. Tutop* (6 Term Rep. 607), is a case upon which we did not remark in our oral judgments. It was an action for goods sold, and the plea was a former recovery in an action of the sum of £71 10s. "for the damages the Plaintiffs had sustained as well by means of not performing the same identical promises," as for their costs. The facts were, that the Plaintiffs had given no evidence on the writ of inquiry as to the goods sold. The replication denied that the promises declared upon were the identical promises, for the non-performance of which the said sum was recovered. Lord Kenyon says:—"The issue was, whether the damages demanded in this action have been already satisfied by the recovery in the former action: and most clearly they have not." On this narrow question, the only one raised by the pleadings, both formally and substantially, justice was with the Plaintiff, and the case is no authority whatever for the position that a new suit can be brought for a portion of the same demand, because that portion has not for some reason been the subject of inquiry. [66] Fourth; a comparison of the plea in that case with that in *Lord Bagot v. Williams* (3 Barn. and Cress. 235), will show that this is so. It is not for us sitting in this Court to comment upon the question whether the course taken by the Lords of the Judicial Committee of the Privy Council was justifiable or not. It is sufficient to say, that there is a decree of a Superior Court distinctly declaring that the Plaintiff is as against the present Appellant entitled. I entertain no doubt whatever, that the effect of this decree is to bar the cause of action at present set up, because it is *res judicata*, the matter of it being an exception to the Plaintiff's cause of action which that decree must have overruled. Fifth; there is no question here of Bills of review, if our procedure admitted of them, or if an inferior Court could entertain such a Bill if it were admissible. The case is simply one of a new suit brought by a defeated Defendant upon a plea which he had already pleaded in the suit in which judgment was given against him. Sixth. It is not necessary to consider now the different positions of a Plaintiff whose Bill has been dismissed, and of a Defendant whose plea must have been overruled, to justify the decree passed. The case seems to me a very plain one, and this appeal must be dismissed with costs.

The present appeal was against the decree of the High Court of the 11th of July, 1864, as well as the decree of the Civil Court of Madura, dated the 4th of May, 1864.

The Attorney-General (Sir John Rolt, Q.C.) and Mr. Leith, for the Appellant.—Both the decrees appealed from were wrong in holding, that under sec. 2 of the Act, No. VIII. of 1859, [67] the judgments of this Tribunal in 1844 and 1863 and the Orders in Council made thereon (3 Moore's Ind. App. Cases, 278) was a bar to the suit now under appeal. The present suit was brought to establish the due execution and validity of the Will of the original Zemindar, Gowery Vallabha Taver. Such cause of action has not been "heard and determined by a Court of competent jurisdiction in any former suit between the same parties, or between parties under whom they claim." This is the language of that section of the Act, which the Court below has held thus defines this suit *res judicata*. By the decision of this Court in 1844, the Will, though referred to, was not adjudicated upon, nor was it in issue. Neither in the appeal in 1863 from the Sudder Court's decree in India consequent on that judgment was the question of the due execution and validity of such Will raised. The suit out of which the appeal in 1844 arose, did not raise in their Lordships' opinion, the proper issue; but that was no fault of the parties, but of the Court below neglecting the observance of the law of procedure then in force, Mad. Reg. XV. of 1816. It was the duty of the Court to record the points under the 10th section of that Regulation. In the suit thereafter to be brought the parties were restricted by the judgment of the Privy Council to the single question of division or no division of the Zemindary. In neither of the appeals brought here (a) was the validity of

(a) On the argument before the Civil and Sudder Courts, the Records in the

the Will at issue; and, [68] therefore, no adjudication on the points, this Tribunal decided, could have been made, or was in fact made, as the issue was confined to that single point. The Will was never abandoned, either by the Appellant, then a minor, or by his father in his lifetime; therefore, the decree of 1863 was not *res judicata*, so as to be pleaded as a bar to the present suit: *Henderson v. Henderson* (3 Hare, 115); *Bainbridge v. Baddelley* (2 Phill. 705); *Toulmin v. Copland* (2 Phill. 711); 3 Burge's Comms. on Col. and For. Laws, p. 1014, who refers, as the primary authority, to the Dig. lib. 42, tit. i. l. i.; and lib. 44, tit. 2. As the relief sought by this suit is founded upon a case never before put in issue or adjudicated upon, there is no bar to the cause of action. One of the criteria of the identity of two suits, in considering the plea of *res judicata*, is the inquiry whether the same evidence would support both, *Hunter v. Stewart* (31 L.J. Ch. 350). The title of the Appellant's late granduncle is under a testamentary instrument valid by Hindoo law, in force in Madras, and overrides the title by inheritance of the Respondent, *Nagalutchmee Ummall v. Gopoo Nadaraja Chetty* (6 Moore's Ind. App. Cases, 309). That case shows that the Court below was in error in extrajudicially holding that a Zemindar under the permanent Settlement could not alienate his Zemindary. The cases referred to in the High Court do not support that position. *Subbarayulu v. Nā Yak Rāma Reddi* (1 Stoke's Mad. H.C. Reps. 141) only decided upon the point of restraint on alienation as against the Government. *Malavaraya Nayanar v. Oppayi Ammā* (Ib. 349) related to the right of maintenance of a [69] sister out of the Zemindary. Moreover, the Appellant, as heir in succession, is entitled to repossession of the Zemindary, subject to the trusts of the Will.

Sir R. Palmer, Q.C., and Mr. W. W. Mackeson, appeared for the Respondent, but were not called upon.

The Right Hon. Lord Westbury.—The facts of this case have been lucidly presented to us, and the case has been argued very ably by the learned Counsel for the Appellant; but their Lordships feel no difficulty upon the point. All that has been urged is involved in and decided by the judgment of the Privy Council in the year 1863, and what passed before this Tribunal on that occasion.

To render our decision intelligible, it is necessary to make a short recapitulation of the leading facts of the case.

On the death of the Zemindar, the original proprietor, questions arose whether he was undivided in estate with his brother, and whether this property was to pass as undivided or divided estate. A document was produced in which the Zemindar made a testamentary gift of the estate to the Appellant's father, in the event of the child of one of his widows, who was *enciente*, not proving to be a son. A great deal of litigation ensued; but in the suits that were brought before the Privy Council in 1844, the exact issue, whether the family was undivided or divided, had not been so raised as to become necessarily the subject of judicial determination. The issue, however, of the validity of the alleged testamentary paper had been raised, and the decision of the Sudder Court was against it.

When the case came before the Privy Council in [70] 1844 [3 Moo. Ind. App. 278], having regard to the law touching undivided property, their Lordships were of opinion that there must be a judicial determination upon the point, whether the family was divided or undivided before the question of the validity of any devise could arise. No opinion, therefore, was expressed upon the issue raised as to the validity of the testamentary paper, which remained until it had been ascertained that the property in question was capable of being devised. The Privy Council accordingly remitted the case, pointing the parties' attention to the necessity of having it determined, whether there was division or no division. It is plain that when the issue was raised, whether there was division or no division, the importance of determining whether the paper in question was a valid testamentary gift or not would immediately be felt; because, if it should turn out that it was a divided property, then the party in possession, claiming by virtue of his being a nephew of

Privy Council appeals of 1844 and 1863, respecting the right to the same Zemindary, were referred to by the Council. The Respondent, on special application to the Privy Council, obtained leave to refer to them on the argument of this appeal.

the deceased proprietor, would immediately have been enabled to set up the Will as constituting his title. But it has been contended before us to-day, that what was said by the Privy Council must be considered as amounting to a positive direction that there should not, in the subsequent litigation contemplated, be any question whatever raised except the question of division or no division. It is plain to us that the language used by the Privy Council on that occasion does not admit of any such construction. The same point was raised and insisted upon before the Judicial Committee in 1863 [9 Moo. Ind. App. 586]; for it was then contended, on behalf of the present Appellant, or those who preceded him in title, that the suits which had been instituted and were brought by way of appeal were suits that transgressed the limits imposed by the Order in Council [71] of 1844 (being, in effect, the same argument that we have heard to-day); but that contention was overruled, and it was held that the Order in Council of 1844 did not at all interfere with or preclude the parties from bringing forward the claim, and instituting the suits which they had instituted subsequently to 1844, the decrees in which were the subject of the appeal to the Queen in Council in 1863.

We take as an example of these suits the form of the suit, No. 10, of 1856. One of the present Respondents filed her plaint in that suit for the recovery of the Zemindary, and the question of the forgery or genuineness of this alleged testamentary paper was distinctly raised in that plaint. By the answer to it, the present Appellant, answering by his guardian, did not set up the alleged testamentary paper, but he rested his defence on the ground that as to this property the brothers were undivided. Ultimately, all the suits came before the Judicial Committee of the Privy Council in 1863; and the Judicial Committee were of opinion that the question of division or no division was, after all, immaterial, because they found it clear that the Zemindary in question was self-acquired property: that is, that the deceased proprietor had been the first to acquire it; and they accordingly held, that even if the brothers were undivided, yet that the estate being self-acquired, was not governed by the law applicable to undivided property, but descended to the heirs general, and was capable, therefore, of being devised. Immediately it became most material, in the mind of the Judicial Committee of 1863, to determine the question with regard to the testamentary paper; but they were wholly relieved from the necessity of doing so, because the present Appellant, then appearing by most [72] able Counsel, as the Respondent at the Bar, deliberately told their Lordships, that although the paper in question had been familiarly called a Will, the name had been introduced only as a short denomination of the instrument, which in reality was not testamentary, and neither had, nor was ever intended to have, the effect of devising the property; and that the Respondent did not claim any title under it as a testamentary devise; but used it only as conclusive evidence of what the opinion of the last proprietor was, viz., that this Zemindary was in reality undivided property. It is quite plain why the learned Counsel for the then Respondent adopted that course. In their minds it was thought safest to rest their case upon the question of division or non-division. They appear to have reasoned thus:—"If we set up this as a Will, then it is a conclusive declaration by the alleged Testator that the property was devisable; and if devisable, that it was not undivided. We will, therefore, abstain from treating that instrument as an instrument of title. We will abstain from insisting upon it as a devise, and we deliberately tell the Judicial Committee, that it is not to be regarded as being in any sense testamentary." The result, therefore, was, that the Judicial Committee, carefully acting, as it did throughout, in the hope and with the express object of preventing further litigation, recorded in its judgment the fact that the Respondent's Counsel, had deliberately elected to disclaim any title under that instrument as a Will, and that, therefore, its validity or invalidity became no longer material for decision.

That being the state of the case, we are now called upon to approve of a suit, subsequently instituted by the very person who had deliberately given this [73] character to the instrument, a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid Will and testament. It is impossible that any such suit should be allowed to proceed. In the first place, it is clear, upon the former record, that the Appellant had then the power of relying upon that document as being a valid Will. He in

effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might, first, have insisted that it was an undivided property, and that, therefore, the Plaintiff in those suits had no interest therein; and, secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour. When a Plaintiff claims an estate, and the Defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present Appellant might have insisted on the validity of the alleged Will; but instead of doing so when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a Will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the Appellant of setting up the Will, were allowed.

On every ground, therefore,—first, on the general ground that the thing was in issue, and that what was in issue must be taken to have been decided by the judgment; secondly, upon the personal ground that the Appellant having used this document and [74] abandoned all right to it as a Will, cannot now use it for a different purpose; we are of opinion, that there is no doubt as to the correctness of the determination of the Court below. We regard this suit, in which the present appeal is brought, as a suit instituted without *bona fides*, and directly contrary to what the Appellant must be considered to be bound by; and we have no hesitation, therefore, in advising Her Majesty to affirm the decree, and to direct that this appeal be dismissed, with costs.

Sir R. Palmer.—It may be a satisfaction to your Lordships to know that what Sir Hugh Cairns did at the Bar was a mere repetition of what had been done in the printed answer to the appeal by the Respondent in India, and your Lordships will find it at p. 218, par. 39 of the Record of the appeal in 1863, which runs thus:

“In opposition to par. 64 of appeal petition, Respondent submits that the correspondence which passed at the time shows that the Government authorities did acknowledge the *prima facie* right of the Respondent's grandfather, and that the Civil Court was correct in terming the Will a mere declaration of right. It is only necessary to refer to Reg. V. of 1829 to perceive that it could not possibly be more, and that in quoting it the Government Officers could only have viewed it in that light, and not as a bequest.”

Lord Westbury.—I am very glad that you have stated that, because it removes from the case any possibility of its being supposed that Sir Hugh Cairns either mistook or exceeded his instructions.

Sir R. Palmer.—That was my motive for mentioning it.

[See note to *Katama Natchier v. The Rajah of Shivagugna*, 9 Moo. Ind. App. 617.]

[75] APPOVIER *alias* SEETARAMIER,—*Appellant*; RAMA SUBBA AIYAN, VENKATARANA AIYAN, ANANTAMMAL, ANNA AIYAN, and ANANTANA RAIYANA AIYAN,—*Respondents* * [Nov. 16, 17, 1866].

On Appeal from the Sudder Dewanny Adawlut at Madras.

According to the true constitution of an undivided Hindoo family, no individual member of the family, whilst it remains undivided, can predicate of the joint and undivided property, that he has a certain definite share.

The proceeds of undivided property must be brought to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of the family. But if the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and each member has thenceforth a definite and certain share in the estate, which he may claim to receive and enjoy in severalty, although the property itself has not been actually severed and divided [11 Moo. Ind. App. 89, 90].

Where, therefore, a deed of partition was made and executed by the members of an undivided family, dealing with and making actual partition of a portion of the joint estate, but leaving the remainder to be divided at a future period in the same manner: Held, by the Judicial Committee (affirming the judgment of the Courts below), that such deed, being a division of right, operated as a conversion of the tenancy and a change of *status* in the family, *quoad* the property specified, changing, as it were, the joint tenancy thereof into a tenancy in common; and by operation of law making the members of the previously undivided family a divided family, in respect of such property.

In this case the suit was brought by the Appellant in the Court of the Principal Sudder Ameen at Tinnevely. The object of the suit was to establish his claim, as a member of an undivided Hindoo family, to a moiety by right of inheritance of the family [76] property, and to eject three of the Defendants (the present Respondents) from the three several divided shares which they held of such property, under a deed of partition made in the year 1834, to which deed the Appellant was a party.

The validity of the partition made in pursuance of this deed was the main question in the suit. The Appellant sought to invalidate it, principally on the ground that such deed of division being only partially acted on, was, therefore, wholly void; that certain adoptions, by which three of the parceners became members of the family when undivided, were contrary to Hindoo law; that the Appellant was a minor at the date of that partition; and in the event of those points being decided in favour of the Appellant, he supported his claim to a moiety of the property by relying on a partition alleged to have been made in the year 1806, by the then members of the family.

The Defendants to the plaint were fifty-nine in number, and the five Respondents were the first-named five Defendants; the rest of the Defendants were severally holders of mortgages, and other derivative and subordinate interest in the different shares taken by the parceners under the division made in 1834.

The facts were these:—

The common ancestor of the Appellant, the third Respondent's husband, and of the fourth and fifth Respondents, was one Sitaramien, who died, leaving six sons. These sons formed an undivided family, consisting of six branches, who, after the death of Sitaramien, held and enjoyed the family property in common.

* Present: Members of the Judicial Committee,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

In the year 1806, the family being then undivided [77] and the first, second, and third sons of Sitaramien, the common ancestor, being dead, their three sons, together with the three surviving sons of Sitaramien, came to a division of the family property, upon which the Appellant relied as the foundation of his claim. This transaction was held by the several Courts of Sudder Ameen, the Zillah, and the Sudder Dewanny, to have been a mere temporary arrangement, and not intended to be permanent, and its purpose being served, a reunion of the family ensued, after which the parceners continued to hold the property as an undivided family until the year 1830.

On the 30th of September, 1830, a Kararnamah (agreement) was entered into by the then surviving members of the family, for a prospective division of the family villages at some future period, as might be agreed on, with joint cultivation and engagement thereof in the six equal shares in the meanwhile. Nothing, however, was done to carry out this intended division. At the date of this agreement, the Appellant was a minor, and a party to it by his Mother, as his guardian.

On the 22nd of March, 1834, a further deed of division was executed between the parties to the deed of 1830, which the Appellant, being then of age, executed. By this partition the property was divided into six equal shares, which were separately allotted to the Appellant, and the first, second, and third Respondent, and the fathers of the fourth and fifth Respondents.

On the 19th of November, 1855, the Appellant filed his plaint in the Court of the Principal Sudder Ameen of Tinnevely, against the Respondents and others not parties to the appeal, stating the transac-[78]-tion of 1806, and alleging that in March, 1834, the Appellant and the second Respondent, Venkatarama Ayan, since deceased, were minors, and that during their alleged minorities Sitaramien, who had been adopted by the Appellant's elder brother, was while a minor of only five years, adopted without authority, by that brother's widow, Ananta Ammal, the third Respondent, during pollution after her husband's death. And that in March, 1834, during the minorities of the Appellant and the second Respondent, Sitaramien, through his mother, joined in the partition, and redistributed the family property into six shares contrary to law, and exchanged deeds of partition, but that such deeds were not put in force. The plaint then alleged circumstances to show that certain other adoptions made by some of the family were illegal and invalid; but which fact from the course the suits took, both in the Courts below and before the Judicial Committee, it is not necessary to specify; and then went on to allege, that the Appellant was the Dwamushyayana or heir, both to his adoptive father and his natural father, and was entitled, as such, to a moiety of the property in question, which he thereby claimed, the other moiety falling to the first and second Respondents; and prayed for a decree for an account of his moiety of the property described in the plaint, authorizing him to enjoy his share according to the local usages.

The effect of the case made by the plaint was, that by the disqualification of Sitaramien and the fourth and fifth Defendants, three of the parties to the partition of 1834, through the alleged illegality of their several adoptions, to reduce the family from six to three members, and, having regard to the Appellant's [79] double capacity of heir to his natural as well as to his adoptive father, the family property was reduced to four shares, of which two would belong by proprietary right to the Appellant, as such conjoint heir, and the other two to the first and second Defendants.

The Defendants, the present Respondents, filed separate answers. The first Defendant denied the validity of the second Defendant's adoption, and consequently his right to any share, and claimed a moiety of the family property for himself. The second Defendant pleaded his minority at the time of the partition of 1834, and alleged that the division of 1806 had been confirmed by the Courts.

The fourth Defendant relied on the following points:—First, that the suit was barred by the Regulations of Limitation, the cause of suit having arisen in 1834, and the suit not having been commenced within twelve years. Second, that the family was a divided one. Third, that the adoption of the fourth Defendant was valid; and fourth that the Appellant's plea of Dwamushyayana was unsustainable. He further stated, that the Appellant's allegation of his being a minor in the year 1834, was false; that he attained his full age in 1832-3, and that ever since the

partition of 1834 the property in question had been enjoyed by the parceners as a divided family according to the division then made, as had been admitted by the Appellant in certain proceedings and depositions before the Revenue authorities; and that the Appellant, if dissatisfied with that division, ought to have brought his suit within twelve years. In respect of the adoption of the fourth Defendant, the answer stated, that the adoption (the fact of which was admitted in the [80] plaint) took place in January, 1836, when he was five years old, and before the performance of his tonsure; and that he being, at the time of filing the answer in 1856, twenty-five years old, the interval since the adoption was twenty years, and exceeded twelve years, after which lapse of time an adoption was unimpeachable. The answer further stated, that the deed of division in 1806 was passed simply in order to evade the demands of Creditors, but was not effectuated; and that, after the pressure of the Creditors had ceased, the parceners cancelled the deed of 1806, and agreed by the deed or agreement of 1830 to hold and enjoy the property in six shares, and to live separately; that, conformable to that agreement, the parceners, by the deed of the 22nd of March, 1834, divided the property into six shares, and thenceforward held and enjoyed the same in severalty accordingly, and had ever since lived separately, and paid fiscal dues separately. That after the division of 1834 a dispute arose among the parceners in regard to the house grounds, and that an agreement was passed to the effect that they should enjoy them according to the lots cast by them of their own accord in April, 1834, and that in other respects the division of 1834 should be adhered to; and he further stated that the Appellant had attested a deed of mortgage made by the fourth Defendant of his share of the property in 1840; and that from such fact, in conjunction with the allegation in the plaint, that the Appellant and the first and second Defendants had separately mortgaged certain portions of the original family property, it was evident that the Appellant was a divided member of the family. The answer also referred to Hindoo law authorities, in sup-[81]-port of the validity of the adoptions impeached by the plaint; and averred, with reference to the allegation of the Appellant, that he was a Dwamushyayana, or heir of two fathers, that the claim was untenable.

The answer of the fifth Defendant relied upon the Regulation of Limitations, and insisted upon the validity of his own adoption, as conformable to the custom of the southern countries, to adopt nephews (sisters' sons), the validity of the second Defendant's adoption, which stood on the same footing, being admitted by the Appellant. He claimed also the benefit of the fourth Defendant's answer, as a sufficient defence against the Appellant's claim.

The answer of the third Defendant relied on the agreement for partition of 1830, to which her deceased husband and the five other parceners were parties; the subsequent agreement of 1834, and upon the continuous enjoyment of the property, according to the division of 1834, down to the commencement of the Appellant's suit. She relied also on admissions of her title to one-sixth, made by the Appellant, in the course of various proceedings before the Officers of Revenue. She denied the alleged adoption of Sitaramien when under pollution; and she averred that in February, 1834, when her husband, Ramakistnien, was laid up with illness, he, in his own proper person, made the adoption as declared by Sastras, and died subsequently. She denied also the legality of the claim of the Appellant to be Dwamushyayana, or son of two fathers, and stated that the custom of Dwamushyayana, did not exist in the District where the family property lay, and that the Appellant could not [82] on such ground lay claim to a moiety of the estate. This Defendant claimed also the benefit of the answer of the fourth Defendant.

The cause was heard by the Principal Sudder Ameen of Tinnevely (T. Sundara Charlu), and on the 14th of September, 1857, the plaint was dismissed. The Sudder Ameen was of opinion, that whatever might have been the nature or character of the alleged division of 1806, the division of 1834 was binding on the Appellant, by whom it had been executed in *propria persona*, by affixing his own mark, and not by his guardian, as was the case with the agreement of 1830. It was observed by the Sudder Ameen that the Appellant was of the age of discretion at the time of entering into the agreement of 1834; that in the Exhibit XVII., which was a petition presented by the Plaintiff to the Taluk authorities, he admitted the division of the property into six shares by the agreement of 1834, and also the fact that some

of the lands were afterwards enjoyed in common, and that some were divided and enjoyed in six shares; that under these circumstances the Plaintiff and the first, second, and third Defendants, and the fathers of the fourth and fifth Defendants, became divided members; that notwithstanding the statement of the Plaintiff at the hearing, that the six sharers did not under the division of 1834 enjoy any portion of their respective shares, or the produce thereof, and that he the Plaintiff enjoyed a greater share, such illegal enjoyment could be of no prejudice to the shares of the lawful coparceners, and could confer on the Plaintiff no title to a greater share to which, under the Hindoo law, he could not become entitled, for that, according to the text of the Hindoo law, a person who for ten years [83] lived separately, and performed ceremonies separately, must be considered as divided, and that the Plaintiff had in his deposition admitted that ever since the division of 1834 the parceners had lived separately, and performed the anniversaries, death, etc., separately. As regarded the adoptions of the fourth and fifth Defendants, to which the Appellant took exception, the Judge held that all these adoptions were valid by the Hindoo law. As to the adoption of Sitaramien, which was impeached on the ground of its having been made by the third Defendant while under pollution after her husband's death, the Sudder Ameen considered it proved that this adoption was not made by the third Defendant at all, but by her husband, Ramakistnien, himself, shortly before his death, and he held that as Sitaramien was dead, the third Defendant, as the widow of Ramakistnien, was a parcener under the division of 1834.

The Appellant appealed to the Zillah Court of Tinnevely. The appeal was heard before Mr. E. Story, the Civil Judge, and the decree of the Court below affirmed, on the 21st of May, 1858. The judgment of the Zillah Court proceeded on the ground that the Appellant was, by his own showing, seventeen years of age at the date of the division in March, 1834, and, not being a ward of Court, became of age when sixteen; that the division of 1834 was shown to have been acted upon by all parties, including the Appellant; that all the impeached adoptions took place more than twelve years prior to the institution of the suit, and could not, therefore, after such a lapse of time, be brought into question; that the equality or inequality of the division of 1834 was of no moment, and that, as the Appellant had not proved his own title to the shares of the third, fourth, [84] and fifth Respondents, it mattered not whether their defence had or had not been substantiated.

From this decree the Plaintiff appealed to the Sudder Dewanny Adawlut at Madras.

On the 26th of April, 1860, that Court, consisting of Messrs. Frere, Strange, and Beauchamp, pronounced the Court's decree; after stating the facts of the case, the Court delivered their judgment upon the question of division in 1834, in the following terms:—"After hearing argument on either side, the Court consent to extend their investigation to the consideration of the various other points of law embraced in the case, namely, the circumstances of the family as to division, and the validity of the disputed adoptions. It is attempted on the part of the Plaintiff's Counsel to maintain his rights under the alleged division of 1806. The Court, however, view the plea as untenable. It is not in accord with the form in which the plaint has been drawn up, which puts the family forward as virtually undivided, and calculates the shares as consisting of six equal parts. It is pleaded that the Plaintiff is not bound by the arrangement of 1834, on the ground that he was then a minor. This plea has been negatived in the Lower Courts, it having been found by the Exhibit XIX. that the Plaintiff had accounted himself twenty-nine years of age in 1846, which would show him to have been more than sixteen years old, or in his majority, in 1834. The Court observe also that in the years 1845, 1846, and 1847, the Plaintiff has spoken of the division of 1834 as a transaction in which he had been concerned, and has stated that it had in part been carried out, as appearing by the Defendant's Exhibits XVII. and XIX., and Plaintiff's Exhibit Z, so that [85] the Plaintiff is precluded now from disputing the fact or questioning his liabilities under it. At the hearing of this appeal the objection taken to the adoption of Sitaramien has been withdrawn, and it is found that on previous occasions, namely, in the aforesaid Exhibits XVII. and Z, the Plaintiff has recognized this adoption. The fact of the family being in a divided state furthermore vests this share in the third Defendant,

whatever may be said of the adoption of Sitaramien, who was demised. The adoption of the fourth and fifth Defendants occurred in the years 1837 and 1842 respectively. In the Exhibit Z, dated in 1847, the Plaintiff has mentioned that illegal adoptions had been made in the family, but without specification of such adoptions. It appears, however, that on a previous occasion, namely, in 1846, the Plaintiff admitted these parties to be shareholders, as shown by Exhibit XIX., without in any way objecting to their position in the family; and in Exhibit XXVI., which is a family tree made use of by Plaintiff, their names appear as members of the family. The Court is of opinion, that the Plaintiff is precluded from challenging these adoptions, by his own past acquiescence therein. The second Defendant has demised; but as his share forms the subject of the appeals Nos. 191 and 192 of 1859, it is not necessary to deal therewith in the present suit. The Court so far amend the decrees below as to award to the Plaintiff a sixth share in the villages mentioned in the Exhibit XLII. as still undivided. The Plaintiff's suit having been based upon a misrepresentation of his title, and it not appearing that, had he confined his demands to so much as was really his due, compliance therewith would have been refused by the Defendants, the Court [86] resolve to charge the Plaintiff with the whole costs of the suit."

The Appellant applied to the Sudder Dewanny Adawlut for a review of the above judgment, but the petition was rejected by an Order, dated the 5th September, 1860.

From the above decree and the Order of the Sudder Court of Madras, refusing a review of judgment, the present appeal was brought.

Mr. W. W. Mackeson, for the Appellant.—The question of disability arising from infancy raised in the Court below is abandoned. The principal points now relied on are, first, as to the effect of the alleged deed of partition made in the year 1834. Upon this question, it is submitted, the Courts in India proceeded in their judgments on a false basis, namely, that there was a complete and valid division by the deed made in the year 1834. Such was not the case; no entire division of the family property was made by metes and bounds, and the evidence shows the deed did not operate as a complete division. It has been ruled by the Courts in India, that the mere fact of the registry of an estate in separate portions is not conclusive of the fact of division. A partial and incomplete division is no division at all. *Strange's Hindu Law*, Vol. I., pp. 195, 209 [2nd Ed.]. *Strange's Hindu Law*, Vol. II., p. 53. *Doe dem. Remmout Seat v. Bulram Chunder* (Morton's Rep. 80), *Praenkissen Mitter v. Sreemutty Ramsoondry Dossee* (1 Fulton's Rep., 110, and see authorities collected on this point, 6 Moore's Ind. App. Cases, 546). The mere execution [87] of a deed of division, therefore, if not acted upon, cannot alter the condition of an undivided family. The Hindoo law recognizes no arrangement as constituting a divided *status*, nothing short of entering upon the enjoyment of the respective shares, and that under a valid division. Here the deed of 1834 of the intended division, having been only partially acted upon, is void. Moreover, the intended division was unequal, which also invalidates the partition.

Secondly, with regard to the alleged adoption of the fourth and fifth Respondents. It is submitted that there is no evidence to support that fact, but if so, they were invalid in law. There can be no adoption of a sister's son. *Strange's "Manual of Hindu Law,"* p. 22, pars. 84 and 86 [2nd Ed.]. "*Princ. of Hindu and Mohammdan Law,*" p. 70, a by W. Macnaghten [Ed. by H. H. Wilson]. *Sutherland On Adoption*, p. 35. *Strange's Hindu Law*, Vol. I., pp. 83, 84 [2nd Ed.]. *Ramalinga Pillai v. Sadasiva Pillai* (9 Moore's Ind. App. Cases, 510). *Narasammal v. Balaramacharlu* (1 Stoke's Mad. H.C. Reps., 420). The adopted must be one who might have been issue of the adopter, as the child of one whom the adopter might have married. *Strange's Hindu Law*, Vol. I., p. 83. The objection as to tonsure having taken place before adoption is now also abandoned. As a general rule, tonsure places a son inextricably in his family, but investiture prevents adoption. *Strange's "Manual of Hindu Law,"* p. 26. *Sutherland On Adoption*, p. 124. *Strange's Hindu Law*, Vol. I., p. 89.

Again, the decree is wrong, as the Appellant is entitled as Dwyamushyayana, or son of two fathers, to seven-twelfths instead of one-sixth, as decreed by the Sudder Court. As a general rule, the adopted son [88] cannot be heir in his natural family,

but only to his adopted father; but it is otherwise where the natural and adoptive fathers agree that the adopted shall retain his natural rights, or belong to both fathers. If a man having two sons gives away one, and his other son die, and their issue fail, the adopted son may resume his natural rights. Sutherland On Adoption, pp. 127, 187.

Mr. Prendergast, for the third, fourth, and fifth Respondents. —The family of the parties to the suit was a divided family. The right to impugn the validity of the partition deed of 1834, if any error existed, which is denied, was barred by lapse of time under the law of limitation, as well as by the acquiescence of the parties before the commencement of the suit. The partition made in 1834 was made with the personal concurrence of the Appellant, who, it is acknowledged, at that time was under no legal disability. He is, moreover, as appears from the evidence, estopped, by his own acts and declarations subsequent to the partition, from impugning its validity. With regard to the adoptions which the Appellant impugns, the evidence in the cause is sufficient to establish their validity; but if the Appellant had any right to question their validity, such right is barred by the lapse of time before the commencement of the suit. The decree, therefore, of the Sudder Dewanny Adawlut was in all respects just and proper, and ought to be affirmed, and this appeal dismissed with costs.

The Right Hon. Lord Westbury. —This is an appeal brought from a decree of the Sudder Court at Madras, which affirmed the decree of [89] the Zillah Court of Tinnevely, which itself affirmed the original decree of the Sudder Ameen of that District. It is, therefore, an appeal from three decrees, unanimous in rejecting the claim of the Appellant.

The present appeal is founded upon an allegation that certain property (shares in which are claimed by the Appellant) continues the undivided property of the family of which the Appellant was a member, and which was originally an undivided family. The foundation of the defence to the Appellant's claim is an instrument, which we will call, for the present purpose, a deed of division, dated the 22nd of March, 1834.

Certain principles, or alleged rules of law, have been strongly contended for by the Appellant. One of them is, that if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds.

Their Lordships do not find that any such doctrine has been established; and the argument appears to their Lordships to proceed upon error in confounding the division of title with the division of the subject, to which the title is applied.

According to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the [90] Collector or receiver of the rents, a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

With reference to the cases in the Madras High Court which have been relied upon by the Appellant, we believe, upon an examination of them, that there is not to be found in any one, clearly and affirmatively, the doctrine contended for with reference to an agreement for the conversion of joint ownership into separate

ownership, namely, that such agreement is of no effect to convert an undivided family into a divided family without an actual partition.

In the last case cited and relied upon by the Appellant, decided in the month of February, 1865, in the High Court at Madras, that Court refuses to assent to the doctrine that nothing short of an absolute partition by metes and bounds in the lifetime of the different members will make the shares of the property divided.

Undoubtedly their Lordships would be unwilling to reverse any rule regarding property which had been [91] long and consistently acted upon in the Courts of the Presidency, but it is impossible for them here to come to the conclusion that the doctrine contended for by the Appellant is to be considered a rule, which has been so accepted or acted upon by those Courts. Upon an examination of the cases, it will be found that in some the deed of partition was not attended by any subsequent act, and had been repudiated by subsequent conduct of the parties; and in another of the cases cited, where there had been a decree of partition, it seems that the decree of partition had been abandoned.

If, then, the rules derivable from the true theory of an undivided family are such as we have described, and are not at variance with any settled course of legal decision,—let us apply those rules to the deed upon which this case in reality depends.

The Appellant admits that the deed was operative with regard to a certain number of villages, because, he says, those were actually divided; but he contended it was not a deed which made the family a divided family with regard to the rest of the villages, because it has not been followed by actual partition.

It is necessary to bear in mind the twofold application of the word “division.” There may be a division of right, and there may be a division of property; and thus, after the execution of this instrument, there was a division of right in the whole property, although, in some portions, that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition.

The deed, after dealing with the villages that were [92] intended at once to be the subject of an actual partition, proceeds thus:—“But inasmuch as it is not intended to divide now”—What is the meaning of the words, “divide now?” Clearly, to make the same partition of the villages that follow as had previously been directed to be made of the villages which precede. “But inasmuch as it is not convenient to divide now our moiety of the villages” (then follows an enumeration of the villages), “we shall divide every year in six shares the produce of them, and enjoy it, after deducting the Cirkar kist and charges on the villages.” Nothing can express more definitely a conversion of the tenancy, and with that conversion a change of the *status* of the family *quoad* this property. The produce is no longer to be brought to the common chest, as representing the income of an undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family, who are thenceforth to become entitled to those definite shares. Thus—using the language of the English law merely by way of illustration—the joint tenancy is severed, and converted into a tenancy in common.

Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may at any time be claimed by virtue of the separate right.

The words with which this instrument of the 22nd of March, 1834, concludes, manifest an intention to become divided, for, after expressing that they have [93] already divided the silver and brass utensils, the parties use these words:—“We have henceforward no interest in each other’s effects and debts except friendship between us.” We find, therefore, a clear intention to subject the whole of the property to a division of interest, although it was not immediately to be perfected by an actual partition.

We have examined the whole of these papers with great anxiety and care; we have been very much assisted by the arguments at the Bar; and by the able manner in which the cases on both sides have been prepared. We have no doubt of the true

principle which is applicable to the matter, or of the legal effect of this deed of March, 1834. It operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, viz., that that is sufficient to make a divided family, and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject-matter.

Upon all these grounds we concur with the decisions of the Courts below, and we think it right to advise Her Majesty to dismiss this appeal, and to dismiss it with costs.

As the Appellant admitted, with great propriety, that, provided the conclusion of their Lordships was that the property was divided, then the shares which he now claims have followed a course of descent with which he has no right whatever to interfere,—we say nothing upon the question of adoption. Her Majesty's Order will merely confirm the decree of the Court below.

[See *Rajah Suraneni Vencata Gopala Narasimha Row, Bahadoor, v. Rajah Suraneni Lakshma Venkama Row*, 1869, 13 Moo. Ind. App. 138; *Ram Chunder Dutt v. Chunder Coomar Mundul*, 1869, 13 Moo. Ind. App. 181; *Runjeet Singh v. Koorer Gujraj Singh*, 1873, L.R. 1 Ind. App. 9; *Baboo Doorga Pershad v. Musumat Kundun Koovar*, 1873, L.R. 1 Ind. App. 55; *Girdharee Lall v. Kantoo Lall*, 1874, L.R. 1 Ind. App. 329; *Ameeroonissa Khatoon v. Abedoonissa Khatoon*, 1874-75, L.R. 2 Ind. App. 99; *Chidumbaram Chettiar v. Gouri Nachiar*, 1879, L.R. 6 Ind. App. 181.]

[94] ASHRUFOOD DOWLAH AHMED HOSSEIN KHAN BAHADOOR, and WAZEEROON NISSA BEGUM,—*Appellants*; HYDER HOSSEIN KHAN, *alias* ACHEY SAHIB,—*Respondent* * [Nov. 25, 1866].

On appeal from the Court of the Judicial Commissioner of Oude.

According to the Mahomedan law, the presumption of legitimacy from marriage, follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child: but this presumption is not ante-dated by relation. An ante-nuptial child is illegitimate; a child born out of wedlock is illegitimate, but if acknowledged by the father he acquires the *status* of legitimacy. Such acknowledgment may be express or implied, directly proved or presumed [11 Moo. Ind. App. 113, 114].

By the same law, the denial of a son either of Nikalee (regular), or Mootahar (irregular) marriage after an established acknowledgment, is untenable, though supported by a deed of disclaimer and repudiation by the father [11 Moo. Ind. App. 111, 112].

Suit by the son and daughter of A., a Mahomedan of the Sheah sect, claiming as his sole heirs, for a declaration of the illegitimacy of B., who claimed to be also a son of A., and co-heir, as the issue of a Moottah, or inferior marriage, and as having been acknowledged by A. in the lifetime as his son. Such marriage not having been proved to have taken place previous to the birth of B. and the acknowledgment of the sonship not being satisfactorily proved, held by the Judicial Committee, reversing the decision of the Court of the Judicial Commissioner of Oude, that B. was not intitled to any share of the property of A., notwithstanding that he had been put in possession of a third by a decree in a summary suit for the administration of A.'s estate.

Held also that the *onus* of proof of his illegitimacy was upon the Plaintiffs in such subsequent suit [11 Moo. Ind. App. 108, 109].

* Present: Members of the Judicial Committee,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

Where a summary suit is instituted to enforce a claim to possession of property, and the question in dispute necessarily involves the right, the Claimant ought to be directed at once to proceed in a regular suit, and not to be left to proceed under the Acts, Nos. XIX. and XX. of 1841, and X. of 1851, which do not determine the right, but only give possession to the *prima facie* heirs.

The suit out of which this appeal arose was originally brought in the Civil Court at Lucknow, by the Appellants, the son and daughter, and, as such, claiming as sole joint heirs of Nawab Ameenood Dowlah, deceased, formerly Vizier and Prime Minister of the late King of Oude, against the Respondent, who [95] claimed to be a son of the deceased Nawab, and as such a co-heir with the Appellants, to establish their right of inheritance and a declaration of the Respondent's illegitimacy.

The parties were Mahomedans of the Sheah sect. The Respondent claimed to be a son of the Nawab Ameenood Dowlah, but the Appellants alleged that he was illegitimate; he, however, relied on a Moottah (or irregular) marriage of his mother with the Nawab, and his consequent birth in wedlock, and insisted that the Nawab had in his lifetime acknowledged him as his son; and he further relied on a decision of the Civil Judge at Lucknow in a summary suit for the administration of the goods of the Nawab, under the Acts, Nos. XIX. and XX. of 1841 and X. of 1851, by which he had obtained a certificate of joint administration and title with the Appellants, subject to their right to bring a suit to prove his illegitimacy. The Appellants denied the Moottah marriage, and the declaration and acknowledgment by the Nawab of the Respondent as his son, and they set up and relied on a deed of disclaimer and repudiation of the Respondent, executed by the Nawab in his lifetime, denying that the Respondent was his son, which deed was proved in the suit.

The suit was tried and a verdict given by a Punchayet, acting as a jury, the constitution of which was [96] thus described by the Civil Judge: "Each party named ten, and thus we had an array of twenty of the first Mahomedans at Lucknow, including the High Priest and another Priest of high authority. Challenges were allowed till only five remained on each side, and every man of this panel, ten in all, was mutually approved by the parties." The fact of a Moottah marriage, by the Nawab, with the Respondent's mother, a person of low station in life, and originally one of his menial servants, was established, but there was a failure of proof that such marriage preceded the birth of the Respondent; the effect of the evidence upon that point, as well as upon the question of his acknowledgment by the Nawab, and of the deed of repudiation, is fully stated in their Lordships' judgment. On the four issues put to them on these matters in the Court below, the Punchayet found, first, that the Moottah marriage took place after the Respondent's birth; secondly, that no acknowledgment by the deceased Nawab that the Respondent was born of his body had been proved, according to the conditions of law, and that, therefore, no deed of repudiation was correct; thirdly, they found that it was not proved that the Respondent was a son begotten of the body of the deceased Nawab; fourthly, they found that had sonship been proved according to law, then, after payment of the marriage settlement of the Muskoolah wife, the son would have received an equal share of the residue with the other son; but, by law, an adopted son had no legal claim to a share, provision depending on the pleasure of the heirs.

It appeared that the following question was put to the High Priests, who were of the jury:—What would [97] constitute proof of sonship, according to the Sharrah? and they replied, that had the Nawab distinctly stated the Defendant to be his son, whether orally or in writing, that would have been conclusive; or had the son been the issue of the Master by his slave girl, that would also create an heir; or if he was admitted to his right by the acknowledgment of the other heirs that would suffice.

The Civil Judge, Mr. Fraser, by his judgment, dated the 6th of June, 1861, stated his concurrence in and approval of the verdict of the jury, as follows:—
"If in my own opinion, I differed materially from these findings on the issues, I

should still hesitate to touch the unanimous verdict of such a strong body of intelligent and independent Mahomedans, but as my views are substantially the same as theirs, I have no hesitation in accepting their verdict;" and he decreed in favour of the Appellants, rejecting the claim of the Respondent, whom he declared illegitimate, and cancelled the summary decision recognizing him as a joint heir with the Appellants to the late Vizier's estate.

The Respondent appealed to the Judicial Commissioner of Oude, and the Commissioner, Mr. Campbell, by his decree, dated the 12th of July, 1861, reversed the decree of the Civil Judge, and held the Respondent legitimate. The material part of his judgment was in these terms:—"In my opinion, in a case like this, both under the well-ascertained principles of the Mahomedan law, and in the form in which the case came before the Court, the *onus* of rebutting the ordinary legal presumption of legitimacy, by proving illegitimacy, lay entirely on the Plaintiffs. The Panchayet was not a regular Jury, but a selected body very irregularly constituted, several of them having been before mixed up in the case, and having [98] during the trial also given testimony as witnesses. They have also mixed up the law and the fact. As I put the *onus* of proof, their findings—i.e. that it is not proved that there was a marriage before birth, and that it is not proved by legal witnesses that the Appellant (Defendant in the suit) was the son of the deceased—are of no avail. They do not find it proved that, in fact, the Appellant was not the son and was unlawfully begotten. The only point they find sufficiently is, that the deed of repudiation is correct; and if by that they mean that it is legally effective, the question is one of law, not of fact. In my opinion, the question being, whether the Appellant is deceased's legal son or not, the subsequent deed of repudiation is of no avail at all, except as evidence affecting the testimony on the main issue, and I cannot take that deed as ground for decision. On the other hand, as a matter of fact, I think it perfectly clear, that the deceased and the Defendant's mother cohabited continuously together, that the Appellant was born during such cohabitation, and that, while no ceremony of marriage is proved, it is certain that for many years (subsequently to the birth) we find the deceased and the woman to have been without doubt man and wife, and the Appellant brought up as their son. The question then, is—under such circumstances, does the Mahomedan law presume a marriage before birth, or rather before conception? The weight of authority goes to show, that even a Soonee regular marriage would be presumed from the cohabitation, without any subsequent proof of marriage. Infinitely stronger is the presumption of a Sheah Moottee marriage, backed by the undoubted subsequent existence of such a marriage. Both in fact and in law, I am clear, that I must presume that there was such a [99] relation as would constitute a Sheah Moottee marriage. I find for the Defendant, and reverse the decree."

The present appeal was from this decree.

The Respondent put in no appearance, the appeal, therefore, was heard *ex parte*.

Mr. Leith (Sir R. Palmer, Q.C., with him) for the Appellants.—The decree of the Judicial Commissioner proceeds upon the fallacious assumption that by the Mahomedan law a previous marriage with the Respondent's mother was to be presumed from continued cohabitation, so as to legitimize issue born during such cohabitation. Here, however, no such cohabitation was proved, previous to the birth of the Respondent, between his mother and the late Vizier. Neither was it proved that he was the son of the Vizier. His mother was a widow, and, therefore, he might have been the son of her deceased husband. Again, the jury found that the Moottah marriage took place after his birth, and that fact, therefore, necessarily rebuts the legal presumption of parentage from cohabitation, Macnaghten on "Moolhunnadan Law," p. 58, which might otherwise arise, that a marriage took place previous to birth, and distinguishes the case from *Mirza Qaim Ali Bey v. Mussumaut Hingun* (3 Ben. Sud. Dew. Rep. 152), *Khajah Hidayut Oollah v. Rai Jan Khanum* (3 Moore's Ind. App. Cases, 295), *Jeswunt Sing-jee Ubbhy Sing-jee v. Jet Sing-jee Ubbhy Sing-jee* (3 Moore's Ind. App. Cases, 245). The case of *Mahomed Bauker Hoossain Khan Bahadoor v. Shurfoon Nissa Begum* (8 Moore's Ind. App. Cases, 136) is on all-fours with the present. There this Tribunal held, that in the

absence of evidence of mar-[100]-riage, or circumstances of a formal acknowledgment sufficient to found a presumption of legitimacy, such legitimacy could not be presumed. According to Mahomedan law, a marriage does not legitimize issue previously born. Legitimacy, when impeached, can only be established in one of two ways, either by showing that the legal presumption of a valid marriage can be deduced from proved continuous cohabitation, Macnaghten on " Moohummadan Law," p. 58, or sexual intercourse commenced previous to the period of conception; or on the other hand, where there can be no such legal presumption, by proving an express declaration and acknowledgment by the alleged father that the child is his son: Macnaghten on " Moohummadan Law," pp. 61, 296. Here the Vizier by a deed expressly declared that the Respondent was not his son, but a person of unknown lineage. All the kindness and liberality shown by the Vizier towards the Respondent is accounted for, and referable to the fact that he was the son of the woman he had married. The *onus* of proving the legitimacy, notwithstanding the proceedings for the certificate in the summary suit, under Act No. XIX. of 1841, was undoubtedly on the Respondent, and he has failed to establish his legitimacy. The decision of the Judicial Commissioner that the *onus probandi* lay on the Appellants, because they sought to set aside an unauthorized transfer of possession in a summary suit, was erroneous and unjust.

The consideration of their Lordship's judgment was reserved, and now pronounced by

The Right Hon. Sir James W. Colvile (Dec. 15, 1866).—This is an appeal from a decree of Mr. Campbell, made by him when Chief Judicial Commis-[101]-sioner of Oude, which reversed a decision in favour of the Appellants, the Plaintiffs in the suit, made by Mr. Fraser, the Civil Judge at Lucknow. The case comes before their Lordships *ex parte*, and, difficult in itself, occasions by its being heard *ex parte* an increase of anxiety and difficulty. The Appellants are son and daughter, and as such, heirs of Ameenood Dowlah, Bahadoor, the late Vizier of the ex-King of Oude. The Respondent claims to be also a legitimate son, and as such a co-heir of the late Vizier, founding his claim on a Moottah marriage of his mother, and on his birth, in due course, as a son conceived in wedlock of that marriage. He relies also on the acknowledgment of him for many years by the late Vizier as his legitimate son. The Appellants deny the alleged parentage, legitimacy, and acknowledgment.

The suit which gave rise to this appeal results from a precedent litigation between these parties, of which some account is necessary to a more complete understanding of the cause.

At the time of the Vizier's death, the Respondent was not *de facto* a member of his family, having been some time previously expelled by his reputed father, the Vizier, from the house, and renounced as a son, under a suspicion of a grave offence imputed to him. On that occasion the Vizier executed a formal instrument, which is described in the suit as " a deed of renunciation," declaring the Respondent not to be his son. At the time of the Vizier's death, the Respondent, whatever his legal *status*, was not *de facto* an apparent heir of the Vizier, and the possession of the Vizier's estate was, after his death, in some one or more of his undisputed heirs, and no risk of [102] disturbance from disputes as to possession seems to have existed.

A portion of the property appears from the statements on the record to have consisted of Company's paper, indorsed generally to the heirs of the Vizier. But this state of indorsement did not require the institution of a merely possessory suit. In this state of things the Respondent preferred a claim to be admitted as co-heir to a joint possession of the estate of the late Vizier, and his claim being disputed by the Appellants, this gave rise to a summary suit to enforce his claim to possession. If a suit of this kind, which cannot determine rights, be instituted where the actual possession is quiet, and where the question in dispute necessarily involves rights, the Claimant should at once be directed to proceed in a regular suit; for if he proceeds under the Acts subsequently referred to, an expensive and inconclusive litigation is the probable result.

It is unnecessary to go through the history of this previous litigation in detail,

or to examine the correctness of the course adopted in its several stages. It was attended with varying success, and finally ended with a decree of Colonel Abbott, on appeal, in favour of the Respondent. That gentleman, the Commissioner and Superintendent of the Lucknow division, after referring to the Acts of the Indian Legislature, Nos. XIX. of 1841, XX. of 1841, and X. of 1851, under one or more of which the summary proceeding was instituted, observes of them: "They cannot determine right, but they place the *prima facie* heirs in possession, and leave the subject to litigation in the proper course of law." This decision, then, was intended to establish a *prima facie* [103] title in the Respondent as co-heir, leaving the right undetermined; but in this case no *prima facie* title exists distinct from the complete title in dispute, the whole subject of litigation resting on legitimacy alone. The right to that *status* was left undetermined, and was to be decided in a regular suit, to which the Appellants were referred.

In consequence of this decision, the Appellants brought their suit in the Civil Court at Lucknow, on the 6th of June, 1861. The object of the suit, as it appears from the plaint, was to be relieved from the effects of that summary decree, and to establish the Respondent's illegitimacy, so that the proceeding went on in a somewhat inverted order, arising from a misunderstanding of the object of those Acts. The plea is not set out at length, but an abstract of it is to be found in Mr. Fraser's judgment. The issues, as also the findings, are carefully framed, and evidence an accurate knowledge of the Mahomedan law as to legitimacy. The first, second, and third, issues are alone necessary to be stated here, as nothing which affects the decision of this appeal turns upon the fourth issue, which relates merely to the share, if legitimate, and a claim to maintenance, if illegitimate. The first, second, and third issues are as follows:—

First; did Nawab Ameenood Dowlah (deceased) contract Moottah with Defendant's mother before or after his birth?

Second; has the deed of repudiation (dated, 23 Suffur, 1272, Hijree) the effect of cancelling previous acknowledgment of Defendant's legitimacy, if such were made?

Third; if Defendant be not a legitimate son, is he an illegitimate son of deceased?

[104] It was admitted on the pleadings that a Moottah marriage at some time had been contracted between the late Vizier and the Respondent's mother, but the Plaintiff stated in effect that the conception and birth of the Respondent preceded that marriage. The plea distinctly stated the marriage, though without assigning a date to it, and alleged the legitimacy of the Respondent as a child born of that marriage. The existence of a Moottah marriage, therefore, at some time was not contested, and the first issue, which by implication admits a marriage, is framed correctly on that state of the pleadings. The second issue, it may be observed, is also very correctly framed. It substitutes for the ambiguous word "sonship," which might include an illegitimate son, the word "legitimacy," and uses the word "acknowledgment" in its legal sense, under the Mahomedan law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of legitimacy as a son. The first and second issues include the two legal grounds of legitimacy, viz., marriage and acknowledgment, to which the plea is limited. Acknowledgment in the sense of treatment, as evidence simply of marriage or of legitimation, could not have been included with propriety in the issues, though as evidence it would not lose any part of its efficacy by reason of the wording of the issues.

It is not necessary to state the evidence in detail, nor to weigh the conflicting direct evidence; since both Courts, viz., the Civil Court and the Court of the Commissioner, agreed in their view of the facts generally on which the decision turned, the latter adopting the facts as stated in the judgment of [105] Mr. Fraser. Mr. Campbell's judgment was founded mainly on the inferences which he drew from those facts.

Mr. Fraser was assisted in his decision of this important and difficult case by a Panchayet, as it is termed, formed out of twenty Mahomedan gentlemen, selected with care, and reduced to ten by five challenges on either side; and as the reduced number consisted of ten men, including the High Priest, and another Mussulman

Priest, all of whom are stated to have been mutually approved on both sides, a more competent Tribunal could hardly have been appointed for the decision of such a case. Their opinion against the claim of the Respondent was unanimous. Their opinion had substantially the concurrence of the Judge, Mr. Fraser, who made it the ground of his decision, treating them as Assessors, and concurring in their finding.

On a question of Mahomedan law, so closely allied as it is with the religion of the Mahomedans, the opinion of Priests of the dignity of these would be entitled to respect, since they are unlikely to be ignorant of it, or consciously to swerve from it. Such a decision, therefore, creates a more than ordinary presumption in favour of its correctness. It cannot readily be supposed that the High Priests would sanction so irreligious an act, in the view of Mahomedans, as the sacrifice of a son's legitimate *status*, conferred by acknowledgment of a Father, to mere caprice, or to resentment working on the mind of the Father; and their decision does not seem to be open to the suspicion of a tendency in the members of the Panchayet unduly to augment a Father's power. Upon turning to the findings of the issues, [106] they appear to furnish no ground for questioning the care, or learning, or impartiality of the Panchayet.

On the first issue, they find that the Moottah marriage took place after birth. Mr. Fraser says, that according to the stronger evidence impregnation took place during the service, and, therefore, *prima facie* before the marriage. The second finding is as follows: "We do not find that deceased's acknowledgment that Hyder Hossein was born of his body has been proved according to the conditions of the law; therefore, the deed of repudiation is correct." This finding, if it were construed literally, and disconnected from the context, would seem to favour the belief, which Mr. Campbell seems to have entertained, that the Panchayet may have been proceeding on some stricter rules of evidence, under the Mahomedan law, than the procedure of the Courts at Lucknow authorized; but there is no proof that such was the case, and it cannot be presumed that any rules of the Mahomedan law of evidence were adopted by them which they could not legally adopt. The presumption should be in support of the regularity of their course.

The rules of evidence of the Mahomedan law were not generally in force there: it cannot be inferred without proof that they meant to be governed by rules of evidence foreign to the Tribunal. The whole sentence must be read together. Their conclusion, "therefore, the deed of repudiation is correct," is a conclusion from the former part of the sentence, and they are plainly referring to that species of "acknowledgment" which the second issue embodies, viz., one of legitimation, and not one simply constituting a piece of evidence. This is explained also by what [107] follows in the statement of the Priests as to the law, constituting proof of sonship. They reply, "Had the Nawab distinctly stated Defendant to be his son, whether orally or in writing, that would have been conclusive." They say nothing here of any peculiarity of proof of such a statement as a necessary condition of its legitimating power. The conditions of law to which this passage probably refers, are those which are to be found in the 3rd Volume of the Hedaya, p. 168, title "Miscellaneous Cases," which treats of acknowledgment of parentage; and the terms "conditions of law" would refer on that supposition to "acknowledgment," and not to be the more immediate antecedent "proved." But supposing that the learned Commissioner was correct in his conclusion that the Panchayet had proceeded on some special rule of evidence under the Mahomedan law, applicable to acknowledgment of parentage, the rejection of their finding on that ground merely would not be reconcilable altogether with the opinion expressed by the Privy Council in their judgment, at p. 318 of the 3rd Vol. of Moore's Indian Appeals, in the case of *Khajah Hidayat Oollah v. Rai Jan Khanum*: "We apprehend," say their Lordships, "that in considering this question of Mahomedan law (that is, the question of legitimacy), we must, at least to a certain extent, be governed by the same principle of evidence which the Mussulman Lawyers themselves would apply to the consideration of such a question."

The general rules of evidence of the Mahomedan law did not prevail in the Courts in which that cause was heard, any more than they prevail in the Courts at Lucknow; but in relation to that particular subject, so intimately connected with family feelings [108] and usages, that deference was recommended if not enjoined.

Taking the whole of this finding together, and viewing it with relation to the particular issue which it finds, it appears to do no more than say, "As sonship does not appear (that is as the Respondent is one of doubtful parentage), the deed of repudiation is correct, whereas it would have been untenable after an established acknowledgment;" this reconciles the opinion here expressed with that of the Mahomedan High Priest, who says that a denial of a son either of a Nikahee or Mootahee wife, after an established acknowledgment, will, according to the Mahomedan law, be untenable.

On the third issue they find thus: "We do not find it proved that Hyder Hossein is a son begotten of the body of the deceased Nawab." The propriety of this finding with reference to the matter in dispute, viz., legitimacy, resolves itself into the question, whether, on the whole evidence in this cause, legitimacy ought to have been declared to be established. The consideration, therefore, of this part of the case is for the present postponed.

In the judgment of Mr. Fraser, he states, in the commencement of it, "that the *onus* of proof in this case was thrown on the Plaintiffs, for the Defendant had acquired the right of being regarded as one of the legitimate sons of the late Nawab Ameenood Dowlah, such being the summary judgment passed by the Commissioner." The reason assigned seems to admit the correctness of the general rule, and to assign to the Appellants the burthen of proving what is substantially a negative, to the inversion also, in this case, of the ordinary course of proceeding as to [109] possession. The title of the Respondent, if established, was one in privity with the Appellants' title. The mere fact of possession of a portion of the disputed property by either party was not a matter of any importance to the decision of the question on whom the burthen of proof rested in this cause; that depended on the nature of the issues.

Mr. Leith made this inversion of the usual order of proof a subject of complaint against the decision. In many cases, undoubtedly, an unauthorized transfer of possession would work serious injury and injustice to a Claimant; but in this particular case it does not appear that the mistake as to the transfer of possession, and as to that of the *onus probandi*, which, in the judgment of Mr. Fraser, it involved, worked any real injustice or imposed any difficulty on the Appellants from which they would otherwise have been free; and their Lordships' decision is unaffected by this objection.

This preliminary objection to the mode in which the case was dealt with below being removed, it becomes necessary to view the whole of the facts in proof in the cause; for the case really depends on a conflict of evidence, and the due application of presumptive proof. The facts on which the Commissioner grounded his decision he took from the judgment of Mr. Fraser in the Court below, but they require to be stated, with one not unimportant addition, the want of which was made, on the argument, a ground for questioning the correctness of his view of the facts.

It appears to have been a mere omission of statement; the fact does not appear to have escaped the attention of the Commissioner. The addition [110] required is this—that the mother of the Respondent entered the Vizier's family as a servant in a menial capacity, and served in that capacity for some time, and after some period of service was taken behind the Purdah. The Vizier, it may be observed, was then simply a Darogah, not much elevated in position above the woman whom he hired and afterwards married. The facts, then, when stated more fully, should stand thus: that the mother of the Respondent entered the service of the Darogah, afterwards the Vizier, in a menial position, as Cook; that she was a widow; that the date of her husband's death was not proved; that she went out in the course of her service into the Bazaar to make purchases, and was taken subsequently behind the Purdah; that the date of the commencement of her cohabitation with the Darogah was not proved; that the dates of her pregnancy and of the birth were not proved; that the date of the Moottah marriage was not proved; and that it was not proved that any change in her position or treatment occurred before the date of her pregnancy. There is, therefore, a total failure of proof whether marriage preceded or followed pregnancy. Mr. Fraser said that pregnancy commenced during the service. Mr. Campbell removed the difficulty by a presumption of an antecedent marriage. Can

the defect of the evidence in this case be supplied by a presumption placing that marriage itself at a time anterior to pregnancy? This is the main question in the case.

It is to be observed, in considering the propriety of strengthening the weakness of the direct proof by this last presumption, that the mother was living at the time of the trial, and that the date of her marriage [111] was a fact which she was competent to prove, as well as the time of the birth of her child. No explanation has been afforded by the Judges who have heard this cause why the evidence fails on these important points, or why that is to be worked out by a presumption from marriage which living testimony might support, especially in a case where the treatment has been interrupted, and an impediment of more or less weight interposed by the repudiation of the parentage by the reputed father. It would be an easy matter to legitimize a child conceived before marriage by withholding proof of the time of marriage, and resting on an inference from the marriage itself. These or similar reasons may have been present to the minds of the Panchayet when they found on the first issue, that the birth preceded the Mootlah marriage. It is important to consider the real nature of such a document. It has no effect whatever on the *status* of a legitimate son, whether legitimate by birth or made legitimate by acknowledgment. The finding of the Panchayet does not contravene that position. Their finding on the issues as to acknowledgment and sonship leaves the Respondent in the position of a son of an unacknowledged father. On the *status* of such a son the renunciation may be operative according to the Mahometan law; but it is not conclusive, and may be contradicted and disproved, and does not seem to be more weighty in itself than a declaration by a deceased parent in a case of pedigree. The Panchayet say that the renunciation is correct, that is, that their law admits it to take effect; whereas in either of the other cases "the denial is untenable." It might be inferred from the proceedings of the Panchayet alone, that such an instrument is in use among the Maho-[112] metans: a similar document was admitted in proof in a case which came before the Privy Council, *Jesuunt Sing-jee Ubbby Sing-jee v. Jet Sing-jee Ubbby Sing-jee* (3 Moore's Ind. App. Cases, p. 253). Had this deed of renunciation been evidence on which reliance could be placed as to the denial of sonship which it contained, then it might have sufficed to displace a mere presumption of legitimacy, founded on treatment as a son of one in truth illegitimate. It might be designed and suffice to remove a growing repute. That document, however, cannot be relied on. It was executed under great resentment: it spoke the mind of one irritated by a grievous sense of wrong, and it would be dangerous to give effect to such a document, so prepared and executed, and to place it in the power of an irritated man to bastardize his offspring by an instrument executed under a sense of wrong, especially amongst a vindictive race. It is so difficult to credit the story that the Vizier adopted the Respondent, who on that supposition would be the bastard son of a woman of low degree by some unknown father, that the insertion of that statement in the deed detracts greatly from its credit: an untrue account of the origin of the Vizier's connection with the Respondent gives rise to some degree of suspicion that the disclosure of the real state of the case might aid the Respondent's claim to be deemed legitimate.

As it appears, then, that the Panchayet below, and the Court which adopted its finding, attached an undue importance to this deed of renunciation, and as this undue estimate of its weight may have greatly influenced their findings on the other issues, the learned Commissioner seems to be substantially correct in forming his own judgment independently of the [113] findings, in which there had been a miscarriage. Whether he was correct in deciding the issues in favour of the Respondent, is a doubtful and difficult question. It would be desirable to know to what authorities, if particular cases were in his contemplation, Mr. Campbell refers.

Unfortunately he does not name any, but he refers to Mr. Baillie's Book on Inheritance as questioning the broad assumption that "mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring." This statement drops the important qualification "with acknowledgment."

The binding decisions on this subject must be looked for in the judgments of the Privy Council. No decision can be found there which supports so broad an assump-

tion, or which, when rightly understood, is in conflict with the law, as stated by the Priests in this case.

The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An antenuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may [114] become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive. The case of *Mahomed Banker Hoossain Khan v. Shurfoom Nissa Begum* (8 Moore's Ind. App. Cases, p. 159), affirms this principle.

Their Lordships said in that case, which was one of legitimacy under the Mahomedan law:—"In arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahomedan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof either of a marriage between the parents, or of any formal act of legitimation. Here there is, to their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference."

Their Lordships are not aware that these principles have ever been lost sight of in the Courts in India. They believe that they have been constantly observed by, and have guided the decisions of their Lordships in the Judicial Committee.

In the case in 3 Moore's Ind. App. Cases, p. 323, already cited (*Khajah Hidayat Oulab v. Rai Jan Khanum*), it is observed in the judgment:—"With-[115]-out going into the question of the oral evidence, whether there was an express acknowledgment of the child by Fyz Ali Khan, as the son or not, there seems to be that which at least is tantamount to oral evidence of any declaration, because there is a consecutive course of treatment both of the mother and the child for a period of between seven and eight years, under circumstances in which it appears to their Lordships to be next to impossible that such a mode of treatment would have been continued except from the presumption of the cohabitation, and of the son being the issue of the loins of Fyz Ali Khan." The cohabitation alluded to in that judgment was continual; it was proved to have preceded conception, and to have been between a man and woman cohabiting together as man and wife, and having that repute before the conception commenced; and the case decided that not cohabitation simply and birth, but that cohabitation and birth with treatment tantamount to acknowledgment, sufficed to prove legitimacy. The presumption throughout the whole judgment is treated as one of fact.

It would be much to be regretted if any variance on this important matter arose between the decisions of the Courts and the text of the Mahomedan law of legitimacy as understood and declared by the High Priest, connected as their law and religion are. Such a variance exists between the law as expounded in this case, and the position contained in Mr. Campbell's judgment, that "mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring." This position, if established, would have sufficed to legalize the *status* of the Claimant in the case before referred to, [116] *Mahomed Banker Hoossain Khan v. Shurfoom Nissa Begum* (8 Moore's Ind. App. Cases, p. 159), for in that case there was abundant evidence of continued cohabitation between the Father and the Mother of the Claimant; but as there was no proof in that case either of marriage or of acknowledgment, he was adjudged to be illegitimate.

This case, then, must be determined on the principles of evidence which are ap-

pliable to presumptive proof, every reasonable legal presumption being made in favour of legitimacy. The force of presumptions of fact as evidence will vary with varying circumstances, and cannot well be fixed by decision. The Courts have properly presumed, in many cases, both marriage and acknowledgment; for to presume acknowledgment, and to consider treatment as tantamount to it, is virtually the same thing. The loss or destruction of evidence by time or design is as likely to take place with respect to acknowledgment as with respect to any other subject; and whilst matters of the highest import are capable of being inferred and are inferred from circumstances, it would be a merely arbitrary limitation of legitimate inference to exempt this one subject from its operation.

Mr. Campbell's conclusion that the Respondent was the son of the late Vizier seems to their Lordships a just inference from the facts, nor does it seem to be at variance with the opinion of Mr. Fraser. Mr. Campbell treats this as the only question of fact in the case. But the issues distinguish properly between sonship and legitimate birth. Mr. Fraser keeps that distinction clearly before him in his judgment. Mr. Campbell, indeed, does not appear to [117] have lost sight of it, but to have considered that he was entitled to presume the Respondent's legitimacy, if cohabitation of his parents, and his birth from them at any time, whether before or after the marriage, were established as facts.

Mr. Campbell does not question, in his judgment, the correctness of the opinion expressed by Mr. Fraser, that pregnancy commenced during the service. At that time cohabitation, in the sense of permanent intercourse such as takes place ordinarily between man and wife, is not proved to have existed between the late Vizier and the mother of the Respondent. The evidence forbids the presumption that that kind of cohabitation commenced with her service, for a change in the treatment of her ensues when she is taken behind the *Purdah*, and the antecedent relation, according to the evidence, was that of ordinary servitude. If pregnancy occurred, as Mr. Fraser is of opinion that it did, during that service, and when she was in the habit of going from the house freely into the Bazaar, sexual intercourse then in that state between her and her Master would not have the character of cohabitation of a permanent nature, such as under this head of law distinguishes concubinage from casual intercourse. If the subsequent marriage were adjudged to have relation back, by presumption of law, to the time of impregnation, then such a *presumptio juris* would destroy altogether the difference between a law which admits to inheritance and a law which excludes from inheritance an antenuptial child. As a presumption of fact such a presumption is admissible, but then it must be subject to the application of the ordinary principles of evidence.

A subsequent marriage, so far from furnishing, as [118] Mr. Campbell supposes, a ground for presuming a prior marriage, *prima facie*, at least, excludes that presumption. Therefore, no ground exists for presuming a marriage antecedent to the Mootah marriage, which at some period or other was established between the Vizier and the mother of the Defendant. Laying, then, this presumption aside, it appears to have been found in the Court below, on evidence which justified that finding, that pregnancy commenced during the time when the mother of the Respondent was in service, and before she had the acknowledged *status* of a Mootah wife. There was a marriage, but when it does not appear. It does not appear when the intercourse began which led to the birth, nor what was the nature of it, whether casual or of a more permanent character. It is obvious that the pregnancy might induce the desire to give the woman the reparation of marriage. No difficulty is suggested about rendering these dates certain, which are now left utterly uncertain.

The treatment of the Respondent by the Vizier appears for many years to have been that of a son by its father: this, however, is correctly treated by Mr. Fraser as inconclusive in itself, since a son conceived before marriage, and whom his father desired to recognize at some time as a legitimate son, would receive similar treatment. The treatment itself, therefore, does not suffice to dispel the darkness in which this case is left. The *onus* of proof lay on the Respondent, on the pleadings in this cause, to prove his mother's marriage, and his own legitimacy as a child of that marriage. There has been no continuing treatment up to the time of the father's death; there has, on the contrary, been an absolute denial of pater[119]nity by the reputed father: there is no proof of any acknowledgment, but there is proof

of treatment strong enough to prove legitimacy in an ordinary case, but of treatment not inconsistent with the *status* of a son conceived before marriage. It is shown that the Respondent did not receive all the honours which his brother received. This circumstance is much pressed against him by the Appellants.

It may be, however, that the inferiority of his mother's condition, or his own later birth, caused the difference: or, on the other hand, the father may have postponed a legitimating acknowledgment, being as yet undecided as to his future treatment of him, and he may have waited to see how the youth conducted himself at puberty. The circumstance of some inferiority of condition having been continued down to the time of final rupture, to some extent supports the case of the Appellants, that the Respondent was not legitimate. Their Lordships are, therefore, of opinion, that the decision of the Commissioner is founded upon presumptions not warranted by the facts of the case, and in some degree upon a misconception of the authorities, and ought not to be allowed to stand. They will, therefore, humbly advise Her Majesty to reverse that decision, and to affirm the judgment of the Court of First Instance. Considering, however, that the uncertainty as to the *status* of the Respondent has been mainly caused by the acts of the deceased Vizier, the residue of whose estate will, in consequence of this decision, fall to the Appellants, their Lordships are not disposed, to subject the Respondent to the costs in the Commissioner's Court, or to those of this appeal.

[Followed *Abdool Razack v. Aga Mahomed Jaffer Bindaneem*, 1894, L.R. 21 Ind. App. 56.]

[120] SHAH KOONDUN LALL and SHAH PHOONDUN LALL,—*Appellants*: RAJAH AMEER HUSSUN KHAN, Minor, RAMDUTTA MULL, Curator, and the DEPUTY COMMISSIONER OF SEETAPORE,—*Respondents* * [Dec. 13, 1866].

On appeal from the Court of the Judicial Committee of the Province of Oude.

In a suit to recover the amount of principal and interest due upon two several Bonds, one of which alone was forthcoming, the other being referred to and vouched by a note of hand of the Obligor, the issues, settled and recorded by the Court below for trial were, first, whether the first Bond was the deed of the deceased Obligor, and, secondly, whether the note of hand was under the seal of the Obligor, and if so, whether it was a valid acknowledgment of the debt claimed on the second Bond, and up to what time and at what rate interest was due. The Court below, notwithstanding that the first Bond actually proved, purported to have been given on an account settled, allowed evidence of the accounts and dealings between the Obligor and Obligees previous to the execution of both Bonds, and, after having referred the same to an accountant, decreed the Plaintiffs entitled to a less sum than sued for, with interest upon the accounts thus taken;—Held on appeal by the Judicial Committee, that the Courts below had miscarried, first, in allowing the opening of and founding the decrees upon settled accounts, the only question upon the issues recorded for their judgment being the validity of both Bonds, of which they were satisfied, and secondly, that from the frame of the issues neither the Obligees nor their representatives were bound to prove the consideration for the Bonds, but were entitled to recover the whole principal and interest due thereon, which was decreed, and the decree of the Court below amended to that effect.

* Present:—Members of the Judicial Committee.—The Right Hon. Sir James William Colville, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor:—The Right Hon. Sir Lawrence Peel.

The facts of the case are fully stated in the judgment.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants, and Mr. Forsyth, Q.C., and Mr. Maule, Q.C., for the Deputy-Commissioner of Seetapore, one of the Respondents. The case after argument stood over for consideration.

Judgment was now pronounced by

The Right Hon. Sir James W. Colvile (Feb. 1, 1867).—The Appellants are Shroffs and money lenders, carrying on business at Muttra. The Respondents [121] are the infant son and heir of the late Nawab Ali Khan, who was Talookdar of Mahmudabad, in the Province of Oude: the native Manager or Curator appointed by the Court of Wards, who, during the minority of the Talookdar, has the custody and management of his estate: and the Deputy Commissioner of Seetapore, who represents and exercises the functions of the Court of Wards in that District. The deceased Nawab died largely indebted to the Appellants: and the question on this appeal is, whether the decree which has been made in their favour by the Civil Court of Lucknow, and has been confirmed by the Judicial Commissioner of Oude, has awarded to them all that they had a right to claim.

The latest transaction between the Appellants and the Nawab, of which there is any evidence, was in May, 1856; when, as they allege, an account was settled between them and their debtor, and the securities on which they sue were taken from the foot of it. One of the Bonds is not forthcoming, but by the other the sum thereby secured, which was by far the larger portion of the debt, was made payable by instalments, of which the first fell due about September, 1857. At that time British rule had been interrupted, and all civil administration suspended, by the mutiny; and that state of things continued until after the Nawab's death in 1858. In April, 1859, when order had been restored, and the Court of Wards had assumed the management of the estate, the Appellants claimed the sum of Rs. 35,239 as then due to them for principal and interest. The suit, however, out of which this appeal has arisen was not actually commenced until January, 1862. Certain proceedings were had during the intermediate period. But all these are beside the present question. They may have been material in the Court below in order to show the *bona fides* of the demand, to account for the delay in prosecuting it, and to meet the point, which was at one time raised, that the suit had not been commenced within the period of limitation of suits. This last objection has, however, been abandoned; and it must be taken to be a fact established, if not admitted, that something is recoverable upon the principal security on which the suit has been brought.

The particulars of the Appellants' demand were annexed to the plaint. They claimed as then due to them the principal sum of Rs. 22,188, of which Rs. 20,488 were stated to be due on a Bond of a date corresponding with the 15th of May, 1856, and Rs. 1700, on another Bond of the same date. They further claimed a like sum of Rs. 22,188, as due for interest on the principal debt: a larger sum being, as they alleged, in fact so due, but the practice of the Courts of India forbidding the recovery under the head of interest of any amount in excess of the principal. And they also claimed a sum of Rs. 5711. 5s. 3p., alleged to be the balance due in respect of an allowance agreed to be paid to the Karindahs or [123] Agents of the Appellant's. They gave credit for Rs. 100, admitted to have been received some time in the year 1857, and thus reduced the balance claimed to Rs. 49,987. 5s. 3p.

The Appellants filed in Court the Bond for the Rs. 20,488, which was marked Exhibit A. They did not produce the Bond for the Rs. 1700, which they said had been lost, but they filed a note of hand or letter of the same date, Exhibit B, which is in these words:—"My dear Shah Koondun Lall,—As two Bonds have been executed through your Agents, viz., one for Rs. 20,488, and the other for Rs. 1700, you may rest assured that payment will be made on account of the rights of your Agents at the rate of 8s. per Rs. 100, per month." They seem to have relied on this document both as corroborative evidence of the execution of the second Bond, and as a voucher in support of the claim for the allowance to the Agents.

The issues settled in the cause, on which the parties went to trial, were:—First, is A the deed of Nawab Ali Khan deceased? Secondly, how much was repaid? Thirdly, is B under the seal of the deceased; and if so, is it a valid acknowledgment

of debt, especially with reference to an alleged Bond for Rs. 1700? Fourthly, up to what date, and at what rate, is interest claimable?

The decree which is under appeal reduced the principal sum recoverable by the Appellants in this suit to Rs. 18,145, and allowed interest on that sum at the rate of only 12 per centum per annum, from the 15th of May, 1856, to the date of suit, deducting from that period the ten months during the time of the rebellion. It rejected altogether the claim for the allowance to the Agents.

[124] Their Lordships will consider the propriety of this decree: first, with reference to the principal money claimed under the Bonds; secondly, with reference to the interest; and lastly, with reference to the Agents' allowance.

It is obvious that as regards the Rs. 20,188, claimed to be due upon A, the only issue before the Court was, whether that document had been duly executed by the deceased. The third issue, as their Lordships understand it, involves the questions, whether B was under the seal of the deceased; and, if so, whether it can be taken to establish that he had executed the second Bond for Rs. 1700, and to supply the want of that missing instrument. Upon these issues the Appellants were not bound to prove the consideration for the Bonds. But, inasmuch as no Court of Justice would in the circumstances have accepted the mere proof that the seals on A and B were true impressions of the deceased Nawab's seal, as sufficient proof of the due execution by him of either Bond, it became necessary to go fully into the history of the transaction of the 15th of May, 1856. Accordingly evidence was given to show that on that day there was a settlement of accounts between the Nawab and the servants of the Appellants who had come over to Mahmudabad to "dun" him for what was due from him to the Appellants' firm: that the result of that settlement was to strike a balance of Rs. 22,188, as the amount then due for principal and interest; and to agree that, in consideration of the forbearance by which the larger portion of this sum was made payable by instalments, the interest then due should be turned into principal; and further, that the two Bonds were executed on the footing of that [125] settled account, the paper B being also sealed at that time. This is the general effect of the evidence, which, notwithstanding certain discrepancies, and some confusion touching the Exhibit C, their Lordships are disposed to accept as substantially true, particularly as there is nothing to set against it, and it is confirmed by Seetaram, the witness examined at the instance of the Defendants.

If the case rested there, it would be difficult to see upon what ground the Respondents could resist a decree for the full amount secured by the Bonds, or at least that secured by Bond A. It appears, however, that the Appellants produced the accounts which resulted in the balance of Rs. 22,188. The record does not show why this was done. There is no Order of the Court requiring their production. It is possible that the production may have been voluntary, and that these accounts were put in order to corroborate the evidence of Datta Mull as to the Bond for Rs. 1700, which they do, as appears by the entry in the record. All that is clear on the record is, that the accounts were brought in between the 22nd of July and the 20th of August; that the Defendants (the Respondents) took no objections to them, except that "the interest was inserted in a single lump, and not in separate items, after two years' running accounts; so that it was impossible, without calculating interest throughout, to tell on what principle it was done." In consequence of this objection, the Judge referred the accounts first to the native Secretary of the Chamber of Commerce at Lucknow, and afterwards to other Mahajuns and Experts; and the final result of their investigation was, that, by recasting the account of interest, they reduced that [126] portion of the balance due in May, 1856, which consisted of interest and expenses, from Rs. 13,580. 6a. 9p. to Rs. 9547. 8a. 9p., making the whole amount due at that date Rs. 18,145. 2a., instead of Rs. 22,188.

Their Lordships do not attempt to enter into the question whether the principle upon which the Appellants kept their account, or that upon which the account has been recast by the Experts, is the correct one; because they are of opinion that no case was made for reopening the account which was settled on the 15th of May, 1856. The evidence of Seetaram, the witness for the Respondents, shows that the Nawab examined the accounts; that he objected to the interest; but that he nevertheless finally submitted to the account rendered, accepted the balance shown as the sum due, and, in consideration of his creditors' forbearance, executed the Bonds

by which payment of that balance was secured. He was no doubt very much at the mercy of his Creditors; his case was the ordinary one of a needy landholder purchasing the forbearance of those who had ministered to his necessities by submitting to very usurious terms. But, with his eyes open, he entered into a contract which is not forbidden by any law. No fraud, in the proper sense of the word, has been established; and their Lordships cannot agree with the Judicial Commissioner in thinking that, upon the facts proved, the Nawab would in his lifetime have been entitled to reopen an account which he had advisedly settled. And if this could not have been done by him in his lifetime, it cannot now be done by his representatives. Their Lordships, therefore, conceiving that there is sufficient proof that the missing Bond for Rs. 1700, was duly executed as well as A, and that the two were [127] given to secure the balance of Rs. 22,188, must hold that the Appellants have made out their right to recover that principal sum in this suit.

Their Lordships are unable to see upon what ground the Courts below have reduced the rate of interest on the sum which they have awarded as due on the 15th of May, 1855, below the contract rate. Their course would perhaps be intelligible if they had set aside the securities altogether as fraudulent, and had treated the sums awarded as due on open account; no rate of interest being fixed by either positive stipulation or the course of dealing between the parties. The facts, however, would not support such a view of the case; nor does Mr. Fraser, notwithstanding some loose and inaccurate expressions in his judgment, appear to have entertained it. The intention of the decree, as explained by his Judicial Commissioner, was simply to correct the account, and to allow A to stand as a security for the reduced balance. And if A were to stand as such security, the contract rate of interest would remain. It must *a fortiori* remain, if, as their Lordships think, there is no ground for reopening the accounts, and reforming the contract of the deceased Nawab.

Some difficulty might arise in respect of interest from the absence of the missing Bond, and the imperfection of the evidence as to its details, if the whole amount of interest that has accrued was demandable in this suit. But inasmuch as the Appellants have been obliged to limit their demand for interest to a sum equal to the principal, and the interest due at the contract rate on Bond A alone considerably exceeds the sum of Rs. 22,188, the difficulty suggested does not arise in the present case. Again, [128] it is not easy to see upon what principle of law, equity, or sound policy the period when the rebellion took place should be excluded from the time for which interest is computed. It is unnecessary, however, for their Lordships to amend the decree in this respect; because, even if that deduction be allowed, the interest which has accrued would still be in excess of the principal.

Their Lordships, then, are of opinion that the Appellants have established their right to recover the whole of both the principal money and interest claimed by them to be due on the Bonds.

But the claim of the further sum of Rs. 5711. 5a. 3p. in respect of "allowance due to the Karindahs and Agents," under Exhibit B, was, in their Lordships' judgment, properly rejected by the Courts below. Whether that allowance was a contrivance for adding another half per cent to the usurious interest already secured by the Bonds, or whether it was what it purports to be, a gratuity to the Appellants' servants, their Lordships do not pretend to say. It seems, in any point of view, to be something *dehors* the contract; and the evidence fails to show that there was any consideration to support the assurance or promise to make this payment, which is contained in Exhibit B. If this item be struck out of the particulars, it will reduce the Appellants' demand to Rs. 44,276, which sum, with interest at the ordinary Court rate from the date of the decree to the date of payment, they are, in their Lordships' judgment, entitled to recover in this suit.

Their Lordships will, therefore, humbly recommend Her Majesty to reverse the Order of the Judicial Commissioner of Oude of the 11th of May, 1863, and [129] to declare that the Appellants were entitled to recover in this suit the sum of Rs. 44,276, in lieu of the sum of Rs. 28,645, awarded to them by the decree of the 24th November, 1862, and likewise the costs of the proceedings in both the Courts below, and that the cause be remitted to the Civil Court of Lucknow, in order that the last-mentioned decree may be amended accordingly.

The Appellants' costs of this appeal must be paid by the Respondents.

CHARLES SEATON GUTHRIE and SOPHIA his Wife,—*Appellants*: FREDERICK GEORGE LISTER,—*Respondent* * [Nov. 17, 1866].

On Appeal from the High Court of Judicature at Calcutta.

A. advanced to B., his son-in-law, two sums of money for the purpose of trade. These advances were secured by promissory notes, by which B. agreed to repay the loans in three years, with interest at five per cent. B. paid in his lifetime, and debited himself in his account with interest upon these loans at the rate of eight per cent. There was, however, no fresh agreement as to such increased rate of interest, nor did A. press for it. At B.'s death A. claimed against his estate the principal sum due with eight per cent interest. Held (reversing the decree of the High Court at Calcutta), that although B. had voluntarily debited himself in his accounts with interest at the rate of eight per cent, yet the legal relation created by the promissory notes was a contract to pay five per cent on the money borrowed, and the voluntary payment of eight per cent being without consideration, did not constitute a new contract so as to bind his estate with the payment of eight per cent.

This was a suit brought by the Respondent against the Appellants in the Court of the Principal Sudder Ameen of the Twenty-four Pergunnahs, to recover [130] the sum of Rs. 26,640. 10a. 10p., alleged by him to be due by the Appellant, Sophia Guthrie, formerly Sophia Inglis, the Executrix of her husband, Henry Inglis, to the Respondent, and claimed by him to be the balance of an account up to the 15th of August, 1863, for moneys advanced and lent by him to Inglis in his lifetime, and the Respondent claimed interest on that sum at the rate of eight per cent, being, as he contended, the rate of interest agreed to be paid by Inglis to the Respondent.

The Respondent was a Major-General in the Indian army, and the Appellant, Sophia Guthrie, was his daughter.

Inglis at one time was assistant political Agent to the Respondent, who acted as the Governor-General's Agent in the Kossya Hills, in Bengal. Inglis carried on business as a Merchant in Bengal, and certain pecuniary transactions existed between him and his father-in-law, the Respondent. On the 18th of May, 1850, the Respondent advanced to Inglis the sum of Rs. 41,900, and Inglis gave his promissory note for that amount, agreeing to redeem within three years, and to pay five per cent interest. On the 31st of December, 1850, the Respondent made a further advance to him of the sum of Rs. 19,500, upon the same terms and conditions.

Inglis died in 1860, and by his Will left his widow, the Appellant, Sophia, afterwards the wife of Charles Seaton Guthrie, his sole Executrix. On examining [131] the deceased's papers, it was found that he had debited himself with interest at eight per cent on the above loans.

On the 14th of May, 1861, the Respondent wrote to his daughter, the Appellant, Sophia Guthrie, a letter, containing the following passages:—"Poor Harry's last account current, which you gave me in Berkeley Square, is made up to the 30th April, 1859, and exhibits a balance in my favour of one lac and fifty rupees three annas and four pice. Since that date I have received nothing whatever, and whether anything has been paid in on my account I have no knowledge. With respect to the interest due on the above sum, you can give what you please. Avarice is not one of my sins; if it had, I should have invested my capital in Bank, Coal, and Steam Company's Shares, by which it would have increased to half as much again, besides being in receipt of much larger interest than what I was receiving. At the time Harry asked me for the loan of the money, he offered to mortgage his property to me, but I said it was unnecessary, considering the relation we stood towards each other. I also told him I did not require him to allow me larger interest than what I was getting from the Government: he replied he could well afford to give me eight

* Present: Members of the Judicial Committee,—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colville, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

per cent, as he was making more than treble that sum by my money : that being the case, I made no further objection, beyond saying that he could do as he pleased. Harry, during his illness, once told me that he had eleven lacs of rupees in Company's paper, but where it was lodged, or with whom, he did not say ; and I being averse on all occasions of prying into other people's affairs, did not ask him ; he also told me that he had [132] left my money in his business, and on doing so asked if I then wanted money. I said, ' No ' : I had sufficient to go on with. This is all that ever passed between me and him on the subject of his money affairs."

It appeared that the Appellant, Sophia Guthrie, did not then raise any objection to the payment of eight per cent interest, and subsequently paid the Respondent on account, Rs. 100,000. An estrangement with the Respondent afterwards took place, and the Appellant, believing that she had paid all that was legally due, refused to pay any more.

Sophia Inglis having married the Appellant, Charles Seaton Guthrie, the Respondent brought a suit in the Court of the Principal Sudder Ameen for the Twenty-four Pergunnahs, against the Appellants to recover the sum of Rs. 26,640. 10a. 10p. for money lent and interest at eight per cent due from the Appellant, Sophia Guthrie, as Executrix of her late husband Henry Inglis' Will, on the balance of the before-mentioned promissory notes. The defence set up was, that Inglis, being a wealthy man, had voluntarily debited himself with eight per cent interest in the Respondent's favour, but that he was not liable under the promissory notes to pay more than five per cent, and had never entered into any contract to pay a larger interest. The letter of the 14th of May, 1861, was put in evidence.

By the decree of the Principal Sudder Ameen (Grish Chunder Ghose), dated the 3rd of March, 1864, the Ameen expressed his opinion that five per cent was only due, and dismissed the Respondent's suit with costs. On a regular appeal therefrom to the High Court of Judicature at Calcutta, composed [133] of the Hon. C. B. Trevor and the Hon. G. Campbell, Judges, on the 17th of August, 1864, that Court reversed the decree of the Principal Sudder Ameen, and decreed the claim of the Respondent for Rs. 26,640. 10a. 10p. with interest thereon at the rate of eight per cent per annum, from the 15th of August, 1863, to the date of realization ; and also ordered the Appellants to pay the Respondent the sum of Rs. 1326. 6a. 4p. for costs in the High Court, with interest thereon at the rate of twelve per cent per annum, from the date of the decree to the date of realization, together with costs in the Lower Court, at the same rate of interest.

The appeal was from this decree.

Sir R. Palmer, Q.C., and Mr. Newmarch, for the Appellants.—It was not established in evidence, that there was any contract between Inglis and the Respondent legally binding on the former for payment of interest at a higher rate than five per cent per annum. The mere fact that Inglis voluntarily debited himself with eight per cent formed no new contract. It was without consideration and could not bind his estate. Neither was there any agreement for the payment of interest upon interest with annual rests. The account directed by the High Court was wrong in principle as between the Respondent and Sophia Guthrie, the Executrix of her deceased husband, Inglis. It ought to have been made up with interest at five per cent only, and without annual rests. According to that calculation the payments to the Respondent left a balance in the Appellant, Sophia Guthrie's favour.

[134] The Attorney-General (Sir John Rolt, Q.C.) and Mr. Rodwell, for the Respondent.—It is clear that Inglis agreed to pay interest at eight per cent. per annum on the amount of the loans which were made him by the Respondent. He debited himself in his account with the Respondent with interest at that rate. It was a new contract in substitution of the original one, and was acted upon by him up to his death and binds his estate. The account based upon this agreement was properly ordered to be taken.

At the conclusion of the arguments their Lordships' judgment was delivered by

The Right Hon. Lord Westbury.—This is a suit of a painful nature, which has arisen between a daughter and her father, touching the rate of interest payable upon a loan made by the father to her deceased husband.

It appears that Mr. Henry Inglis, the son-in-law of General Lister, was engaged in trade: that the trade was lucrative; and that he applied to General Lister to advance him money, to be employed by him in that trade. General Lister assented, and lent to his son-in-law, on two several occasions in the same year, two sums of money, one amounting to Rs. 41,900, the other amounting to Rs. 19,500. On the occasion of these advances two promissory notes were given by his son-in-law to General Lister, and in both those notes (because, although one only is produced, it has been admitted at the Bar that there was another, and that the other must be taken to have been of the [135] same tenor with that which is produced), there is a promise by the borrower, Mr. Inglis, to repay the money borrowed with interest at five per cent. at the expiration of three years. The contention now on the part of the General, the lender of the money, is, that he is entitled to interest at the rate of eight per cent.; that his interest is not to be limited to five per cent, which is the prescribed rate of interest on the promissory notes. He might maintain that contention by proving either that at the end of the three years, the time for the repayment of the money, he forebore to press for the money, in consideration of an augmented rate of interest, or he might maintain that the contract, of the terms of which the notes are evidence, was superseded by a new contract, which allowed the money to remain for a longer period of time than three years, at an augmented rate of interest. But unless some such case can be proved, a claim of interest at eight per cent., founded upon a bare promise of the debtor to pay eight per cent., or upon the fact that the debtor has in account voluntarily debited himself with eight per cent. in lieu of five per cent., could not be maintained in law for want of consideration, amounting merely to a *nudum pactum*.

It is satisfactory to find that the history of the introduction of the eight per cent. into the dealings between the parties is very clearly given by General Lister himself; and it is a history which is very creditable to his son-in-law, Mr. Inglis, but which is inconsistent with the General's founding upon the circumstances any legal claim. We do not refer to the allegations made in the plaint,—we prefer to take the letter of General Lister addressed to his daughter after the death of her husband, in which he gives her [136] a narrative of the transaction between himself and his son-in-law; and upon an accurate examination of the contents of that letter, it is clear that the General distinctly states there was but one contract on the subject of interest, which he made with his son-in-law. He states the stipulation was that the legal interest, *i.e.* the legally demandable rate of interest, should be five per cent., but that on the occasion of the loan being made, the son-in-law, of his accord, said, he would pay eight per cent. interest, because he was able to make more than three times that rate by the employment of the money in trade.

It is plain that the words in which this promise was made were not intended to supersede the written engagement. Independently of this, we find the General giving a striking narrative of what occurred between himself and his son-in-law subsequently, some time after the notes had been made, when the son-in-law rendered a written account, in which he had charged himself with eight per cent. The General's words amount to this:—I pointed out to Mr. Inglis that he was charging himself with eight per cent. interest, whereas I was entitled only to five per cent.; but the son-in-law said, it is all right, I can make more than three times that amount by the use of your money, therefore, I desire to pay you eight per cent. That conversation, again, is a clear acknowledgment on the part of the General that he regarded himself as the legal creditor of his son-in-law for only five per cent. It is in perfect harmony with the account given in the letter that the engagement originally was for five per cent., but that the son-in-law said, He could well afford to pay more; and the General answered, You can do as you please [137] about it. It was left, therefore, to the *arbitrium* of the son-in-law, if he chose to pay eight per cent., to pay that amount; but the legal relation which was created, was an engagement to pay five per cent. only. What was done subsequently is not inconsistent with that. We have the fact that, subsequently to the date of the promissory note, on several occasions the son-in-law rendered to his father-in-law accounts current, in which he debited himself with eight per cent. instead of five per cent., and that he continued that practice down almost to his death; for in

one of his repositories after his death his widow found three accounts or written papers, in which also he had debited himself with eight per cent. If there had been no written promissory note, or if there had been no history given by the creditor making the claim of the origin of the introduction of the eight per cent., the accounts so made out by the debtor might be a legal ground for presuming that the original contract had been to pay eight per cent., or that there had been a new contract to pay that rate of interest. They cannot, however, be used as evidence that the original contract contained in the promissory notes was done away with and a new contract substituted, for the reason we have already given, viz., that the General admits that when he saw the first account with interest at eight per cent., he treated it as a thing to which he was not entitled. Clearly, therefore, there was no contract entitling him to eight per cent. existing at that time; and with reference to the subsequent accounts, with perfect notice of those accounts because he had them in his possession, the General writes to his daughter the letter to which we have [138] referred, explaining how it had arisen, giving, as we have already observed, a history of the introduction of the eight per cent., that it was a voluntary offer by his son-in-law, and that the General did not fasten it upon him and make it part of the contract, but said to his son-in-law, "You shall be at liberty to do as you please about it."

The result of the whole, therefore, seems to be plainly this, that so far as the legal right is concerned, there is but one contract existing for valuable consideration and capable of being enforced, viz., the contract made at the time of the loan, in conformity with the written obligation for the loan contained in the promissory notes: that all departures from that in respect of interest are departures which have been made from mere goodwill and sense of duty on the part of the son-in-law, who is the debtor, but not as being the result of any legal contract or obligation between him and his father-in-law.

There is no trace that the father-in-law ever treated the matter, up to the time of making the demand, as one which entitled him as a matter of right to interest at eight per cent.; he always treats it as a matter of bounty and favour on the part of his son-in-law; and he tells his daughter he left his son-in-law at liberty to do as he pleased about it.

We regret that the demand has ever been made. It appears that when the interest is reduced to the legal rate, the sum paid by the Appellant, Sophia Guthrie, was more than would satisfy the whole demand of the General according to his just right, and the action, therefore, was brought when there was nothing due on the part of that Appellant. The consequence [139] must be that the decree of the Court below must be reversed, and the plaint dismissed, and the costs of the proceedings below and of this appeal must be borne by the Respondent.

We will make our report and humbly advise Her Majesty accordingly.

MUSSUMAT THAKOOR DEYHEE.—Appellant: RAI BALUK RAM and Others.—

Respondents * [Dec. 11, 12, and 13, 1866].

On appeal from the Sudder Dewanny Adawlut, North West Provinces, Agra.

By the Hindoo law, as laid down in the Benares or Western schools, although a widow may have power of disposing of moveable property inherited from her husband, which she has not under the law of Bengal, yet she is by both laws restricted from alienating any immoveable property which she has so inherited; and on her death the immoveable property, and the moveable, if she has not otherwise disposed of it, will pass to the next heirs of her deceased husband. There is no distinction with respect to such alienation between ancestral and acquired property [11 Moo. Ind. App. 175].

* Present: Members of the Judicial Committee—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, The Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor.—The Right Hon. Sir Lawrence Peel.

The devolution of Stridhnan, or wife's peculiar property, from a childless widow, is regulated by the nature of her marriage. If her marriage was according to one of the four approved forms, at her death her husband's collateral heirs succeed to it.

A deed of gift of immoveable and moveable estate, alleged to have been executed by a Hindoo widow, which was registered, set aside, as, without deciding that there had been a conspiracy, perjury, and forgery in respect to such deed on the part of the grantee and others, yet that the suspicious circumstances attending its alleged execution and registration had not been removed by sufficient proof to support the affirmative issue on the grantee, and to establish it as a genuine instrument.

The appeal in this case raised two questions; first, whether by the Hindoo law received in the Benares or the Western schools, which governed the rights of [140] the parties, Choteh Bebee, a childless Hindoo widow, had power to alienate any portion of the property of Ramjee, her deceased husband, which consisted of ancestral and self-acquired property; and secondly, whether a registered deed of gift of such property, alleged to have been executed by Choteh Bebee, in the Appellant's favour, was valid. The Respondents, who claimed to be heirs of Ramjee, denied his widow's power to alienate, as well as the execution of the deed, and insisted that it was a forgery and had been collusively registered.

The decree of the Sudder Dewanny Adawlut appealed from, declared that the Respondents were the heirs-at-law of Ramjee, and entitled, and that the deed of gift alleged to have been executed by Choteh Bebee, was a forgery, and her person simulated before the Registrar of deeds for the purpose of registration.

The facts were these:—

Rai Suhuj Ram, the common ancestor of the Respondents and Ramjee, died, leaving considerable real and personal property, consisting of Talooqua Rughoonathpore, situate in Pergunnah, Bissarah, in the District of Tirhoot, which he had acquired by purchase. The villages of Beerapoor, Bulore, and Sooghurgunje, two of the villages, formed integral portions of the Talooqua. He left five sons, Kirpa Ram, Sheo Ram, Moonshi Jye Ram, Rai Benee Ram, and Madho Ram, all since deceased, him surviving, his joint heirs, constituting an undivided [141] Hindoo family, who effected a mutation of names in the Books of the Collector. The family property was subsequently added to by a purchase out of their joint funds of a moiety of three villages, called respectively Puchowna (and sometimes Bichowna and Butchna), Suksorah, and Kishenpore, all situate in the District of Behar. The villages of Urouj or Urrujpore, and Tirhur, situate in this District of Shahabad, were also acquired by the joint family under a grant from the Maharajah of Behar in Mokurrery tenure. The grand-son of Suhuj Ram, Unund Ram, died leaving three sons, Jankee Ram, since deceased, the Respondent, Toolsee Ram, and Salik Ram (also since deceased without issue). Ramjee died in the year 1824, intestate and without issue, leaving Luchmund Sing, since deceased, only son of Jye Ram, Salig Ram, since deceased, Jankee Ram also since deceased, the father of the Respondents, Bheerbhan Sing, Munnee Ram, and Dhunnee Ram, and of Motee Ram, and also leaving the other Respondents Rai Baluk Ram and Toolsee Ram, and as members with him of a joint and undivided Hindoo family, entitled as heirs to his undivided share in the ancestral and other property. Ramjee left Choteh Bebee, his widow, him surviving. The above members of the family participated with the heirs in food, weddings, obsequies, and in the management of the property, and this state of affairs continued up to the date of the departure of Chotey Bebee on a pilgrimage to Juggernaut.

In addition to the other joint family property, there was purchased out of the joint family funds certain immoveable property in the district of Benares, which was registered in the names of Choteh Bebee and [142] Radha Bebee. This property consisted of the village of Okenee Byrumari, a seventh share in village Dhourkura, the village of Tajpore Puttee, appertaining to the Puttee of Rughoobur Sing, and the village Tajpore Puttee, appertaining to the Puttee of Bhoop Sing and Debeeelurn Sing, all situate in Pergunnah, Bidhole, and also certain houses and land situated at Lultaghat, Lahoree Tolah, and Lucksa.

In the month of July, 1858, Chotey Bebee went on a pilgrimage to Juggernaut, and before leaving delivered over all the immoveable and moveable property then in her possession to the custody of the Respondent, Rai Baluk Ram.

It appeared that Chotey Bebee reached Juggernaut and was returning homewards when she died on the way. On hearing of Chotey Bebee's death, Rai Baluk Ram, as the eldest of the above-mentioned heirs, performed her funeral obsequies. Soon after her death proceedings were had before the Magistrate of Benares respecting the succession to the estate, founded on a registered deed of gift of the whole estate, alleged to have been executed by Chotey Bebee in favour of the Appellant, who also set up a title as Chotey Bebee's adopted daughter. Rai Baluk Ram, Toolsee Ram, and Beerbhan Sing, also claimed to be heirs of Chotey Bebee, and urged that Chotey Bebee, as a Hindoo widow, was incompetent to alienate the property, that the pretended deed of gift was a forgery, and the alleged adoption false and contrary to usage, she being a female: and that as to the alleged registration of the deed by Chotey Bebee, that it was incredible, as she was suffering severely from dysentery and about to die, and could never have appeared in Court, as was alleged, or would [143] have done so, being a *Purdah Nasheen* (a woman living in seclusion), having Managers and Agents to transact her business, and that, therefore, it was clear that some other woman must have been substituted for Chotey Bebee to the Registrar of deeds.

Pending the settlement of these claims, the Court attached the estate, and finally the Judge of the Civil Court of Benares rejected the Appellant's claim, referring her to a regular suit.

The suit in which the present appeal arose, was instituted on the 9th of April, 1859, in the Court of the Principal Sudder Ameen of Zillah Benares, by the Respondents against the Appellant. By the plaint, they sought to obtain a decree for possession by right of succession on the death of Chotey Bebee, to the villages and shares of villages above-mentioned as being registered in her name, with houses, lands, and buildings at different places in her possession at the time of her death, and other personal property; and further to obtain a decree cancelling the alleged deed of gift which the Appellant had set up as having been executed by Chotey Bebee, and stated to bear date the 30th of August, 1858: and finally, for a declaration that the alleged claim by right of inheritance and adoption of the Appellant was void. By the plaint it was submitted, that besides the Respondents there were not any other surviving heirs of Sahuji Ram, the great ancestor; and it charged that since his death all his heirs took and continued in possession of his estate without any division of shares, and by means of the common stock they had purchased additional landed property. It further stated, that the greater part of the estate was purchased by Bence Ram, with ancestral and [144] family-acquired funds, and on his death the name of his son, Ramjee, was retained, and when he died the names of his mother, Radha Bebee, and Chotey Bebee were substituted with consent of the co-parceners, under a special agreement, admitting the heirship of the latter and the want of power in the former to alienate the property as above mentioned, and that during the lifetime of these ladies they participated with the other co-parceners in food, weddings, obsequies, and in the management of the estate, and no disagreement among them; that, on the contrary, the Respondent, Rai Baluk Ram's marriage expenses were defrayed by Chotey Bebee, and that he and his wife resided in the same house with her, their table expenses being in common, and that on her leaving for Juggernaut in July, 1858, she delivered over to him, owing to his being the nearest heir and in possession of the ancestral estate, the entire property, goods, and houses, etc., and recommended to him Ramrook Sing, her Agent, and that with the exception of that portion of personal property held in safe custody under the Order of the Magistrate, the whole of the property continued in his possession. The plaint then stated the circumstances attending Chotey Bebee's death, *en route* from Juggernaut, and the alleged fabrication and putting forward the deed of gift by the Appellant, with the aid of her brother, Balkishen Bunsee, who it alleged together must have contrived to produce another woman to impersonate Chotey Bebee before the Registrar of deeds at Midnapore; and it submitted and charged that the adoption of Appellant never took place in fact, and that if it had, it was invalid and inoperative by Hindoo law, that there

was no deed or instrument [145] of adoption in existence, and that if there had been any such adoption there would have been no necessity to fabricate the pretended deed of gift. The plaintiff further submitted, that even if such deed of gift had been executed by Choteh Bebee, which was denied, it was invalid, as by Hindoo law a widow's estate, which she took as heir of her deceased husband, determined on her death, and that, therefore, she could not alienate by gift or otherwise any property beyond her own life.

The Appellant, by her answer, insisted, first, that as the Plaintiffs had from several generations remained separate, they had no right under the Hindoo law to the property in dispute; secondly, that the property was acquired by and held in the exclusive possession of Rai Benee Ram, Ramjee, and Choteh Bebee; thirdly, that Choteh Bebee, during the lifetime of Radha Bebee, her mother-in-law, adopted her, and while in a sound state of mind bestowed in gift the entire property to her, and put her in possession, in accordance with the deed of gift, dated the 30th of August, 1858, duly attested and registered. The evidence of the Plaintiffs consisted of the depositions of thirteen witnesses, including those of the Respondents, Rai Baluk Ram and Toolsee Ram, who generally proved that the family was a joint and undivided Hindoo family, and that the property in question was partly ancestral joint property, and partly acquired by purchases out of the joint funds; that a division or partition of the family property had never taken place; and that the Appellant had never been adopted by Choteh Bebee.

The Defendant filed the alleged deed of gift, which was written in Bengalee, a language it appeared not [146] understood by Choteh Bebee, who read and wrote Hindee only, and the signature on which (in Nagree) bore no resemblance to her signature; and that it appeared on the face of the instrument that the property which it purported to give to the Appellant was not correctly described as regarded its situation, although it was admitted that Choteh Bebee managed the property and was an excellent business woman. The alleged deed of adoption of the Appellant was neither produced nor its absence accounted for. The evidence of the three of the attesting witnesses to the alleged deed of gift produced, were Balkishen, the brother of the Appellant; Bunsee, a servant, who stated that he did not understand Bengalee, that he could neither read nor write, and that Nathoo, the third witness, signed for him. Nathoo described himself as a Priest in service of Choteh Bebee for ten or twelve years, but he did not corroborate the last witness, as he stated that one Deenbhundoo signed for those witnesses who could not write; and this witness also, although he stated he had been so long in the service of Choteh Bebee, deposed that he did not know what relation the Respondent, Rai Baluk Ram, was to her, or if at all related, and that he had never seen him nor heard that Choteh Bebee's husband had uncles or nephews. They all admitted Choteh Bebee to have been a *Purdah Nasheen* (a female who does not appear in public), and yet stated that she had voluntarily gone before the Registrar at Midnapore to acknowledge her alleged signature, and at a time when she was stated by them to have been suffering under dysentery, the illness of which she died, and when, as they admitted, she was in fear of death. The witness, Balkishen, further stated, [147] that he was a witness to the deed of gift, and that Choteh Bebee had fallen ill at Baiturnee (*en route* from Juggernaut), six days' journey from Midnapore, and was in the same state when she arrived at Midnapore; that she had the same complaint, dysentery, for a long time at Benares, but it increased at Baiturnee; and that she died thirteen days after the execution of the deed at Gobind Chuttee, seven days' journey from Midnapore. He admitted that none of the witnesses other than the two last-named knew Choteh Bebee, and that only he himself and the two latter witnesses, and Chowbey, a sweetmeat seller, but who was not produced, and on inquiry by order of the Court could not be found, had identified the woman who had signed the deed of gift, and also appeared before the Registrar to acknowledge it, as Choteh Bebee, deceased. Eight other witnesses were called to speak to the adoption, but none of them were present at such alleged adoption. Although they said they had heard of it, they admitted that they had never known any other instance of the adoption of a female.

The hearing of the suit took place before Mr. R. H. Smith, the Principal Sudder Ameen of Benares, on the 15th of February, 1860, and by his judgment of that date, he found and declared the first issue in favour of the Appellant, that the late Choteh

Beebe was legally competent to make a gift of all the property in question by Hindoo law, as the same, in his opinion, was not joint ancestral property; and he declared that he saw no reason to doubt the authenticity of the deed of gift, as Choteh Beebe had personally attended at the Registrar's office to have it registered, and dismissed the suit with costs.

[148] The Respondents appealed to the Sudder Dewanny Adawlut at Agra, urging the following grounds:—First, that the estate was joint ancestral, being acquired by ancestral undivided capital; and second, that the deed of gift set up by the Appellant was a forgery, and was not proved by the evidence; that the witnesses adduced by the latter, among whom one was her own brother, were untrustworthy, had been tutored, and their statements contradictory; and that on the inspection of the deed other circumstances confirming its spuriousness would be apparent.

The Appellant, by her answer to the grounds of appeal, alleged that the property in dispute was not joint and undivided, but that the property was divided after the decease of Anund Ram; that as the name of Ranjee, son of Bence Ram, was registered as proprietor of the village, Berapoor Sookhurgunge, and the names of Jankee Ram, Toolsee Ram, and Salik Ram, of the villages, Rugoonathpore and others, she asked if, as alleged by the Respondents, they were in partnership, how came their names to be registered for the several villages and their respective shares assigned to them? The answer then alleged that the property was self-acquired by Bence Ram, and concluded by stating that the claim of the Respondents was not established, and, therefore, their objection to the deed of gift was of no avail.

On the 6th of August, 1861, the Sudder Dewanny Court put the following questions to the Hindoo Law Officer attached to that Court:—

Question 1.—C. and D. have inherited landed property from a common ancestor, A., and have divided it between them. C. dies and leaves a son, [149] F. D. dies and leaves a son, G. G. dies leaving no issue, but a widow, H. Query: Can the widow H. will away by Testament, to relations of her own blood, the share of the ancestral property which belonged to her husband, G.? or, after her death, will that share necessarily revert to her husband's cousins?

Answer.—If the share of the ancestral property which the woman's husband held separately by virtue of a partition, and to which she succeeded after his death, consisted of a personal property, she could give it away to any one she chose; but, as it consists of real property, she cannot do so under any circumstances; for such (real) property must necessarily remain in the family of the person by whom it was originally acquired. The object in making a division of property is to preserve peace and to prevent disputes, but the parties take division mutually retain their rights in respect of the whole property. Hence H. shall, according to Kattiayun and others, have a right to enjoy the real property during her life, after which it shall revert to her husband's near of kin, viz., his cousins, etc.

Question 2.—Can the widow H. alienate, by sale, gift, or otherwise, during her lifetime, the share of her husband, G.?

Answer.—The answer to the first question involves also the answer to the second: viz. H. has not the power of alienating the real property by sale, gift, or otherwise, which she would have had in the case of personal property.

Question 3.—If the widow H. or her husband G. shall, during their lifetime, have acquired any other real property with the proceeds of their share of the [150] ancestral estate, can the widow H. alienate the real property so acquired by Will, by sale, by gift, or otherwise, or does it, on her death, revert to her deceased husband's cousins, in common with the other ancestral estate?

Answer.—The real property which G. or H. acquired during their lifetime with the proceeds of the former's separate share is not hereditary, and the latter (because her husband died without issue) can give it away to any one she likes. Real property cannot be alienated in the event of the person who acquired it having issue of his own.—Pundit, Heranund.

It having been discovered in the Sudder Dewanny Adawlut that the Appellant had not examined the persons whom she alleged had witnessed or had knowledge of the deed of gift, and who were residing at Midnapore, and considering that it was expedient that they should be examined, the Registrar of that Court was ordered to communicate by letter with the Judge of Midnapore, and request him to examine on interrogatories, those several witnesses, and to return their depositions to the

Sudder Court. In obedience, the Judge, E. Jackson, Esquire, examined five witnesses, all but Chowbey, who could not be found. Their evidence was contradictory and unsatisfactory as to what took place; not one of these witnesses knew Choteh Bebee, but could only rely on the three former witnesses' statement as to identity. The Judge returned the depositions to the Sudder Court at Agra, with an official letter, bearing date the 23rd of September, 1861, expressing his opinion of the characters and conduct of two of those witnesses, who were the Vakeel and Mookhtar employed by Balkishen [151] in preparing the alleged deed and in witnessing it, that they were not worthy of credit.

The hearing of the appeal took place before M. R. Gubbins and James Lean, Esquires, two of the Judges of the Sudder Dewanny Adawlut, on the 16th of November, 1861, when they delivered the following judgment:—"Of the pleas adduced in appeal it is only necessary to go into one—viz., the allegation that the deed of gift on which the Defendant (Respondent's) claim is based is a forgery. This, we observe, is a main and most important issue in the case, and towards its thorough investigation and development the attention of the Lower Court should have been principally directed. We consider it to have been an error of judgment in the Principal Sudder Ameen that he should have constituted any other issue than this the first issue, and should have devoted the greater part of his judgment to other questions which, in our opinion, do not even require to be examined, when the main plea 'of the Defendant's claim being based upon a forgery' has been properly investigated. That plea the Lower Court rejected briefly at the close of its judgment, upon reasons which we hold to be wholly insufficient. After a full consideration of the circumstances put forth by the Defendant (Respondent) respecting the execution of the Hibbenannah, by the deceased Choteh Bebee at Midnapore, a few days before her death, in favour of her niece, by which deed the large property, real and personal, which she died possessed of would be diverted from the Plaintiffs (Appellants) the rightful heirs-at-law, to the Defendant, who appears to be a childless widow, dependent on her brother, Balkishen, nephew of the deceased, who accompanied her upon [152] her pilgrimage to Juggernaut, from which she never returned, and who also witnessed the deed of gift; we have no hesitation in rejecting it altogether, as we hold that the Defendant has entirely failed to establish its authenticity. We are of opinion, that there is a strong preponderance of probabilities against the admission of the fact advanced by the Defendant, that Choteh Bebee executed this deed in her lifetime and with her own consent. We incline rather to regard the deed to be a fabrication after the death of Choteh Bebee. The deceased is shown to have been a good woman of business, transacting her affairs herself, and the business letters which have been put in evidence by the Appellants show not only this, but also that her handwriting was excellent. Now, in the deed in question, the property belonging to the deceased is so incorrectly stated, that even the names of the Zillahs, or Districts in which the landed estates lie, are misstated. This could not have been the case had Choteh Bebee herself really dictated the instrument. Again, the signature bears no sort of resemblance to the excellent handwriting of the deceased. We think the reason assigned by the Principal Sudder Ameen for getting over this objection, viz., that Choteh Bebee was 'prostrated by sickness,' is quite insufficient; for the Defendant alleges that Choteh Bebee executed the deed at Midnapore, where she was able to cook her own food, and afterwards attended in person at the Registrar's office, and attested it. She is there represented to have travelled seven marches beyond Midnapore, and to have died thirteen or fourteen days after the execution of the instrument. It certainly must be inferred from these asserted facts, that she [153] ought to have been capable of writing a signature not very different from her ordinary one, at the time when it is pretended that she executed this deed. No witnesses of any real respectability, or on whose evidence reliance can be placed, are found to have attested the deed. It bears the signature of nine witnesses. Of these, three only were acquainted with the deceased so as to be able to speak to her identity. These are Balkishen himself, brother of the Defendant (who is evidently the party who will most benefit by the recognition of the deed), and two servants of his, named Bunsee, caste Koonhee, and Nathoo, a Brahmin. Their evidence is open to too much suspicion to carry weight with us. The remaining six are persons of no note at Midnapore, and it is not pretended on the part of the defence that any one of them was personally acquainted with the female donor. This radical defect in their testimony is at-

tempted to be supplied by a statement made by Balkishen and others, that a certain 'Chowbey' originally resident of Muttra, who then lived at Midnapore, had been cognizant of the whole transaction, and had assisted the deceased in procuring the services of the Vakeel and Mookhtar, who are two of the subscribing witnesses, and the attendance of the four other witnesses. But this Chowbey has not been produced: he has not been even named; nor is the Defendant able to indicate him in any such way as to enable us to cause his attendance. Further, on reference to the Judge at Midnapore, that Officer, Mr. E. Jackson, in his letter No. 130, dated the 23rd of September last, makes the following remark in respect to the Vakeel and Mookhtar alluded to: "I place little reliance on the good faith of the Mookhtar and Vakeel who attest the deed,—first, because they had [154] the audacity to identify the woman who executed the deed before the Registrar of deeds when they were totally unacquainted with her; and secondly, as to the Vakeel, because from my experience in this District of his depositions in other cases, I place little credit in his good faith generally;" an opinion which certainly tends still further to diminish the value of the testimony adduced in support of the Hibbenamah. We further observe that the only witnesses brought into Court for the defence, out of those whose names are attached to the deed, are Balkishen and his two servants. The six others, residents of Midnapore, were not examined until a commission issued from this Court. The circumstance that the Defendant took no pains to have her own witnesses examined is obviously a most suspicious one, and ought, in our opinion, to have attracted more notice than it seems to have done from the Principal Sudder Ameen, whose acceptance of the deed on the very imperfect evidence tendered for the defence we consider to be a serious error of judgment. For the above and other reasons, which need not be enumerated, we decide to reject altogether the Hibbenamah in favour of herself, on which the Defendant's case is built; and accordingly we reverse the decision of the lower Court, and decree for Plaintiffs (Appellants) with all costs."

The present appeal was from this judgment.

The Attorney-General (Sir John Rolt, Q.C.), Mr. Forsyth, Q.C., and Mr. A. Bailey, for the Appellant.—Three questions arise upon this appeal,—first, had Choteh Bebee, a childless Hindoo widow, power to alienate the estate of her deceased husband, to which [155] she succeeded on his death; secondly, was the deed of gift made by her in the Appellant's favour, a valid instrument; and thirdly, have the Respondents established their title as the heirs of Ramjee.

First, as to Choteh Bebee's power of alienation. There were four species of property to which she succeeded on her husband's death—(1) ancestral, which we admit she could not alienate; (2) the family real estate held by her husband in severance; (3) the self-acquired property of Benec Ram and Ramjee; and (4) that separately acquired by Choteh Bebee herself. With respect to the latter three descriptions of property, it was no doubt competent for her, as a Hindoo widow, to alienate by deed of gift. The law which governs the rights of the parties in this case is the Mitaeshara, which prevails in Western India. It was a divided Hindoo family. Although there may be some restraint upon a widow's power of disposition of her deceased husband's estate by the Daya-bhaga, regulating succession in Bengal—*Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (9 Moore's Ind. App. Cases, 123)—yet by the Mitaeshara the widow of a member of a divided family takes the whole estate of her deceased husband, which devolves on her by inheritance absolutely. The Mitaeshara, chap. ii. sec. i. arts. 6, 18, 30, 39, Translation by Colebrooke, p. 336, and ch. ii. sec. 11, on the separate property of women, Strange "Hindu Law," Vol. I. p. 134 (2nd Ed.), alluding to the passages in the Mitaeshara on the widow's right to inherit, says it is "a right vested in her by marriage, to be perfected on the death of her husband, dying without leaving male issue;" and in treating of a woman's separate estate, Sir Thomas Strange, "Hindu Law," Vol. I. p. 248 (2nd Ed.) [156] says: "But, according to the Mitaeshara, ch. ii. sec. xi. 2, and its followers, property, which the widow may have acquired by inheritance, is transmissible to her own heirs, classing with this school as part of her Stridhana." To the same effect it is laid down in W. H. Macnaghten's "Princ. of Hindoo Law," Vol. I. p. 40. The Hindoo law officer consulted in this case says she can alienate self-acquired estate (*ante* [11 Moo. Ind. App.], p. 150). The case of *The Collector of Masulipatam v. Cavalry Fencible Narrainpah* (8 Moore's Ind. App. Cases, 529)

is distinguishable from the present case, as it involved a question of escheat of a Zemindary to Government for want of male heirs. It is apparent that the decree of the Sudder Court cannot be sustained. The Benares property was purchased by Choteh Bebee after her husband's death. It was from the Stridhana, or accumulations from her income and savings from her husband's property, and as such entirely at her own disposal.

Secondly, the genuineness of the deed of gift by Choteh Bebee to the Appellant, her adopted child and niece, was established by the evidence, and the Respondents failed to prove that it was a forgery. The Sudder Court assumes personation of Choteh Bebee by a stranger before the Registrar and forgery of the deed of gift. There is no evidence to justify such a conclusion. Lastly, we submit, that the Respondents have not established that they are the heirs of Ramjee, as they were bound to do.

Sir R. Palmer, Q.C., and Mr. Leith, for the Respondents.—The descendants of Sahuj Ram, the common ancestor, were members of a joint and undivided [157] Hindoo family. The *onus* lies on the Appellant to prove the separation of Benee Ram, or of his son, Ramjee, from whose childless widow, Choteh Bebee, she alone claims title. Part of the property the Appellant claims is admitted to have been ancestral property, descended directly from Sahuj Ram: the remainder was purchased and acquired by members of the joint family by means of the ancestral property and the accumulated funds and earnings of the joint family; therefore, according to the Hindoo law, the whole property in its devolution as well as disposition was subject to the incidents of joint property. But supposing such property is to be considered and treated as joint property, or as the separate or self-acquired property of Benee Ram or Ramjee, it makes no difference as regards the right of the Respondents to succeed, being admitted to be the nearest male relatives, and, therefore, by Hindoo law, the joint heirs of Benee Ram, on the death of his childless widow, Choteh Bebee, who, as such widow, succeeded to and was entitled and enjoyed it for her lifetime only, and could not alienate the same beyond the term of her natural life. With respect to the nature of a Hindoo widow's estate, the Appellant's proposition is founded on passages in Strange's "Hindu Law," and goes to this extent, that a widow may alienate movables of her late husband by the *Daya-bhaga*, the law received in Bengal, and both movables and immovables, according to the Benares school, where the *Mitacshara* prevails. [Sir Lawrence Peel: Some confusion exists in Strange's "Hindu Law," Vol. I., pp. 27, 31 (2nd Ed.), by confounding Stridhana, the wife's peculiar property, with the property of her husband.] That passage in Strange's "Hindu Law" proves too much, as it in-[158]-cludes property which a woman may have acquired by inheritance, purchase, or finding. Inheritance there referred to has the signification of property acquired by her mother, and at pp. 51, 248 of the same volume, he treats the power of a widow to alienate the property derived from her husband as distinct from her power to alienate her Stridhana. Here the property in dispute is to be considered only as inherited property. No issue is raised that any portion was acquired by Choteh Bebee herself. In the case of *The Collector of Masulipatam v. Cavalry Vencata Narrainapah* (9 Moore's Ind. App. Cases, 543) the Pundit, to whom the question was referred, states for what purposes a widow may alienate her husband's estate against her next heirs. Our contention is, that the interest a widow of a man dying without issue takes in his estate is only as tenant for life, and that she has no power to alienate or devise any portion of such estate; which at her death devolves upon her husband's heirs; *Keerut Singh v. Koolahul Sing* (2 Moore's Ind. App. Cases, 331)—except under special circumstances with the heirs' consent: *Mohun Lal Khan v. Ranee Siroomunnee* (2 Ben. Sud. Dew. Rep., 32). [Sir W. J. Colvile: Lord Gifford, the Master of the Rolls, in the case of *Cossinauth Bysack v. Hurrooondery Dossee*, which was heard before the Privy Council, 1829 (Morton's Cal. Rep., 85), affirms that principle, and says the extent and limit of her power of disposing of the property are not definable in the abstract.] The *Mitacshara* is silent as to the limit. This Court, in *Katama Natchier v. The Rajah of Shivagunga* (8 Moore's Ind. App. Cases, 529, 556), treated the interest of a Hindoo [159] widow, succeeding to her husband's estate, according to the *Mitacshara* prevailing in Madras, as that of a tenant in tail by English law, representing the inheritance. The true principle recognized by

all Hindoo authorities is really only the right to maintenance of the widow. Strange, "Hindu Law," Vol. I., pp. 121, 234 (2nd Ed.), and he considers her only as trustee for her husband's heirs.

Then as to the question of fact, the execution of the alleged deed of gift. It was clearly a forgery, and the person of Choteh Bebee simulated before the Registrar of deeds. Not only was such deed of gift inoperative as regards the passing of the property, even if the property or any part had been proved to be Choteh Bebee's absolutely; but the Appellant failed to prove the due execution by Choteh Bebee. The evidence as well as probabilities of the case, strongly militated against the evidence offered by her, and the decree of the Sudder Court holding that it was a forgery and that no act of adoption had taken place was well founded.

Mr. Forsyth, in reply.

The consideration of the case was adjourned.

Their Lordships' judgment was now delivered by

The Right Hon. Sir James W. Colville (Feb. 1, 1867).—The question on this appeal is the right of succession to certain property of which one Choteh Bebee, a Hindoo widow, died possessed. She was the widow of one Ramjee, who died in 1824 without issue, and he was the only son and heir of Benee Ram, one of the five sons of Rai Sahuj Ram. The Respondents are all descended from the last-named ancestor through [160] one or other of his four other sons, and are admitted to be the collateral male heirs of Ramjee living at the date of his widow's death. The Appellant is the niece of Choteh Bebee, her brother's daughter. She is said to have been from her infancy adopted by her aunt, and treated as a daughter. But the word "adopted" must here be taken in its popular, and not in its technical sense. It is not now contended that the adoption was of that kind which, according to Hindoo law, would create between Choteh Bebee and the Appellant the relation of parent and child for all religious and legal purposes, or give to the latter any right of inheritance. The question in this case is, whether the property in dispute on the death of Choteh Bebee descended to the Respondents as the collateral heirs of her husband then living, or passed, under a deed of gift alleged to have been executed by her shortly before her death, to the Appellant. That property is partly movable, and partly immovable. The latter is situated in the Districts of Tirhoot, Behar, Shahabad, and Benares, and the deceased was domiciled at Benares. Therefore, the law by which the succession to the whole is governed is that of the Western schools.

The issues recorded in the cause were, whether Mussumat Choteh Bebee was competent to bestow the property in gift or not; and if she was, whether the deed of gift relied upon by the Defendant (now the Appellant) is valid or not. This appears from the Record. Between the date, however, at which the issues were recorded and that of the trial, a change took place in the constitution of the Court of the Principal Sudder Ameen of Benares, in which the cause was pending; and Mr. Smith, by whom it [161] was tried, in his judgment, says: "The disposal of the case rests on two important issues; first, whether the property which was the subject of the gift to the Defendant was joint ancestral or not; second, whether the alleged deed of gift is or is not a *bona fide* instrument. The first of these questions, as will hereafter be shown, is by no means identical with the first recorded issue. Mr. Smith, however, having decided it in favour of the Appellant, appears to have considered that the necessary consequence from his finding was, that Choteh Bebee was legally competent to alien the property; and further found that she had duly executed the deed of gift. He, therefore, dismissed the Respondent's suit, with costs. There was an appeal to the Sudder Court of Agra, and that Court, confining its attention to the second of the recorded issues, and after taking further evidence as to the *factum* of the alleged deed of gift, came to the conclusion that the instrument was forged, and on that ground alone made a decree in favour of the Respondents. The present appeal is against that decree.

Their Lordships, reverting to the recorded issues, will consider them in their inverse order. They will first consider whether the evidence in the cause can be taken to have established that the alleged deed of gift was duly executed by Choteh Bebee.

The case set up by the Appellant is the following: In 1858, Choteh Bebee under-

took a pilgrimage to Juggernaut. She was accompanied by the Appellant, the Appellant's brother, Balkishen, Nathoo Ram, a Priest, and Bunsee, a menial servant. On her return homewards from the Shrine, and a few days before she reached Midnapore, she was attacked [162] with dysentery, and arrived at Midnapore very ill, and despairing of recovery. The instrument itself expresses that she had no hope of getting home alive. It was prepared by Hurry Doss, a Pleader in the Judge's Court of Midnapore, and by his nephew and Clerk, Deenbundhoo Muttye. It was written in Bengalee, a language foreign to the person by whom it purported to be executed—a language which it is admitted she did not understand. It was executed at the door of the Cutcherry of the Registrar of deeds, to which place both Choteh Bebee and the Appellant were taken in separate palanquins, and there registered. The Appellant says, "After the registry was effected we returned home, and left the station." Balkishen says that Choteh Bebee remained at Midnapore about two days after the deed was executed and registered. All the witnesses who speak to the fact seem to agree that she died about thirteen or fourteen days after the execution of the deed at a place called Gobind Chuttee, distant about seven days' march from Midnapore, and that her body was there burned.

We have now to consider the evidence given to prove this transaction more minutely; and first it may be well to see what evidence there really is that the person who put her hand to the instrument was Choteh Bebee.

The subscribing witnesses to it are Balkishen, Nathoo Ram, Bunsee, and four Bengalees, viz., Tarachund Muduk, Modhoo, a Chowkeedar, Sree Chedum Surma or Chedum Sirdar, and Deenbundhoo, who was concerned in the preparation of the deed. The first three of the Bengalee witnesses may be at once disposed of. Neither their subscription nor the [163] testimony of such as have been examined can add anything to the credibility of the transaction. Tarachund almost admits that he was called out of the crowd about the door of the Cutcherry to become a subscribing witness, without previous knowledge of the parties or of the transaction. He says that Chedum Surma, elsewhere called Chedum Sirdar, and Modhoo the watchman, were unable to write, and he does not know who signed for them; whilst Balkishen says, "Those witnesses who could write signed for themselves, and those who could not Deenbundhoo signed for them." Chedum Sirdar does not seem to have been examined, and Modhoo was probably a witness of the same class with Tarachund; for his statement that he, a village watchman, had been admitted into the presence of Choteh Bebee, or had been requested by her to sign the deed, is utterly incredible. Besides the evidence of the subscribing witnesses, we have that of Hurry Doss and Shamchund Ghose, who took upon themselves to identify Choteh Bebee to the Registrar. But it is obvious that they could only speak to her identity from information derived from those who travelled in her company, or from the person spoken of as the Chowbey. He was the only resident in Midnapore who it is pretended had ever seen or known Choteh Bebee before this transaction. He was a Pundah, a sort of Priest, who had migrated to Midnapore from the Upper Provinces, and there dealt in sweetmeats. His name is not given, and he appears to have been known only as the Chowbey-Hulwai, an appellation which expresses both his status as a Brahmin and his occupation as a Confectioner. What was the extent of his previous acquaintance with Choteh Bebee does not appear. [164] Balkishen says, "She knew a Chowbey of Muttra at Midnapore. On going to Juggernaut she saw the Chowbey, who kept a shop, but did not halt at Midnapore; she halted further on." But whatever was the extent of his acquaintance, the Chowbey neither attested the deed nor appeared before the Registrar to identify her, nor gave evidence in the cause. When the examination of the additional witnesses took place at the instance of the Sudder Court, he had disappeared from Midnapore and could not be traced. There is, therefore, no evidence of the identity of the person who signed the deed with Choteh Bebee except that of the Appellant, her brother, their dependent the Priest, and a servant. This might have been corroborated by satisfactory evidence of the handwriting; but from the evidence on that point and a comparison of the Nagree signature on the deed with the admitted signature of Choteh Bebee upon other documents, the Sudder Court has come to the conclusion that the former is a forgery. The testimony, too, of the Kobiraj, or native doctor, if forthcoming, might have afforded some slight corroboration of the story. He

could at least have proved that he was called in to attend a woman dangerously ill of dysentery, and have shown in what state of body or mind his patient was.

Again, there is no evidence, except that of the four persons above mentioned, of the time and place of Choteh Bebee's death. Their testimony on that point might have been corroborated by that of the police authorities of the station where she is said to have died. But that corroboration is wanting.

We will next consider the evidence touching the preparation and execution of the deed. It seems [165] clear that Hurry Doss, the Pleader, was called in on the night of the arrival of the party at Midnapore. He is the person called Sreedhur Moonshee by the Hindustani witnesses. There is a good deal of discrepancy in the evidence as to the manner of calling him in. He himself says, that Balkishen and Nathoo-Ram called on him, and said he had been recommended to them by the Chowbey. Shanchunder Doss, who seems to have been hanging about the house where the Pilgrims put up, professes to have directed them to Hurry Doss. Bunsee says, "the Chowbey sent for Sreedhur Moonshee." Nathoo Ram's evidence is to the same effect; and Balkishen says that he "and the Chowbey went to Sreedhur Moonshee, who sent for the writer" (Deenbundhoo). These discrepancies, however, are not of much importance. It is clear that Hurry Doss went to the house where the woman alleged to be Choteh Bebee was, on the night of her arrival; and, though the evidence is not altogether consistent on that point, that he took Deenbundoo with him.

Hurry Doss being the professional person responsible for the preparation of the document, it is to his evidence that we naturally look for a true account of that part of the transaction. His statement is to this effect: "I found Choteh Bebee lying down. She said, 'Are you a Vakeel?' I said, 'I am.' She said, All my property I wish to make over in gift to Thakoor Deyhee, my niece"—who was then sitting by her. I asked what estate (Talooqua), and what property, that a rough copy might be prepared. She said, 'To-night I am not at all well, but to-morrow morning I will have it all written out.' I then returned that night to my house. The next morning [166] I sent Deenbundhoo to take a list, and ascertain what she wanted to have written. He went, and took down all particulars. I said the whole of the property was to be made over, and that she had no stamp paper. I then drew out a deed of gift in the Bengalee language, and I sent Deenbundhoo with it to Choteh Bebee to be read to her, and ascertain whether it was what she wanted. Deenbundhoo returned, and said she had agreed to what I wrote. The next day I had it all clearly written out on stamp paper, and brought it to the Cutcherry. Choteh Bebee and Thakoor Deyhee also came in palkees to the Court, and I then read out to Choteh Bebee the contents of the Hibbenamah and she signed it with her own hand. Choteh Bebee was then taken in a palkee before the Registrar, the door of the palkee was opened, and the Nazir questioned her by the Principal Sudder Ameen's orders, and she admitted that she had executed the deed. I received back the Hibbenamah after registry, and the next day took it to Thakoor Deyhee through Balkishen."

From this statement it is to be inferred that on the first evening nothing was expressed but a general intention to make a gift of the whole property; that on the following morning the Pleader obtained more particular instructions through Deenbundhoo; that he then, in his own house and with his own hand, drew up the draft deed, and sent it by Deenbundhoo to be explained to the woman; that on the following day he had the engrossment made on stamp paper in his own house, and took it thence to the Court-house, where he met the two women in their palkees; that he read over the fair copy to the woman said to be Choteh Bebee outside the Court, who executed it [167] there; that she was then taken in her palkee before the Registrar, and to him or his Nazir acknowledged her signature. One would have expected that this account would have been confirmed, at least by the Clerk, Deenbundhoo, in all its material particulars. This, however, is not the case. His statement is that on the night when, according to Hurry Doss, Choteh Bebee was too ill to give full instructions, he remained behind and took down from her dictation what he calls a list containing the names of her husband and her father; that the rough copy of the deed was drawn out the next day, and was clearly written out and taken to her by him. In another part of his evidence he says that Hurry Doss

prepared the rough copy of the deed in her house; that Choteh Bebee explained to him what she wanted done, and that he (the witness), at Choteh Bebee's request, wrote the copy out clearly on paper. (This probably means the copy on stamp paper). He says that on the same day (being the day after the evening on which Hurry Doss was first called in) the two women came to the Cutcherry, and that the deed was then and there executed and registered. He does not state how, or by whom, the Bengalee instrument was explained to her. The testimony of the Hindustani witnesses, on the whole, tends to confirm the statement of Deenbundhoo rather than that of Hurry Doss. Both Nathoo Ram and Balkishen say that both the draft and the fair copy of the deed were written and explained by Deenbundhoo at Choteh Bebee's house. They do not speak to the fair copy having been explained to her by Hurry Doss at the Cutcherry when it was executed. They say that the deed was written and executed on the same day, viz., that following the evening of Choteh [168] Bebee's arrival at Midnapore. Bunsee, however, states that the fair copy on stamp paper was written at the Cutcherry, and that the deed was written after remaining three days at Midnapore.

Here, then, their Lordships have to deal with an instrument avowedly taken *ex capite lecti* from a woman stricken with a mortal disease, and in expectation of death—that woman being one of a class which the law regards as in need of especial protection. Whatever strictness is required in the proof of a testamentary disposition, is, at least, equally required here. The document is written in a character and language which, if in the fullest possession of her faculties, she could neither read nor understand. The accounts given by the witnesses of its preparation and explanation are inconsistent and unsatisfactory. If it were even established that the person who put her hand to the paper were Choteh Bebee, the proof would still fall short of that which ought to be given to support such a transaction—proof that she really knew what she was about, and intended to make this disposition of her property.

Again, the circumstances of the execution are, in their Lordships' judgment, extremely suspicious. This sick and almost dying woman is said to have been carried down on the afternoon of an August day, and deposited at the door of the Cutcherry. Whilst lying there she has the instrument explained to her, for the first time, by the person chiefly responsible for its preparation, through the half-opened doors of her Palanquin. She executes it, and some of the witnesses of her act are picked up then and there out of the crowd. One witness says that the deed itself was fairly copied at this time and place; several—and that is far more [169] credible—that an additional copy for registration was then made. After all this ceremony is gone through she is carried into Court, and questioned by the Nazir.

Now, she might certainly have executed the deed in the privacy of her own house. Nor does she seem to have been bound, by the Acts and Regulations touching registration, to appear personally before the Registrar, in order to have it registered. She might have sent it for that purpose by a duly authorized representative, with one or more of the witnesses, who could speak to her execution of it.

Appearance in a public Court, even under the protection of a Palanquin, is a thing repugnant to the feelings and habits of a Hindoo woman of Choteh Bebee's position, even when she is in perfect health. The same feeling might not operate on one who personated her, or on one who sought to profit by the fraud. And the extraordinary publicity resorted to on this occasion seems more likely to have been designed to give a colour to a false transaction than to have been an incident in a regular one.

Considering, then, the whole evidence and the startling improbabilities of the case set up, their Lordships are of opinion that the Appellant has failed to establish the validity of the deed of gift on which she relies. It is not necessary to say that on this evidence she and her witnesses must be taken to have been guilty of conspiracy, perjury, and forgery. It is sufficient to say that the proof falls very far short of what is required to support the affirmative of the issue, which she was bound to prove.

If the Appellant were suing to recover possession of the property from the Respondents by virtue of [170] the deed of gift, the conclusion to which their Lord-

ships have come would of course determine the cause. That, however, is not the nature of the suit; and the Respondents, being the Plaintiffs below, have to show a title to the relief which they claim. The object of their suit, as stated in the plaint, was to be confirmed in the possession of the various parcels of immovable property which are therein specified; to recover certain movable property which seems to have been under attachment; to have the deed of gift cancelled and set aside; and to avoid the title which the Appellant was then understood to claim by virtue of adoption. The first things to be determined are the *status* of the family and the nature of the property.

The Respondents alleged in their plaint that the family of the common ancestor, Sahuj Ram, including Bence Ram and Ramjee, had continued to be undivided. But the evidence, and above all the indisputable fact that Choteh Behee was in possession of the greater part of the property in dispute, as heiress of her husband, for upwards of thirty years, seen to their Lordships to support the finding of the Principal Sudder Ameen—that Ramjee was not a member of an undivided family, of which the Respondents, whatever be their *status*, *inter se*, are or represent the other co-parceners; Bence Ram having separated from his co-heirs, and taken as his share of the ancestral estate the villages in Tirhoot, which form the first parcel of the immovable property that is the subject of this suit. Their Lordships also accept as true the history which has been given by the learned Counsel for the Appellant of the acquisition of the other parcels of immovable property.

[171] The state of the family and the nature of the property having been thus ascertained, the only question is, whether the Respondents became entitled to the possession of it on the death of Choteh Behee as the next heirs of her husband. The Appellant's supposed title by adoption has been abandoned, and the validity of the deed of gift has already been disposed of. It is difficult, however, to deal with the remaining question without adverting to the arguments which have been addressed to their Lordships in support of Choteh Behee's power to dispose of the property, since the right of the husband's collateral heirs depends in some degree on the nature of the widow's estate.

The learned Counsel for the Appellant; whilst they admitted that, by the law as it prevails in Lower Bengal, the estate of inheritance which a Hindoo widow takes in the property of her husband, dying without male issue, is limited in its enjoyment; that she cannot alien such property, whether movable or immovable, except for certain defined purposes, and subject to certain restrictions; and that it passes on her death to those who are then the next heirs of her husband—have nevertheless contended that this is not the law of the Western schools, and have attempted to show that at Benares and in the other Provinces governed by the Mitacschara, the widow's estate in her husband's property is absolute; that she has full power to dispose of it; and that, if she fails to do so, it is, after her death subject to a different course of succession from that which obtains in Bengal.

The opinion of the Pundit taken by the Sudder Court does not support this contention in its in-[172]-tegrity. He admits the right of the widow to alien movable property, whether ancestral or not, and the immovable property acquired by her husband or herself, with the proceeds of the former's share in the ancestral estate; but he denies her right to dispose of her husband's share in immovable ancestral property, and states that on her death it devolves on her husband's next of kin. He does not show that, if she does not exercise her alleged power of disposition over property of the two other classes, that does not also pass on her death to her husband's heirs.

The learned Counsel for the Appellant relied mainly on arguments drawn from the 1st and the 11th sections of the 2nd chapter of the Mitacschara, and on the supposed confirmation of them by Sir Thomas Strange. The first of these sections deals with the right of the widow to inherit the estate of one who leaves no male issue. It states the various conflicting authorities on the subject—some favourable, others adverse to the widow's right; it weighs and contrasts them, and comes ultimately to the conclusion embodied in the 39th Article, viz.: "Therefore, it is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently reunited with them, dies without male issue." It need hardly be observed that the rule thus stated merely affirms

the widow's right of succession, with a qualification unknown to the law of Bengal—viz., that her husband was not at the time of his death a member of an undivided family. The text is wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate. It may also be conceded that nothing on these points [173] is to be found in the rest of that portion of the *Mitaeshara* which has been translated by Mr. Colebrooke, and published under the title of "The Law of Inheritance from the *Mitaeshara*." It is not, however, a necessary consequence from these circumstances that the Benares school recognizes in the widow an absolute power of disposition over the estate which she has inherited from her husband, other absolute interest therein. We have not the whole *Mitaeshara*. Mr. Colebrooke, in his preface, p. iv., states that his work includes only an extract from that celebrated Treatise, comprising so much of it as relates to inheritance. The widow's disabilities, which depend in a great measure upon the notions which the Hindoo legislators entertained of the infirmity and necessary dependence of the sex, may be dealt with in other parts of the work. It is certain that upon other subjects the *Mitaeshara* cites with approbation Menu, Catayana, Nareda, and others, upon whose *dicta* the limitation of the widow's enjoyment of her husband's estate, and of her power over it, chiefly depends; and that these authorities are received by the Western schools as well as by that of Bengal. Accordingly Sir Thomas Strange (vol. i., p. 247) states clearly that such limitations are, with some slight variations, common to all the Schools.

A more plausible argument in favour of the Appellant's contention may be derived from the eleventh section of the 2nd chapter of the *Mitaeshara*, if the words "also property which she may have acquired by inheritance," which occur in the 2nd article of this section, are taken (as they are taken by Sir Thomas Strange and others), to include property inherited from a husband. For it may be said that [174] there can be no distinction between different portions of a woman's *Stridhun*, or separate property: if she can dispose of part of it she may dispose of the whole; and further, that the whole must pass on her death, according to the law which regulates the succession to *Stridhun*. Sir William Macnaghten, however, in his "Principles and Precedents of Hindu Law," vol. i. p. 38, lays down broadly that there is such a distinction. He says: "In the *Mitaeshara*, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*." And he then proceeds to show what is that *peculium* or *Stridhun* proper, according to Menu.

Certain it is, that whilst no decided case has been cited in support of the Appellant's contention, there are many to show that according to the Benares and other Western schools, the power of a widow over property inherited from her husband is limited, and that on her death it passes to his heirs. The case of *Keerut Sing v. Koolahul Sing* (2 Moore's Ind. App. Cases, p. 331), where the property in dispute was situate in the District of Benares, is directly in point. To the same effect are the cases at pp. 32 and 189 of the second volume of W. H. Macnaghten's "Principles and Precedents of Hindu Law." Several of the cases set forth in the appendix to the tenth chapter of Sir Thomas Strange's work, with the remarks of Mr. Colebrooke and others thereon, also support this view. (See 2 Strange's "Hindu Law," pp. 402, 407, 408, 439.) The *Vivada Chintamani*, which has been recently translated by Baboo Prossunno Coomar Tagore, and is of high authority in the Mithila schools, and in [175] the District of Tirhoot, where some of the lands in dispute are situate, expressly shows that the widow has no power of disposition over the immovable property of her husband, and that his heirs take it on her death. (See pp. 261 to 263.) The doctrine has been assumed as incontestable in the more recent cases, like that of *The Collector of Masulipatam v. Caraly Veneata Narraïnappa* (8 Moore's Ind. App. Cases, p. 528). The result of the authorities seems to be, that although according to the law of the Western schools the widow may have a power of disposing of movable property inherited from her husband, which she has not under the law of Bengal, she is by the one law, as by the other, restricted from alienating any immovable property which she has so inherited; and that on her death the immovable property, and the movable, if she has not otherwise disposed of it, pass to the next heirs of her husband. There

is no trace of any distinction like that taken by the Pundit between ancestral and acquired property. In some of the cases cited the property was not ancestral.

Again, supposing that any of the property claimed in this suit were of the nature of Stridhun, and passed as such, the Respondents would seem to have a better title to it than the Appellant. The devolution of Stridhun from a childless widow is regulated by the nature of the marriage. There is nothing here to show that Choteh Bebee was not married according to one of the four approved forms. In that case her Stridhun would, according to the Mitacshara (chap. ii. sec. xi., art. 11), go to the Respondents as the collateral heirs of her husband. This view of the law is confirmed by two cases in 2 Strange's [176] "Hindu Law," pp. 411 and 412, and the comments of Mr. Colebrooke and others thereon. Upon this record, however, it seems admitted that the whole of the property in dispute was either inherited from the husband, Ramjee, or the fruit of its accumulations.

Their Lordships, then, are of opinion that Choteh Bebee had no power of disposition over the immovable property inherited from her husband, whether ancestral or acquired. Whether she had any such power over his movable property it is unnecessary to determine; since it has been found that no valid disposition of either kind of property has in fact been made. And this being the case, their Lordships are of opinion that, as between the parties to this record, the right to the possession of the whole of the property in dispute, on the death of Choteh Bebee, passed to and became vested in the Respondents.

The decree impeached is, therefore, substantially right. Whether it is altogether right in point of form may be doubted. It contains an order that the Respondents should recover from the Appellant the possession of the immoveable property, with mesne profits from the date of the institution of the suit; whereas the plaintiff seems to admit that the whole, or a large portion, of such property was at that date in the Respondents' possession, and made no demand for mesne profits. The error (if error there be) appears only in the formal decree—not in the judgment upon which it is founded. The recommendation which their Lordships will humbly make to Her Majesty is, that the decree of the Sudder Court be varied, and that it be thereby decreed that the Respondents (the Plaintiffs) be confirmed in the [177] possession of so much of the immovable property in the plaint mentioned as was in their possession at the date of the institution of the suit; and be declared entitled to the movable property; and that they do recover from the Defendant (the Appellant) so much (if any) of the said immovable property as was in her possession at the date of the institution of the suit, with the mesne profits of such last-mentioned property from the said date, together with the costs of suit in both Courts. Their Lordships, however, are of opinion that, notwithstanding the variation of this decree, the Appellant must pay the costs of this appeal.

[See *Bhugwandeem Doobey v. Myna Bae*, 1867, 11 Moo. Ind. App. 504; *Brij Indar Bahadur Singh v. Raneer Janki Koer*, 1877, L.R. 5 Ind. App. 15.]

J. P. WISE and JUGGUNATH ROY CHOWDRY,—*Appellants*; SUNDULONISSA CHOWDRANEE and Others,—*Respondents* * [Feb. 8, 9, 1867].

On Appeal from the Sudder Dewanny Adawlut, at Calcutta.

A nicka marriage between a Mahomedan and a woman of inferior station, and the legitimacy of the child of such marriage established.

The Sudder Court discredited the evidence in favour of such marriage (which the Principal Sudder Ameen believed), and without taking the direct testimony upon that fact into consideration, inferred from the probabilities of the case

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor.—The Right Hon. Sir Lawrence Peel.

that no such marriage had taken place. Held, by the Judicial Committee, reversing such decree, that although in a question of disputed fact regarding the credit due to witnesses, irrespective of the probabilities of the case, the appellate Court is reluctant to compare the conflicting decisions of the two Courts, and decide the case on a conflict of testimony nearly balanced, by a preponderance of probabilities, yet that, in the circumstances, though the Native testimony was open to suspicion, the duty of a Court of ultimate appeal was to judge from the evidence and not to infer from probabilities.

This suit was brought in the Court of the Principal Sudder Ameen at Dacca, by the Appellants and one Denomoney, since deceased, to recover possession [178] from the Respondent, Sunduloonissa Chowdranee and others, an eight-sixteenth annas share of the Zemindary, Talooks, and Khanaterreo of Shorail pertaining thereto, called Pergunnah, Russulpore, of which eight shares the Plaintiff, Denomoney, and her minor son, Fyzoollah Chowdry, claimed to be entitled to a four annas share, the Appellant, Wise, to a twelve and a half annas share; and the other Appellant, Juggunath Roy Chowdry, to a one and a half annas, the two shares last mentioned having been purchased from Denomoney.

The main question at issue in the suit was one of fact, whether a nicka (an inferior kind of marriage among Mahomedans, requiring only declaration and acceptance) had taken place between Akhlakoollah Chowdry, a Mahomedan, and Denomoney, and consequently whether Fyzoollah, the issue of such marriage, was the legitimate son and heir of Akhlakoollah Chowdry. The suit was heard before Moulvee Mahomed Nazim Khan, the Principal Sudder Ameen at Dacca, and by the decree of that Court it was found that Denomoney was married nicka to Akhlakoollah Chowdry, and that Fyzoollah had been acknowledged by the latter to be his son, and was entitled to an eight annas share of his property; and it further declared, that an alleged Will by Akhlakoollah Chowdry, set up by the principal Respondent, Sun-[179]-duloonissa, his elder wife, in favour of herself and her son, was a forged instrument, fabricated by her in order to deprive Denomoney and her son of their shares as co-heirs with her son of the estate of Akhlakoollah Chowdry; and it was further decreed, that a deed of marriage settlement, which was said to have included the property in dispute, relied on by Sunduloonissa as having been executed by Akhlakoollah, was not proved. The decree of the Sudder Dewanny Adawlut, composed of Messrs. H. T. Raikes, G. Loch, and H. V. Bailey, against which the present appeal was brought, decided that the question of marriage of Denomoney was to be determined before entering into the questions raised by Sunduloonissa in her defence, and without taking into consideration the evidence in support of the marriage; held, that the marriage had not been sufficiently proved, and reversed the Sudder Ameen's decree with costs. Hence this appeal.

A summary of the pleadings and evidence sufficiently appears in their Lordships' judgment.

The appeal was heard *ex parte*, and was argued by Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants.

Judgment was delivered by

The Right Hon. Sir Richard T. Kindersley (Feb. 25, 1867).—This case comes before their Lordships as an *ex parte* appeal, brought by Mr. J. P. Wise and Juggunath Roy Chowdry, two only of the original Plaintiffs, from a decree of the late Sudder Dewanny Adawlut at Calcutta, which reversed a decree of the Civil Court of Dacca in favour of the Plaintiffs.

The original Plaintiffs in the suit were Denomoney, [180] suing in her own right as a widow of a Mahomedan Zemindar named Akhlakoollah Chowdry, and as Mother and guardian of her minor son, Fyzoollah Chowdry, to establish their respective rights, as such, to the succession of Akhlakoollah, and the Appellants. Denomoney died pending the suit, which was continued, on behalf of Fyzoollah, by one Mamtazooder Chowdry, as his guardian. The Appellant, Wise, claims to be the Assignee of the whole of Denomoney's share, and of a portion of her son's share, under conveyances from her; and the other Appellant claims to be Assignee of a portion of

Denomoney's share, under a conveyance from Wise, and of a further portion of the minor's share under a conveyance from Denomoney.

The Defendants were Sunduloonissa Chowdranee, widow of Akhlakoollah Chowdry, Olioollah Chowdry, his son, and Meer Saadut Ally, the husband of a deceased daughter of Akhlakoollah, who survived him, and was entitled to share in his estate.

The object of the suit was to establish the marriage of Denomoney with Akhlakoollah, and the parentage and legitimacy of her son, Fyzoollah, as a son and heir of Akhlakoollah; and consequently the titles of both to succeed to Akhlakoollah, the widow to her share, and her son as a residuary legatee and heir of Akhlakoollah.

The suit could have no operation in any question which might hereafter arise as to the effect of Denomoney's conveyance of part of her son's property between him and both, or either of the co-Plaintiffs, Wise and Juggunath.

The cause was decided by the Judge of the Civil Court at Dacca, a Mahomedan, in favour of the [181] marriage of Denomoney, and of the legitimacy of Fyzoollah; but this decision was reversed by the Sudder Court on appeal, and from that last decree the two Plaintiffs, Wise and Juggunath, alone appeal, Denomoney having died previously to the institution of the appeal. Fyzoollah not joining in the appeal, is named by the Appellants as a Respondent. Their Lordships in this, as in other *ex parte* cases from India, are placed in a position of embarrassment and difficulty. It is not explained why Sunduloonissa, who is in possession of the estate, which is large, does not appear to support the decree in her favour. It is possible that had the case of the Respondents been argued before their Lordships, some view of it, amidst the conflict of evidence and the opposing presumptions which arise from the evidence, might have been offered to their Lordships' attention which has escaped their own careful and anxious consideration of the evidence and judgments. The Counsel for the Appellants, Sir Roundell Palmer and Mr. Leith, have argued the case with great candour and completeness. The whole evidence on both sides has been fully presented by them to the attention of their Lordships; but still in such a case there is room for much anxiety and hesitation. The Appellants ought not, however, to suffer by reason of this natural hesitation in a Tribunal about the correctness of its judgment, induced by an omission of the opposite party, nor ought the absence of the latter from the arena to weaken the presumption in favour of a judgment which is given on their side. The *onus* must still lie on the Appellants to show manifest error in the decree appealed from.

The pleadings in this case require attention. The [182] *plaint* assigns a date to the marriage, and treats the marriage as having taken place at the time when Denomoney's intercourse commenced, or a few days after; but in a subsequent portion of the *plaint* Denomoney states the celebration of the seventh month of her pregnancy, and the celebration of the birth of Fyzoollah, circumstances which, if truly alleged and proved, would suffice to prove her marriage and the legitimacy of her son. Consequently, on the *plaint* as framed, the Plaintiffs would be entitled to recover if this latter portion of the *plaint* were credited by the Court, and the allegations as to the ceremony and its time disbelieved. The *plaint* alleges, by anticipation, that Sunduloonissa caused a Will to be forged after her husband's death, and enters into arguments to prove that it was forged. The answer of Sunduloonissa sets up that Will, and asserts it to be genuine, and relies upon it. In that Will are contained a reference to and acknowledgment by the Testator, Akhlakoollah, of a Kabin, executed by him on his marriage with Sunduloonissa, which, if it were established, would show a prior title in her to the Zemindary by conveyance, on good consideration at her marriage, and so overrule entirely the claim of a second wife and her son; whereas a Will simply would be inoperative, even as to a third, without her assent. Sunduloonissa in her answer relies also on a Kaboolat executed to her by Denomoney, for a certain part of the estate, which is, if genuine, an acknowledgment of Sunduloonissa's title by Denomoney.

These documents are alleged by Denomoney to be forgeries.

The issues embrace all these questions; the marriage of Denomoney, the parentage of her son, [183] Fyzoollah, his legitimation, and the genuineness of the Will.

The pleadings in this case, as it has been observed, state the case of each party fully. Nothing comes out in the evidence on the main points in the cause of which some mention is not made in the respective pleadings of the parties.

The case alleged by Denomoney is, that she was married by a nicka marriage to Akhlakoollah at the time of her first consorting with him. She gives the date of the marriage in her plaint. Her case, therefore, as stated by her, excludes the supposition that Akhlakoollah raised her to the *status* of wife subsequently on her proving pregnant with a son which he acknowledged to be his. Still the case may be, that she was acknowledged directly or by implication as a nicka wife at some subsequent period of the cohabitation. In a native case it is not uncommon to find a true case placed on a false foundation, and supported in part by false evidence. It not unfrequently happens that each case, that of the claim and that of the defence, has to struggle through difficulties in which wicked and foolish managers involve it, by fabrication of evidence and subornation or tutoring of witnesses; and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found. The subsequent allegations in the plaint as to the celebration of the seventh month of her pregnancy, and the celebration of the birth of her son, suffice to let in this proof of marriage also.

The plaint does not disclose the history of Denomoney previously to her introduction into the house of Akhlakoollah. But the answer of Sunduloonissa supplies that omission. The evidence on each side [184] supports the general account about Denomoney, which the answer of Sunduloonissa contains in the sixth paragraph, viz., that she was a singing girl, and that she attracted the fancy of Akhlakoollah, who brought her to and maintained her in his house. It is said, in the answer of Sunduloonissa, that Denomoney was brought there whilst still very young. There is no evidence that her life had before then been licentious. The imputation then on her character at this time, which is found in the answer, seems to be founded on her profession of a public native songstress; and though this is not a profession in India which is followed by women of character, it is by no means a reasonable presumption that a very young girl, a member of such a company, should be in her early years grossly profligate. This, however, is what the answer of Sunduloonissa insinuates as to Denomoney, even at this early age, for she says of her that "instead of leaving of her former vicious habits, she continued to indulge her vicious passions"; and then she imputes to her four paramours in succession, to one of whom, Shumfutoollah Sirdar, she ascribes the parentage of Fyzoollah.

In viewing the evidence given in this case, it will be important to bear in mind that many of the witnesses for the Defendants support these allegations in the answer by evidence as inconsistent as the answer itself, by imputing to Denomoney the utmost continuing profligacy of conduct in this respect, so little likely to be condoned by a man of a race prone to jealousy and to the seclusion of their women, and yet not accounting for her continued abode in the Zenana. Thus she is represented as very profligate at a very early age, as continuing to be very profligate during her whole cohabitation in the Zenana of Akhlakoollah [185] intriguing with various men openly, without disguise, and to the knowledge of a hostile wife; and yet as continuing in the Zenana, preserving her *status* there unimpaired, whatever it was, and treated with outward demonstrations of respect. And what is not a little singular in the alleged life of this woman, to whom such early, such long-continued profligacy is imputed, is, that after the death of Akhlakoollah there is no evidence of any profligate life whatever, and she is found to be for a time received as an inmate in the house of a respectable Mussulman on the footing which she ascribes to herself of widow. All this story, therefore, of her previous and continuing profligacy is found on an examination of it inconsistent and incoherent; it does not cohere, and it is not consistent with any of the ordinary presumptions which would be formed on such an intercourse with the Master of a native house in that rank of life.

Some of the witnesses describe her as being in the Zenana not for the ordinary purpose of such an introduction, but simply to divert Akhlakoollah with her songs: others say that she was there for the ordinary purpose; Sunduloonissa says she was there as a slave girl, of which there is no proof or likelihood. She does not expressly deny the existence at one time of sexual intercourse between Akhlakoollah and Denomoney; but her answer puts forth that subsequent case of alleged impotency in Akhlakoollah to which many of the witnesses, including two native Doctors, depose.

The testimony of these Doctors, on examination of it, proves to be utterly worth-

less and inconclusive in a medical point of view, even supposing that any dependence could be placed on its truth.

For what purposes is this worthless evidence pro-[186]-duced? It is to prove that Akhlaqollah could not possibly be the father of Fyzoollah! but it proves also that he could not possibly suppose himself to be the father of the boy.

If the story were true which the answer sets up on this point, it is inconceivable that Akhlaqollah should believe himself to be the father of this child; for the story is, that he had become, some years before his birth, incurably unable, to his own knowledge, of having any sexual intercourse; that the knowledge of his complaint and its consequences was general in the house: and yet this very man, in this state, who had a legitimate son and daughter, is supposed to be keeping in his Zenana a woman who was conducting herself with open profligacy with menial servants, discovered and yet not dismissed. What reason does the answer of Sunduloonissa give for such a toleration of offences, generally so little likely to be pardoned by a Mussulman? She says, the truth is, that for her bad character he ordered her to be put out of the house, but kept her there at the request of other parties. No other explanation is given; that given is of so startling an improbability, by reason of its generality, and the entire absence of evidence to support it, as to be unworthy of any credit. Consequently the attempt has been made, and has wholly failed, to render this marriage improbable by reason of the turpitude of the alleged wife. The improbability is reduced to this: that he married a female by a nika marriage whom he might probably have obtained on easier terms as an inmate of his Zenana. The failure of this attempt and of this evidence to blast the character of the rival Claimant as wife certainly tends to strengthen the case that she sets up.

[187] There is no other intrinsic improbability, then, in this story of his having married, by a nika marriage, a girl of this profession, than that which attaches to it as a disreputable connection with one who probably would have made no difficulty about entering his Zenana on easier terms.

This is an improbability not of a light character, and the evidence to support it ought to be evidence probable in itself and free from suspicion. The burthen of the proof was of course on the Plaintiffs. It is impossible for their Lordships to form any opinion on the credit due to witnesses by reason of their *status* and apparent claims to be trusted, which is at all worthy to be compared to that which is formed by a Judge fit for his office, who sees them, hears them, and probably knows something of their antecedents. This cause between Mahomedans was tried before a Mahomedan Judge. Of the probability of the acts imputed to a Mahomedan Zemindar he is a more competent judge than either the European Judges of the Sudder Court or their Lordships can be. His judgment seems to have been carefully formed, and his observations upon the witnesses are entitled to a respectful consideration. Had their Lordships found that his observations upon the witnesses themselves were opposed to the opinion of the Sudder Court upon the credit due to those witnesses, irrespective of the probabilities of the case, they must necessarily have compared the conflicting opinions, and the result might have been a conclusion that the case must be decided, in a conflict of testimony nearly balanced, by the preponderance of probabilities. But if there be found, even in a Native case, positive credible testimony unimpeached, and credited by a Judge compe-[188]-tent to judge of the credit due to witnesses, it would seem to be equivalent to a total disregard of Native testimony, to say, despite of this positive testimony, we will put all evidence aside, and act alone on the probabilities of the stories and the inference from the conduct of the parties.

When the cause came by appeal before the Judges of the Sudder Court, they, unfortunately, instead of reviewing the whole case and expressing their opinion upon all the points on which the Court below had based its conclusions, which were conclusions of fact, narrowed their inquiry to the simple question whether the Plaintiff, Denomoney, had proved her marriage. Now, the Judge below, in dealing with that question, had brought, and properly brought, to the consideration of it certain inferences from the conduct of Sunduloonissa, which he judged corroborative to some extent of the truth of the Plaintiff's story. These were inferences which he drew from the fabrication of documents set up by the Defendants, and which

the Plaintiffs alleged to be forged, viz., an alleged Will, a Kabooleat, and certain receipts, which they (the Plaintiffs) alleged to have been fabricated to defeat a claim which the Defendants dreaded. The argument for the Plaintiffs was this: "Unless Denomoney's claims and that of her son were judged to be formidable, why this fabrication of documents?" The answer given below was, the documents are genuine. The Judge below found that they were forged. Their bearing on the issue as to the marriage was direct and important. Yet the Court of Error dismissed entirely from their consideration the question of the genuineness of those documents.

Again, the Judge below had believed the witnesses [189] for the Plaintiffs who deposed to the marriage of Denomoney and the legitimacy of her son, Fyzoollah. The Sudder Court did not examine at all into his reasons for believing the evidence. So far from saying that the evidence for the Defendants was more weighty, they attached but little weight to it; but they decided against and reversed the finding of the Judge below, merely on inferences from the conduct of Akhlakoollah and from that of Denomoney herself. Though they appear to have been mistaken in calling Denomoney a Hindoo, who, according even to some evidence of the Defendants, had conformed to Mahomedan usages, they say, and say truly, that the marriage was an improbable occurrence; but though improbable, it was certainly capable of being proved by direct and credible testimony, as to the value of which they forebore from inquiring. What were the inferences on which they acted? The first is that Akhlakoollah took no steps in his lifetime to make a public official declaration of any kind of his nicka marriage, and of the legitimation of his child. This child was little more than three years old when Akhlakoollah died. He died suddenly, of a suddenly contracted disease, cholera; and no inference against the marriage can reasonably be drawn from such light data. With respect to Denomoney's own conduct, her non-opposition to the mutation of names on the production of the Will is mainly relied on. But it is to be observed that a few months only elapsed between the death of Akhlakoollah and this act; that knowledge of it is not brought home to Denomoney; and that it would be too much to presume her, a native Lady whose very *status* was disputed, and without means, armed at all points with [190] means of knowledge, and pecuniary means, and friends able to assist her then. There is the less reason for making this presumption in the present case, that it plainly appears that Mr. Mackillup, the Magistrate who inquired into the circumstances and heard the evidence as to the alleged imprisonment of her, and the duress practised on her, did believe the story, and attributed the withdrawal of her charge to some influence exercised upon her. His view of the case gives an air of probability to her version of her conduct on this occasion. These presumptions, then, seem to their Lordships too feeble to overpower or materially to weaken the evidence in proof of her marriage and legitimacy on which the Judge below acted; and as the Sudder Court went not at all into the consideration of the evidence for the marriage and legitimation, and opposed only insufficient inferences to it, the weight of the opinion of the Judge below on these facts stands really unshaken.

The answer, it has been shown, sets up a Will; it also alleged that Denomoney accepted a Pottah of certain land, and gave a Kabooleat to the Defendant, and took certain receipts. These were all found by the Judge below to be fabricated documents. The Sudder Court expressed no opinion about them; and it remains for their Lordships now to do, unaided by any judgment of the Sudder Court, that which they would have been able to do if assisted by such judgment, viz., to examine the grounds which the Court below had for such conclusion. Their Lordships conceive that if in this case the Defendants are found fabricating documents, and getting up false testimony to meet the case alleged, the reasonable conclusion is that it must have appeared at least a formidable case. [191] But if it were, *prima facie*, a formidable case, then a considerable part of the oral proof of the Defendants must be false; for where would be the risk of meeting in a Court of Justice a claim of this nature, raised by a profligate woman, living an abandoned life in the house of her keeper, intriguing with his menial servants to his knowledge, and threatened by him for it with expulsion; bearing a child to one of his menial servants, and confessing to several her shame and the real paternity; never married, nor so

reputed to be, and her child never even reputed to be the son of her Master, notoriously and by his own confession impotent at the time of its conception, before, and continually after! If such a woman should have had the strange audacity to prefer so desperate a case before a Court of Justice, who would be found to espouse it!

The fabrication of the documents, then, supposes a formidable case at least, and a great part of the oral evidence presents one hopeless and desperate. A Native, even with an honest case, or his advisers, may fabricate evidence to meet a case which they fear, though they know it to be groundless; and if this woman and her child stood in an ambiguous relation to the deceased, and the real heir feared that a Court would draw in favour of marriage and legitimacy really groundless conclusions, from a plausible appearance of marriage and legitimization, the fabrication might, however wicked, not be fatal to a defence; but in this case the Defendant's oral evidence presents a desperate and hopeless case as the real case of the Claimants. If, then, the fabrication be established, proof of that fabrication supports the Plaintiff's case to some extent; for it lays a foundation for [192] and supports the evidence of those apparently respectable witnesses for the Plaintiff, who say that the deceased treated Denomoney as his nicka wife, so called her, and treated her child, Fyzoollah, as his own; and these acts would suffice to prove both marriage and legitimacy, even if the Court refused to believe, or hesitated to believe, the direct testimony as to the ceremony.

Their Lordships have, therefore, directed their attention, in the first instance, to that part of the judgment in the Court below which treats these documents as fabricated. Their Lordships regret to say that they have no hesitation on this part of the case; that they agree entirely in opinion with the Judge below, who pronounced them forgeries. The Kaboolat, when it is viewed in conjunction with the evidence which accounts for its being given, destroys itself. Denomoney is described on the face of it as the widow of Rajub, the man to whom she is said to have been contracted, and for whose dwelling-place she was about to build a house on the ground included in the lease. The recitals of course fall with it. The full recitals in all three of the title of the Defendant explains the motives for their fabrication, and the date of them shows the most incredible degree of inconsistency in the conduct of Denomoney, admitting and opposing about the same time the title of her Opponents. The Will also is surrounded with suspicion, which its internal evidence tends to confirm. It sets up a Kabin, never produced, and the non-existence of which, if it ever existed, is wholly unaccounted for. This Will is not likely to have been executed by the deceased in favour of his wife, with whom he had been at variance. The extract [193] from the Criminal register shows that such was the case. If her claim under the Kabin had been real, it would most probably have been produced as a check upon her husband during their active warfare: she represents her husband as merely her Surberakar; and if that were so, he must have been acting fraudulently in mortgaging her property. His management is not interfered with, even after he had, in his lifetime, suffered her trust property to be taken in execution for a debt of his own. This appears from the judgment of the Court in the mortgage suit. Taking all these circumstances together, the Court rightly judged the Will to be fabricated; and the observations of the Judge on the *factum* are most weighty. Turning, then, with this assistance to the examination of the positive testimony, this portion of it, at least, may be trusted, which shows the woman and her child to be the woman cohabited with, at least, and the child of the woman acknowledged and declared to be the legitimate child of the father; and this acknowledgment made in words which import a precedent nicka marriage. There appears to their Lordships to be no ground for distrusting the evidence, on which the Judge below relies, of the witnesses, Surenloollah and Juggonath Gooho, who, though they were not present at the nicka, nevertheless both speak to acknowledgment of parentage and acknowledgment of nicka. Without going the length of saying that the acknowledgment of a son as legitimate who might be a legitimate son of his acknowledger necessarily in all cases raises its mother to the *status* of a wife—a point which it is not necessary to discuss—it is clear that such an acknowledgment as the present, which acknowledges the [194] mother as wife, involves that consequence. Their Lordships, therefore, cannot find, on a careful consideration of the evidence, and of the reasons given by the

Judge in the Civil Court, in his finding on the facts, any sufficient reason for reversing his decision. His judgment seems to be founded on facts fairly inferable from the evidence, and sufficient under Mahomedan law to confer on the child the *status* of legitimate son, and on its mother, to whom the declaration extends, that of a lawful wife. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decision appealed from, and to confirm the decision of the Principal Sudder Ameen, with the costs of the appeal in the Sudder Court. The Respondents must also pay the costs of this appeal.

MUSSUMAT JARIUT-OLL-BUTOOL, *alias* HOSEIN BUKSH.—*Appellant*: MUS-SUMAT HOSEINEE BEGUM.—*Respondent* * [Feb. 5, 6, 1867].

On appeal from the Sudder Dewanny Adawlut, North-Western Provinces

Upon a question of fact depending on the effect to be given to parol evidence, and the credit due to witnesses, where the Courts in India have all concurred in one opinion, the Judicial Committee will not disturb the finding, unless it is clearly shown that the Courts below were in error [11 Moo. Ind. App. 208, 209].

The finding of the Courts in India—first, that there was not sufficient evidence to establish an alleged Mahomedan marriage; and secondly, that the evidence in support of an alleged Will was unsatisfactory; affirmed on appeal.

A Mahomedan cohabited for many years with a Mahomedan woman who had been a prostitute and who lived in his house. At his death she claimed to be his wife, and called witnesses to prove an actual marriage, but which fact she failed to establish. Held, that the Court of last resort could not presume, in such circumstances, that a woman, once a concubine, had, merely by lapse of time and propriety of conduct, become a wife, and that the ordinary legal presumption was that there had been no marriage [11 Moo. Ind. App. 209, 210].

The appeal in this case was brought against a decree of the late Sudder Dewanny Adawlut at Agra, which affirmed a decree of the Civil Court of [195] Zillah Jounpoor, made in a suit in which the Respondent was the Plaintiff, who claimed by right of inheritance to Mirza Abdoola Begg, her uncle, and to Abdoos Sumud Begg, her husband, both deceased; and the Appellant and others were Defendants, claiming in different rights through Mirza Abdoola Begg. By these decrees it was declared, that the Respondent was entitled to the whole of the movable and immovable estate and property left by Mirza Abdoola Begg, as his niece and heiress, and also as heiress to Mirza Abdoos Sumud Begg, her husband; but that she had failed to prove that the sum of Rs. 25,000, part of Mirza Abdoola Begg's property, had been taken possession of by the Appellant at Mirza Abdoola Begg's decease. These decrees also declared that the Appellant, who was originally a professional prostitute had failed to prove her asserted marriage with Mirza Abdoola Begg; and also that she had failed to establish a Will set up by her as made by Mirza Abdoola Begg, dated the day previous to his death; and that she had also failed to prove a deed of relinquishment of right in respect of all future claims to the estate of Mirza Abdoos Sumud Begg, alleged to have been executed by the Respondent. These decrees [196] also declared against the asserted claims of all the other Defendants, among whom were, first, one Ruzee-on-Nissa, *alias* Rujjee Khanum, who also set up a marriage with Mirza Abdoola Begg; and, secondly, her daughter, Uzeezool Nissa, *alias* Inamum, who claimed to be also the legitimate daughter of Mirza Abdoola Begg; by the latter. Both of these Defendants denied the alleged marriage

* Present: Members of the Judicial Committee,—The Right Hon. Sir William Erle, The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor.—The Right Hon. Sir Lawrence Peel.

and the execution of the Will set up and relied on by the Appellant; and she on her part denied the elder co-Defendant's marriage, and the legitimacy and parentage of her daughter, the younger co-Defendant.

The facts of the case are as follow:—

One Mirza Ashoor Begg, deceased, had four sons, named Mirza Abdool Ehud Begg, Mirza Abdool Juleel Begg, Mirza Abdoola Begg, and Mirza Abdool Kureem Begg.

The property in dispute was not claimed as ancestral property derived from Mirza Ashoor Begg, but was stated to have been acquired partly by Mirza Abdool Kureem Begg and partly by Mirza Abdoola Begg. Mirza Abdool Ehud Begg and Mirza Abdool Juleel Begg died before their brothers, Mirza Abdool Kureem Begg and Mirza Abdoola Begg. The former left a son, Mirza Abdoos Sumud Begg, and the latter a daughter, Mussumat Hoseinee Begum, the present Respondent. Mirza Abdoos Sumud Begg and Mussumat Hoseinee Begum intermarried after the decease of their respective parents. It was alleged by the Respondent that Mirza Kureem Begg, who had no issue, gifted his entire estate to Mirza Abdoos Sumud, and put him in possession. After the decease of Mirza Abdoos Sumud, the name of Mirza Abdoola Begg was recorded in the Registry in respect [197] of the estates which had belonged to Mirza Abdool Kureem Begg in his lifetime. The Respondent accounted for this fact by stating that she and the other females, owing to living in seclusion, did not apply for mutation of names on the Registry. The Respondent alleged that her possession continued, although her name was not registered, and that, as regarded the estate of Mirza Kureem Begg—which was, as she alleged, by virtue of the gift the property of her husband—she was entitled to the entire property. The Respondent admitted that the moveable and immovable property, with the exception of the acquired property of Mirza Abdool Kureem Begg, was acquired by Mirza Abdoola Begg, under whom the Appellant claimed.

On the 2nd of November, 1859, Mirza Abdoola Begg died childless. At his death an Order was passed by the Civil Court that the property left by him should remain attached until it was ascertained who was entitled to succeed to it. Among other Claimants, the Appellant presented a petition to the Judge in the Civil Court, in which she alleged that the deceased executed a Will in her favour, and had it registered; and that under the terms of the Will, and by right of inheritance, as the widow of the deceased, she was entitled to proprietorship and possession of the entire estate, real and personal, and all other property of the deceased.

The Respondent, by her answer and claim, alleged that the Appellant was a prostitute, and denied that she was Mirza Abdoola Begg's lawful wife; and asserted that she (the Respondent) was his lawful heir according to Mahomedan law; and that the Will was a fabricated instrument.

[198] Rujjee Khanum also presented a petition of claim, denying the will, alleging it to be fabricated, also denying the marriage of the Appellant with Mirza Abdoola Begg, and setting up her own claim as the married and lawful wife of the deceased Mirza, and his rightful successor.

Another Claimant, Imamum, the daughter of Rujjee Khanum, alleged that she was the daughter of the loins of Mirza Abdoola Begg, born to him by Rujjee Khanum, his lawful wife by marriage; and insisted that, with the exception of one-eighth share of the latter as such wife, the entire estate and property of Mirza Abdoola Begg descended to her as his heirress; and also stated that the Appellant was never married to him, and that the Will set up by her as aforesaid was fabricated.

After summary proceedings respecting heirship and the appointment of Curator, the Respondent brought a suit in the Civil Court of Jounpoor, as the widow Abdoos Sumud Begg, and as niece and heirress of Abdoola Begg against the Appellant, describing her as a courtesan (Tuwaif); Rujjee Khanum and Uzeezool Nissa, *alias* Imamum, her daughter, describing them also as courtezans; and Agha Ishmael Ullee Khan and Mukhoo Khan as Defendants. Her title was stated to be founded on a right of inheritance, and to extend to the whole of the movable and immovable estate left by Abdoos Sumud Begg, and by Mirza Abdoola Begg, her uncle, and she sought to set aside the Will set up by the Appellant, who the Respondent alleged had no rights, and also to render void the claims of all the other Defendants.

The Appellant by her answer set up for the first time a deed of relinquishment,

dated the 2nd of Oc-[199]-tober 1846, purporting to have been executed by the Respondent, of the entire property left by her husband, Abdoos Sumud Begg, in consideration of a salary of Rs. 15 per month, and insisting that thereby the Respondent's claim to the property was barred, as well also by effluxion of time since the death in 1841 of her husband. The answer then alleged that for twenty-two years the Appellant, having left her family profession, and becoming penitent, was lawfully married to Mirza Abdoola Begg, with a dower of Rs. 51,000, fixed in consultation with Moulvee Gholam Yaheer Khan, Mooftee and Principal Sudder Ameen of Benares, who performed the ceremony of marriage. The answer insisted that her dower was by Mahomedan law a charge on the estate, payable thereout prior to expenses and claims of inheritance, and that, therefore, and under the deed of relinquishment, and also the Will of Mirza Abdoola Begg, no one else but herself was entitled to the entire estate of the latter. The alleged Will was stated by the answer to have been made and executed by Mirza Abdoola Begg while in his perfect senses, and to have been registered, and to have devised the whole and sole proprietorship and right in his estate to the Appellant, who was therein acknowledged to be his wife; and the answer concluded with a denial of the alleged misappropriation by her of the sum of Rs. 25,000 in cash, as, after Mirza Abdoola Begg's death, the property was placed under attachment.

The two other Defendants, Rujjee Khanum and her daughter, Imamum, filed a joint answer, in which they denied the Plaintiff's right, and alleged that the whole estates were the sole property of Mirza Abdoola Begg at his death; asserting that about forty years previously the Defendant, Rujjee Khanum, was [200] lawfully wedded to him, and lived in his house; that three years after the marriage the co-Defendant was born by her, and was the daughter of Mirza Abdoola Begg; that he had subsequently married her to Syud Usjhur Ulee Khan; that the Defendant, Rujjee Khanum, was supported by and lived with the deceased until his death; and that after deducting a two annas share, as the rights of the Defendant, Rujjee Khanum, as widow, the remainder was the property of her daughter. They denied the genuineness of the Will set up by the Appellant.

The Respondent traversed the different allegations as to the marriages, paternity of the daughter, the Will and deed of relinquishment, respectively in the two answers relied on, stating that the Appellant, as well as Rujjee Khanum, was a courtesan, and as such, lived in succession with Mirza Abdoola Begg, the latter retiring into a separate house and maintaining herself to make way for the former, who succeeded as Mirza Abdoola Begg's mistress.

The Respondent examined witnesses to prove her relationship to the deceased Mirza Abdoola Begg; the property acquired by her husband, Abdoos Sumud Begg, from his uncle Mirza Abdool Kurreem Begg; the substitution on his death of the name of Mirza Abdoola Begg in the Government Records for convenience and with her consent, as a female living in seclusion unable to transact business; and his subsequent death without leaving any issue or widow, but leaving her his niece as such nearest relative and heiress. Some of these witnesses also deposed that the Appellant had been a prostitute, and had never been married to Mirza Abdoola Begg; that the Will and deed of relinquishment set up [201] by her were fraudulently fabricated at her instance; and that not only the alleged Will was not executed or sealed by the deceased, but that he was in a state of insensibility at the date thereof, and further that the alleged deed of relinquishment was not executed by the Respondent. The Appellant put in evidence the Will of Mirza Abdoola Begg, and the deed of agreement, dated the 2nd of October, 1846, said to have been executed by the Respondent, and filed depositions of witnesses, taken in the proceedings respecting the administration of Mirza Abdoola Begg's estate, to prove the Will; and, further, that she was the lawful wife of Mirza Abdoola Begg, regularly married to him, with a dower of Rs. 51,000; that he had repeatedly acknowledged her as his lawful wife; that the deed or Will was made by Mirza Abdoola Begg on the 2nd of November, 1846, and registered before his death; and that the Respondent had acknowledged the agreement of the 2nd of October, 1846, and received an allowance of Rs. 15. It was not satisfactorily shown by the Respondent's witnesses that the Appellant even took the Rs. 25,000 alleged by her from the house of Mirza Abdoola Begg.

The hearing of the suit took place before H. G. Astell, Esq., the Judge of the Civil

Court of Jounpore, and by the decree of that Court, dated the 30th of April, 1861, the evidence given by the Appellant, with reference to her claim as widow, was observed upon as follows:—"With respect to her marriage with the deceased, the Defendant, Hossein Buksh, has grounded her proof on the depositions of thirteen witnesses, who were examined by the Judge of Benares. Their statements are to the effect that, although Hosein Buksh was originally a professional prostitute, and in that character first formed her connection with [202] the deceased, that about twenty years ago the deceased regularly married her. Some of these witnesses describe themselves as eye-witnesses to the ceremony, and others deposed to having heard deceased on several occasions acknowledge that he had married her. These depositions, however, have not at all satisfied me that any marriage took place, or that the Defendant, Hosein Buksh, was ever looked upon, or considered in the light of a wife, either by the deceased or by the brotherhood. It is remarkable that the persons who are stated to have assisted at the ceremony, *i.e.* those of rank or position, are dead; whilst it cannot but be considered as prejudicial to this plea of the Defendant, that she has considered it necessary to get a Will executed in her favour by the deceased when he was certainly very ill, and very near his death. I am of opinion, that Hosein Buksh has no claim as a wife of the deceased." The judgment then dealt at considerable length with the depositions filed by the Appellant in respect of the Will, under which she claimed as sole devisee, and the Judge concluded by finding against the Will, declaring that he rejected it on the oral evidence filed by her in support of it. "This evidence is, I consider, worthless in the extreme, and bears falsehood on its face. The witnesses, with a view of showing that the deceased was sensible to the last, have all stated that the deceased's (Mirza Abdoola Begg's) complaint was consumption; but many of them detail at length how, just before the Will was made, the deceased gave long detailed instructions for its preparation, how he called for his spectacles and put them on, and how he was too weak to either sign his name or affix his seal, which was then affixed by another party. I reject this Will *in toto*." The judgment then observed on the evi-[203]-dence in support of the deed of relinquishment, alleged to have been signed by another person for and on behalf of the Respondent, and declared against it, stating that it was the opinion of the Court that the witnesses examined in support of the deed had all perjured themselves. The judgment also declared that the Defendant, Rujjee Khanum, had been a prostitute by profession, and had failed in proving that she was ever married to Mirza Abdoola Begg, or that her daughter, the Defendant, Imamum, was his child. The Respondent's claim of Rs. 25,000 was disallowed by the judgment, which decreed to the Respondent the whole of the property left by the deceased Mirza Abdoola Begg, with costs.

The Appellant appealed to the Sudder Dewanny Adawlut at Agra, and the other two Defendants, Rujjee Khanum and her daughter, Imamum, also appealed against the decree.

On the 23rd of August, 1862, the two appeals were heard together, by Alexander Ross and William Roberts, Esqrs., Judges of the Sudder Dewanny Adawlut, and they delivered the judgment and decree of the Court, and stated at length their reasons, thereby affirming the decree of the Judge of the Civil Court of Jounpoor, and dismissed both the appeals with costs. In their judgment the Judges commented on the proofs filed by the Appellant as follows:—"We would observe *in limine* that a great deal of the evidence of witnesses taken in a miscellaneous case relative to the party entitled to administer to the estates of the deceased Mirza Abdoola Begg, has been received in this case, without the examination of these witnesses *de novo*. But we think the Judge should not have contented himself with copies of depositions, but should have insisted on the parties [204] formerly examined being again produced, unless it could be shown that they were unable to attend. It was necessary that these witnesses should again have been subjected to a rigid examination, so that all the light which could have been thrown upon the circumstances of the deceased should have been brought to bear on this suit. Still, as the inadmissibility of such secondary evidence was not urged in the Lower Court, we have thought proper to allow it to weigh in this instance, *valeat quantum*. The decree declared, as well on the last-mentioned evidence as on the other evidence in the appeals, against the Appellant and her co-Defendants on each of the issues, negating the alleged two

marriages respectively, the alleged Will of Mirza Abdoola Begg, the alleged deed of relinquishment of the Respondent, and the paternity of the Defendant, Imamum.

The appeal was brought by the Appellant alone from this decree of affirmance.

The Attorney-General (Sir John Rolt, Q.C.), and Mr. Almuric Rumsey, for the Appellant.—The evidence given by the witnesses establishes, according to the Mahomedan law, the ceremonies of a regular marriage between the Appellant and the late Mirza Abdoola Begg, and consequently her title as widow and one of his heirs to the whole or part of his estate. Too much weight was attached by the Courts below to the irregular life the Appellant had led previous to being taken into Mirza Abdoola Begg's house. His treatment of her, and her acknowledged character as a wife by the family, was enough to satisfy the requirements of the Mahomedan law, even in the absence of proof of a regular marriage, to raise the presumption that she was married to him. [205] By the Mahomedan law marriage will be presumed or inferred from cohabitation. It differs from the Scotch law of marriage by habit and repute; Bell's Dict., *voce* "Habit and repute," p. 459 [Ed. 1838]; Erskine, B. I. tit. 6, s. 6; as the latter law presumes a pre-existing contract, but no contract or ceremony is necessary by the Mahomedan law (see Baillie's Dig. of Mooh. Law, p. 4 [Ed. 1865], from which it appears that offer and acceptance is a necessary condition). Marriage has been presumed from cohabitation alone, and legitimacy of child arising from that presumption established: *Mahomed Baucker Hoossain Khan v. Shurfoon Nissa Begum* (8 Moore's Ind. App. Cases, 136); *Khajah Hidayat Oollah v. Rai Jan Khanum* (3 Moore's Ind. App. Cases, 295); Macnaghten's Princ. of "Moohummudan Law," p. 58. There can exist no distinction between cases of marriage where there is no child born and the principles with respect to presumption of marriage and legitimacy of child laid down in those authorities. [Sir Richard T. Kindersley: Is there any case of a woman who had been a Nautch girl, or prostitute, having from cohabitation been held to be a wife?] It is admitted that the *status* of a concubine and the *status* of a wife are different; but if for a long period a concubine is treated as a wife and so acknowledged, she acquires the *status* of a wife. The strictness of seclusion generally adopted by a Mahomedan wife is not adopted in every case.

Next, we contend, that the deed or Will of Mirza Abdoola Begg, dated the 2nd of November, 1859, was proved to have been duly executed by him when he was of testamentary capacity, registered on the same day, and operated either as a gift, *inter vivos*, or [206] as a general devise or bequest, to the extent allowed by Mahomedan law, namely, of one third: Hedaya: Vol. 4, p. 468-9; *Mussumaut Soobhane v. Bhetun* (1 Ben. Sud. Dew. Rep., 317). It bears internal evidence of truth. The consent of kindred to a Will does not extend to distinct kindred like the Respondent. Apart from any question as to the validity of this instrument, the Appellant is entitled to her dower of Rs. 51,000 as a primary charge on the estate of her late husband.

In any circumstances, the Respondent, as widow of Mirza Abdoos Sumud Begg, could be entitled only to a distributive share of his estate. There is no proof that she was the adopted daughter of Mirza Abdoola Begg, and her only claim could be as one of his distant kindred. She can have no title whatever as long as any sharer is in existence. Macnaghten's "Princ. of Moohummudan Law," pp. 8, 53.

Sir R. Palmer, Q.C., and Mr. Leith, for the Respondent, were not called on to address their Lordships.

Their Lordships' judgment was delivered by

The Right Hon. Sir James W. Colville (Feb. 24, 1867).—This is an appeal from a decision of the late Sudder Dewanny Adawlut of the North-Western Provinces of India, which affirmed a decision of the local Court of Jounpoor in favour of the Respondent, the Plaintiff in the suit. The Plaintiff sought to recover certain movable and immovable property specified in her plaint "by right of inheritance to Mirza Abdoola Begg, her uncle and ancestor, and also to Mirza Sumud Begg, her husband." The plaint con-[207]-tained a detailed description of the property sought to be recovered. The principal Defendants were Mussumat Hosein Buksh, Mussumat Ruzzee-ool-Nisa, alias Rujjee Khanum, and Mussumat Uzeez-ool-Nissa, alias Mussumat Imamum.

The first and second-named female Defendants claimed each to be a widow of the deceased Abdoola, but each denied that the other was ever married to Abdoola, each alleging the other to have been his mistress and not his wife. The third female Defendant claimed to be the legitimate daughter of Abdoola by his alleged wife, her mother, the second female Defendant. The first female Defendant, the present Appellant, also set up a Will alleged to have been made in her favour by Abdoola the day before his death, by which he bequeathed to her, by the description of "my married wife, Mussumat Jairut-ool-Buttool, alias Bebee Hosein Buksh," all his movable and immovable property, subject to certain provisions in favour of the Plaintiff, to which it is not necessary to allude further. The validity of this Will was disputed both by the Plaintiff and by the second and third Defendants. The Civil Court decided against the Will, and also against both the alleged marriages, and the alleged title of the third female Defendant. On appeal to the Sudder Dewanny Adawlut the decision was affirmed. The first female Defendant alone has appealed to Her Majesty in Council from the decision of the Sudder Dewanny Adawlut. The second and third Defendants have not appealed, and, therefore, their interests are put out of the case entirely.

In the case of *Naragunty Lutchmeedaramah v. Vengama Naidoo* (9 Moore's Ind. App. Cases, 87), [208] their Lordships said: "It is not the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of India merely on the effect of evidence, or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have, and when they have all concurred in opinion, it must be shown very clearly that they were in error in order to induce us to alter their judgment."

Their Lordships, after a very careful attention to the evidence, and to the arguments addressed to them on the part of the Appellants, are of opinion, that there is wanting in this case that clear indication of error in finding against the marriage and the Will which would be necessary to take this appeal out of the operation of the above salutary rule.

The Sudder Court thought the evidence as to the marriage of the Appellant insufficient. The same Court concurred with the Court below in thinking the evidence in support of the Will untrustworthy. They say, "We concur with the Judge in discrediting the evidence in support of the Will. We consider the attendant circumstances as altogether improbable and unworthy of belief."

Is error clearly manifest in these conclusions? Is the evidence clearly sufficient to prove either issue? The claim to be declared the wife of the deceased would establish, or oral testimony, a heavy charge on the estate of a deceased person to the amount of Rs. 51,000, and the Will is one made *in articulo mortis*. Some of their Lordships can Judge, by their experience of precedent cases before this Committee, of the dangers likely to ensue if the Courts of [209] Justice in India did not require cogent proof in such cases.

If it were once conceded that a woman once a concubine could be converted by judicial presumptions into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, when and after what period of time should such presumption arise? The ordinary legal presumption is, that things remain in their original state. Were, then, the Courts below well founded in treating the original connection by the Appellant with the deceased Abdoola as an illicit connection? The evidence was conflicting. She herself admits that she was once a prostitute. It is true that she alleges penitence and a change of life, and some of her witnesses say that she had relinquished the life of a prostitute before her intercourse with Abdoola began; and one witness says that she had discontinued it five years before she came to live with Abdoola. But no evidence is adduced to prove what was her intermediate employment, or what were her means of maintaining herself in the interim. She declares the deceased to have been a man entertaining one mistress whilst his wife was living. The Court had to determine amidst conflicting evidence, whether it was more likely that he should make a woman of that class his wife, and settle on her a very large dower, or that he should induce her to live with him as his mistress, displacing the former favourite? The evidence was conflicting, and the finding cannot be viewed as a decision against the weight of evidence. If, then, the Courts below were

justified in finding that the original connection was illicit, where is the evidence of any change in its [210] character? If length of time be invoked as a reason for considering the previous connection as lawful, the Appellant herself is found placing no reliance on mere length of intercourse with respect to the second Defendant's claim to be regarded as a wife: and if the subsequent removal to a different house of that lady be insisted on as an argument that she was not a wife, the answer seems to be that the mere removal into and maintenance in a separate house is not at all inconsistent with the *status* of a regularly married wife, superseded either by wife or concubine, but undivorced. The Appellant, indeed, is not content to rely on any presumption from length of time; she alleges and calls witnesses to prove an actual marriage ceremony, accompanied with some degree of publicity, the presence of witnesses, and the oral assignment of a large sum by way of dower.

The witness, Iman Buksh, the Physician, deposes to this effect, that only one year before the death of Abdoolla, the latter assured him that the Appellant was his wife; that the witness asked the question in consequence of the Appellant referring him to the deceased for information on the point, asserting that she was a wife, and that the second Defendant was not, and that the Mirza would so inform him. Now, this witness describes himself as having attended both on the Mirza and on the Appellant, not as a mere stranger in the house. But what origin can reasonably be ascribed to this inquiry as to her *status*, unless some ambiguity existed in relation to it; and how is this ambiguity consistent with a marriage celebrated from the first before witnesses, with an outspoken assignment of a large dower in the husband's house? Can any ignorance or uncertainty [211] about such a *status* exist at all in the house of the husband, with such an introduction of a new wife, and such an open celebration of a marriage? The evidence, therefore, does not cohere, and the Court might well distrust it; nor could their distrust be reasonably found fault with in a case where each alleged wife brought forward the same kind of evidence of an open celebration, and each treated as undeserving of credit the allegations and evidence of the other.

With respect to the Will, the improbabilities against it are strong, and the evidence in its favour weak. It is deposed that the second female Defendant was present during the time that the Will was being dictated, rough copied and clean copied; that a provision was made in the Will for her expenses in case she proceeded on a pilgrimage to Mecca, and that this was done on her request. She is, therefore, described as cognizant of the Will, and assenting to it in some degree by accepting a contingent benefit under it. Yet she was united with her daughter and son-in-law in interest, and throughout acted in conjunction with them. She claimed to be a wife, and sought to establish her daughter as an heir. Her assent to the Will is, therefore, most improbable, and the supposition is rendered more so by this, viz., that at this very time her son-in-law, Usghur, was making a public protest by way of petition addressed to a public Officer, claiming his interference and presence at the house of Abdoolla, to prevent a Will being executed in the name, as he alleges, of Abdoolla, then a senseless and dying man. Is the second alleged wife to be supposed acting at variance with herself without adequate [212] motive, and in so short a period of time to return to opposition? It appears that she had two years before protested against a description of herself as "prostitute" on a public assessment, and had been described as wife on her own application on more than one public document. She was, therefore, claiming to be a wife. The reason for describing her as present and acquiescent at the time of the preparation of the Will is obvious. That a Mahomedan of high position and wealthy, a man of business besides, should, with a view to prevent disputes in his family, make such a Will, as likely to foment as to quell them, and omit to make that disposition which would, had her story been true, secure to the Appellant her dowry of Rs. 51,000 and her share as widow, is not a probable occurrence in itself. One would expect him to act with the advice and aid of his usual Mooktah, and not defer the settlement of disputes in the confused state of his family connections until his last hours, and then to put himself in the hands of people not previously employed by him; on the other hand, if a Will, whether from fraudulent or merely mistaken prudential motives, was to be put forth, though without his concurrence, as his, the preparation and execution would be delayed until his end was so near, his strength so reduced, and his mind so inert,

that he would probably be found incapable of opposition to a proposition pressed upon him. Between these conflicting views of the subject the Courts below were called on to decide, and their conclusion does not appear to their Lordships unreasonable or against the weight of evidence.

Their Lordships think, therefore, on a careful view of the evidence, that the case is not taken out [213] of the operation of the rule laid down in *Naragunty Lutchmeedavamah v. Vengama Naidoo* (9 Moore's Ind. App. Cases, p. 87), which has been frequently asserted and constantly acted on. Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed, with costs.

[See *Bhowan Doss v. Sheikh Mahomed Hossein*, 1871, 13 Moo. Ind. App. 350; *Mussumat Mullerka v. Mussumat Jumeela*, 1872, L.R. Ind. App. Supp. Vol. 141.]

MEETHUN BEBEE,—*Appellant*; BUSHEER KHAN for self, and as guardian of Zurbut Beebee, minor, and heir of Moneer Khan, deceased, and Bukht Banoo,—*Respondents* * [Feb. 9, 1867].

On appeal from the High Court of Judicature in Bengal.

Where the issue is one of facts only, and there has been concurrent judgments by the Courts in India, the Judicial Committee will not disturb such findings, unless they are satisfied that the Courts below were wrong in the conclusions they arrived at from the evidence.

The Respondents brought the present suit in the Court of the Principal Sudder Ameen of the Zillah of Cuttack, against the Appellant.

The suit was in the nature of an action of ejectment, to oust the Appellant from possession of a certain Zemindary, land and houses situate at Cuttack, and to obtain possession of personal property, cash and jewels. The Respondents claimed the same as [214] the nearest relations and only heirs, according to the Mahomedan law of one Agha Jan Khan deceased; and that the property in question was, in its entirety, the absolute self-acquired property of Agha Jan Khan. The case of the Appellant, the widow of Agha Jan Khan, was that the Respondents had failed to prove, either that they were such relatives, or that the proprietary right in the entirety vested in Agha Jan Khan, and she contended that the estates were acquired by her father, Burkhordar Khan, and by the use in trade and business of the property and effects of one Omar Khan, her first husband, and her son, Timour Khan, deceased, to which, with its accumulations, the Appellant, as widow and mother, was alone entitled, after the claim of Ismail Khan, uncle and heir of the latter; and she further insisted that, even if Agha Jan Khan could have claimed any share, by reason of his carrying on business and trade for her, at his death she became, as his widow, entitled to such share, and to the sum of Rs. 20,000, the amount of her Dain mohr, or dower, settled on her marriage with Agha Jan Khan.

The case entirely depended upon evidence. The material facts are stated in the judgment.

The decree of Baboo Tarakant Biddyasager, the Principal Sudder Ameen, was partly in favour of the Respondents, and partly in favour of the Appellant, the Court decreeing certain shares to each of the parties in the real and personal estate in question; with this decision both parties were dissatisfied, and appealed to the High Court of Judicature at Calcutta. That Court, consisting of H. T. Raikes, Esq., and Sumbhoonath, Pundit, allowed the appeal of the Respondents, and altered the decree of the Principal Sudder Ameen, by giving them a larger share in the real [215] and personal estate of Agha Jan Khan, and dismissed the Appellant's appeal. Hence the present appeal to Her Majesty in Council.

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor,—The Right Hon. Sir Lawrence Peel.

The appeal was argued by Mr. Leith, for the Appellant, and Mr. Pontifex, for the Respondents.

Judgment was reserved, and delivered by

The Right Hon. Sir James W. Colville (March 8, 1867).—The Appellant is the widow of Agha Jan Khan, a native of Cabool, who died domiciled at Cuttack in July, 1857. Her father was one Bukhordar Khan, also probably a Pathan by origin, who, after carrying on some kind of business at Cuttack, is said to have gone into the Dekhan with Elephants, horses, and other merchandise, and to have died there in the early part of the present century. He left a widow, Fatima; the Appellant, his only daughter; and a son named Hossein Khan. The Appellant married first an Afghan named Omar Khan, who died some time in the year 1824; and very shortly after his death she married his near relation, Agha Jan Khan. By Omar Khan she had a son, Timour Khan, who died in 1829. In the year 1831 there appeared at Cuttack one Ismail Khan, who claimed to be the brother of Omar Khan, and, as such, entitled to share in that portion of his estate which had descended to his son Timour Khan. Agha Jan Khan and the Appellant compromised this claim for a sum of Rs. 300, and the release of a debt of Rs. 721. After that transaction Agha Jan Khan carried on business at Cuttack, became the registered and ostensible proprietor of the [216] Zemindary Talook, which is the principal subject of dispute in this cause, and the apparent owner of the other property which the Courts below have found to have belonged to him at the time of his death.

The Respondents claim to be the co-sharers and residuaries, who, according to the Mahomedan law, are entitled to divide the estate of Agha Jan Khan with his widow. They contend that Koollee Khan, the common ancestor, had two sons, of whom Morad Khan was the father of Agha Jan Khan, and of the female Respondent, Bukht Banoo; and the other, Nidda Khan, was the father of the before-mentioned Omar Khan and Ismail Khan; and that Ismail Khan was the father of the Respondents, Busheer Khan and Moneer Khan, and of one Goolmer Khan, who is dead. Claiming under this title, they instituted the present suit for the recovery of their respective shares of the Zemindary and other property alleged to have belonged to Agha Jan Khan at the time of his death from his widow, who was in possession of it.

The Appellant has contested their title to sue; she has claimed the sum of Rs. 20,000 as due to her from the estate of Agha Jan Khan as the stipulated amount of her Dain mohr, and, on the grounds which will be hereafter considered, has denied that any part of the property claimed belonged to her late husband. The first two questions may be very shortly disposed of.

Their Lordships, in the course of the argument, intimated that they considered the title of the Respondents to be established.

It has been affirmed by the concurrent judgment of the two Courts below, which, the issue being one of fact, their Lordships, according to the ordinary [217] course of this Committee, would not disturb unless they were satisfied that it was wrong. They believe, however, that it was right. It was, no doubt, difficult for the Appellant to disprove the pedigree of a family whose domicile was in Afghanistan; and the omission of Ismail Khan to mention in the petition, which is in evidence, his relationship to Agha Jan Khan, may be a circumstance of suspicion. But it was not necessary for him to state that relationship in order to make out the title, which he was then asserting, as co-heir of Omar Khan's son; and on the other hand, we have indisputable evidence that Agha Jan Khan received into his family, and recognized as kinsmen, first, Goolmer Khan, and afterwards the Respondent, Moneer Khan. The identity of that Goolmer Khan with the Goolmer Khan of the pedigree might be disputed; but there can be no doubt as to the identity of Moneer Khan. The persons, therefore, who are entitled to share the estate of Agha Jan Khan have been correctly ascertained. Again, both the Courts below have held that the Appellant has failed to establish her claim to the Dain mohr; and nothing has been urged on the present appeal which induces their Lordships to doubt the correctness of that conclusion. Therefore the only substantial question in this appeal is, to what extent, if any, is the property which is the subject of the decrees in the Courts below to be treated as the estate of Agha Jan Khan.

The Respondents, relying mainly on the ostensible ownership, insist that the whole of it is to be so treated. The case of the Appellant is, that no part of it, in fact,

belonged to her husband ; that it was acquired from the proceeds of a business carried on with funds left by her father, Burkhordar Khan ; [218] that those funds and that business belonged to herself, her mother, and her brother, as the co-heirs of Burkhordar Khan ; and that her late husband, though the " gerent " of the business, and the ostensible purchaser and registered holder of the Talook, was a mere Manager and Trustee for her and her family.

Of the issues recorded in the suit by the Court of First Instance, the second and the fourth both related to this question of title to the property. Under the first of these, the Respondents had to prove that " the whole of the disputed property was the own property of Agha Jan Khan." Under the other, the Appellant had to establish that " the Zemindary and other property claimed had been inherited by her from her father's, mother's, and brother's estate, and belonged to her ; and that Agha Jan Khan had no right thereto."

Both the Courts below have held, and in their Lordships' opinion properly held, that the Appellant has failed to prove this last issue, and to substantiate the case set up by her. She relied mainly on the oral testimony of witnesses whom both Courts have pronounced to be untrustworthy. Of their evidence, some part was directed to prove the wealth of Burkhordar Khan and of his family, and the poverty of both the husbands of the Appellant and of their family ; other parts went to show that the Zemindary was purchased with funds supplied by Fatima, and even that she was recognized as Zemindar, and received the rents. There is a failure of proof that the property of Burkhordar Khan (and it is very uncertain what was the amount of it) furnished the capital on which Agha Jan Khan traded : there is no proof that the business carried on by Burkhordar [219] Khan was an established, continuing business. His dealing in horses and elephants seems to have been something distinct and of a different nature from the money-lending business, in which, as some of the witnesses, state, his widow engaged after his death. And, lastly, the case set up by the Appellant, and sought to be established by her witnesses, is inconsistent with her acts and conduct. For, though Fatima predeceased Agha Jan Khan, Hossein Khan is stated by some of the Appellant's witnesses to have survived him, and appears, by the Appellant's written statement, to have left a daughter. Yet, on the death of her husband, the Appellant claimed to be entitled to the whole of the property ; and procured, by petition to the Collector, the registration of the Talook in her sole name. No suggestion that either Hossein Khan or his daughter had any interest in the property was then made.

It may be said, on the other hand, and probably with truth, that the oral testimony adduced by the Respondents is hardly more trustworthy than that on the part of the Appellant. Such as it is, it is directed to prove the poverty of Fatima and her family ; and that Agha Jan Khan, at the date of his marriage, had some, though not very ample, means. The Respondents are, however, entitled to rely on the presumption resulting from his ostensible ownership of the property, until that is satisfactorily rebutted. There is documentary evidence in the cause which shows that other real property was bought and sold by him. Some of the proceedings which are in evidence, and the fact of his taking into the house first one cousin and then another, tend to the conclusion that he was the master of his family, and head of his [220] own house. It is not likely that he, who was obviously the active man of business of the family, would have submitted to occupy for thirty years the dependent position which the Appellant's case assigns to him. Nor is there any strong antecedent improbability in the hypothesis that by means of successful traffic during that period he had been able to realize, from however small beginnings, the property of which he died ostensibly possessed. Therefore, of the two cases set up by the parties, the weight of evidence seems to be in favour of that of the Respondents.

But between these two cases lies the theory adopted by the Principal Sudder Ameen. That intermediate theory is that the property was acquired from the proceeds of a trade carried on by the Appellant and her husband in partnership, the original capital of the Appellant being derived, not from her own family, but from the estate of her first husband, Omar Khan ; and that the shares of the parties in this joint concern, being undisclosed, must be assumed to have been equal.

If this case had been established by satisfactory evidence, the Principal Sudder Ameen, in dealing with the second issue, might properly have adopted and acted upon it. It appears, however, to their Lordships, as it appeared to the High Court

of Calcutta, not to be so established. The theory of a partnership, properly so called, between the Appellant and her husband, is not only inconsistent with her case as first launched, but has been indignantly repudiated by her throughout the proceedings in the suit, and particularly by her petition of appeal to the High Court. None of the witnesses attempt to prove [221] it. There is, no doubt, some evidence of partnership dealings between Omar Khan and Agha Jan Khan. But that evidence points rather to some joint adventures, than to a regular partnership in a continuing and established business. Again, there is evidence that Omar Khan died worth some few thousand rupees. The sum at which the residue of his estate is estimated in the petitions of Ismail Khan is less than Rs. 4000. But, as Mr. Pontifex argued, there is no proof that this sum, or any other property of the Appellant, entered into the capital on which Agha Jan Khan traded. Had that been her case, she might have proved it by the Books of the business, which are presumably in her power and custody, the evidence of Gomashtahs, or the like. If the Principal Sudder Ameen thought that his hypothesis was according to the truth of the case, and the real rights of the parties, he should have established it by pursuing the inquiry, and by calling for the production of proper proof. Meer Dowlut's testimony falls very far short of such proof. And the conclusion of the Principal Sudder Ameen as to the partnership seems to rest principally on his own knowledge and belief, or public rumour—grounds upon which no Judge is justified in acting.

Their Lordships are, therefore, of opinion, that upon the facts alleged and proved in this case the judgment of the High Court, which, varying the decree of the principal Sudder Ameen, dealt with the property in dispute as wholly that of Agha Jan Khan, is right. They feel, however, considerable doubt whether that judgment, partly owing to the nature of the suit, and partly to the very unsatisfactory manner in which it has been conducted, has not [222] failed to do complete justice between the parties. The suit is not an administration suit, in which the assets of the deceased, and the charges and incumbrances thereon in the shape of debts or otherwise, are ascertained by proper inquiry. It is a suit for the recovery of certain shares in specified property assumed to have belonged to the deceased. Again, the excessive claim of the Appellant may have prevented her from getting that to which she is really entitled. Her own property may have been mixed up with her husband's. Their Lordships do not feel at liberty to re-open the litigation in the suit. But whilst they humbly recommend Her Majesty to dismiss this appeal with costs, they will add a recommendation that the Order be without prejudice to any proceedings on the part of the Appellant to establish any debt, other than her claim for Dain mohr, against her husband's estate, or any lien, in respect of such debt, upon that estate.

[223] JUGGOMOHUN BUKSHEE.—*Appellant*: ROY MOTHORANATH CHOWDRY, ROY KISTONATH CHOWDRY, and ROY PREONATH CHOWDRY,—*Respondents* * [Feb. 8, 1867].

On appeal from the Sudder Dewanny Adawlut of Bengal.

Ben. Reg. XI. of 1796, sec. 4, provides that, after taking certain specified proceedings, the Magistrate is to order the attachment of any land or other real property, held by a person charged with a criminal offence, who may evade the Magistrate's process by flight or concealment; by requiring the Collector, if the absentee be a proprietor of land or a Sudder Farmer, paying revenue immediately to Government, to hold the land or farm in attachment until further notice, and prescribes the measures to be taken by the Collector. Section 6 enacts, that, "Should the absentee neglect to attend for a period of six months after the lands have been ordered under attachment, the Magistrate

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor.—The Right Hon. Sir Lawrence Peel.

is to report the case to the Governor-General in Council, who will pass such order upon it, and upon the future disposal of the lands, as he may judge proper."

A. held a Sudder farm, part of Government Khas Mehals, paying revenue directly to Government. Although A. was the sole registered tenant, yet he was a member of a joint undivided Hindoo family. A. having been charged with a criminal offence, absconded in order to avoid the process of the Foujdary Court, when the Governor-General, under the provisions of Ben. Reg. XI. of 1796, confiscated the lands, and afterwards sold them by auction: Held

First, that as the Regulation is highly penal, it must be strictly construed, and in the absence of any express provision for the case of joint proprietors of land, or persons jointly holding a Sudder farm, it could not be assumed that the Legislature intended to authorize the confiscation of any other property than the share of the absconding absentee [11 Moo. Ind. App. 238, 239].

Secondly, that it was not competent to the Government, under that Regulation, in the circumstances of the property being held by members of a joint undivided Hindoo family, to sell more than the fractional share and interest of the delinquent absentee, and that the fact of the lands being registered in the sole name of A. made no difference [11 Moo. Ind. App. 240].

Thirdly, that a sale under Regulation XI. of 1796, does not carry with it the consequences of a sale for arrears of public revenue, by sweeping away all sub-tenures or incumbrances made by the defaulter [11 Moo. Ind. App. 239, 240].

In this case, the suit was brought by the Appellant to recover possession, with mesne profits, of Ryottee land and buildings, described as holdings, Nos. 28, 31, and 39, situate in Mouzah Baliaghatta Deelhee [224] Punchannogram in the Zillah Twenty-four Pergunnahs, and to obtain the reversal of a Magistrate's Order of possession under Act, No. IV. of 1840, made in favour of one Gopeemohun Mitter, under a sub-lease by the registered lessee and the Respondents.

The facts of the case were as follows:—

In the year 1841, one Roy Bykantnath Chowdry, since deceased, the elder brother of the Respondents, entered into a settlement with Government for a lease, subject to the payment of the Government revenue assessed thereon, of the holdings, Nos. 28, 31, 39, with other lands; and obtained a Pottah thereof from Government in his sole name; and he was registered in the Collector's records as sole proprietor thereof, and so continued sole registered proprietor up to the time of the attachment and confiscation by Government of the lands in question.

It appeared that in the year 1854 Roy Bykantnath [225] Chowdry, being charged in the Foujdary Court with wounding one Jaffray, resisted the process and orders of that Court, and finally absconded to avoid the jurisdiction of the Court and legal consequences of his acts. The result was, that, on the 3rd of September, 1854, the above holdings, with other immoveable property held in the name of Roy Bykantnath Chowdry, were attached by the Collector of the District, and confiscated by the order of Government. Afterwards, on the 21st of March, 1855, a sale was ordered by Government of these lands, and a public notice of the intended sale published by the Collector. The Respondents presented a petition to the Collector, in which they claimed to be entitled to a beneficial interest in the whole of the lands, alleging that they jointly enjoyed the rents derived therefrom with Roy Bykantnath Chowdry, as brothers and members of the same joint family, and praying that the share or interest of Roy Bykantnath Chowdry might be alone sold.

This petition was rejected by the Collector, and on the 27th of April, 1855, the holdings, Nos. 28, 31, 39, with the other lands, were put up to the public auction by the Collector, and were described as having been, up to the time of confiscation, the sole property of Roy Bykantnath Chowdry, and sold, subject only to the payment of the Government revenue assessed thereon, to one Thakoordoss Bannerjee, as the highest bidder, for the sum of Rs. 4690; and Bills of sale of the same were accordingly executed on the 9th of May, 1855, by the Collector, in favour of the purchaser, who directed possession to be given to him.

The Respondents presented a petition to the Commissioner of Revenue by way of appeal from the [226] Order of the Collector, and alleged that the same was irregular,

inasmuch as the entirety of the lands had been sold instead of the right and interest alone of Roy Bykantnath Chowdry therein, and that certain notices alleged to be required under Ben. Reg. VII. of 1825 had not been served; and prayed that the Petitioners' rights might be saved, and the interest of Roy Bykantnath Chowdry alone sold by sending notice of the sale again. The Commissioner affirmed the Order of the Collector, and declared the legality of the sale of the entire property, which he thereby confirmed. The Respondents appealed to the Sudder Board of Revenue against the decision of the Commissioner; but the objections of the Respondents were overruled by the Order of the Sudder Board, on the ground that the Respondents had no right to the lands in question; and the purchaser was confirmed in his possession.

In the month of October, 1855, one Gopeemohun Mitter set up a claim to the holdings and lands under a lease, dated the 29th of January, 1851, to him by Roy Bykantnath Chowdry and the Respondents, of 12 beegahs, 4 cottahs, 15 chittacks, 3 gundahs, and 3 cowries, including the lands in question, for a term of fifteen years, at the yearly rent of Rs. 125; stating that he had given a counterpart lease and had enjoyed the profits.

Disputes as to possession having arisen between the purchaser and Gopeemohun Mitter, proceedings were had before the Magistrate, who ordered the lands to be put in possession of Gopeemohun Mitter. On appeal this Order was confirmed by the Zillah Judge.

Subsequently, on the 12th of September, 1855, the purchaser mortgaged the lands to one Baboo Ram [227] Rutton Roy, to secure the repayment of a sum of money he had borrowed from the Baboo. On the 25th Asar, 1263, B.E. (8th July, 1856), the purchaser, being unable to repay the mortgage money, and the lands being worth considerably more than the amount borrowed thereon, sold the lands to the Appellant for the sum of Rs. 7325, and also his right to the mesne profits for the time he had been kept out of possession.

The present suit was then brought by the Appellant in the Court of the Principal Sudder Ameen of Zillah Twenty-four Pergunnahs. The suit was brought in the first instance against Gopeemohun Mitter and Thakoordoss Bannerjee, as Defendants; but by a supplemental plaint (in consequence of an objection for want of parties taken by the answer of Gopeemohun Mitter) the Respondents, and Sreemutty Mirmooee, *alias* Juggut Mohunee Dossee, widow of Roy Bykantnath Chowdry, who was then deceased, were made Defendants to the suit. The original plaint stated, that the suit was brought for reversal of the Order of possession made in the proceedings before the Magistrate, and to set aside the lease of Gopeemohun Mitter, and to obtain possession of beegahs 1. 3. 8. 10 of land of holding, No. 28, and of chittacks 7. 15 of land of holding, No. 31, and of beegahs 6. 17. 15. 10 of land of holding, No. 39, aggregating beegahs 8. 1. 15. 15; of land of Mouzah, Baliaghatta Dihee Shoorā; and to recover possession of a Bazaar and wasilat during the period of dispossession. The plaint alleged, that the Defendant, Gopeemohun Mitter, was a servant of Roy Bykantnath Chowdry, and submitted, [228] that if his alleged lease had been true, when the purchaser obtained possession of the lands through the Court, he would not have refrained for six months making any objections; that after the sale to Thakoordoss Bannerjee, and possession under it had been taken by him, no rent was paid to Gopeemohun Mitter; that Thakoordoss Bannerjee had been, immediately on his purchase, put into possession of these lands; and that on the confiscation thereof by Government, the interests of all concerned therein were bound.

Gopeemohun Mitter, by his answer, alleged that the Defendant, Thakoordoss Bannerjee had been Mookter of Baboo Ram Rutton Roy; that the latter purchased with his own funds, through Thakoordoss Bannerjee and in his name, the rights and interest of Roy Bykantnath Chowdry alone; that Thakoordoss Bannerjee was a nominal purchaser having no rights; and that the Appellant was not competent to bring such a suit on a Cobala executed by Thakoordoss Bannerjee; that the Appellant was a servant of Baboo Ram Rutton Roy, receiving a small pay; that it was improbable that the Appellant could afford to pay a consideration sum of Rs. 7325 to purchase the property, and that he had filed the suit though a fictitious person; that the disputed property was the joint estate of Roy Bykantnath, Roy Mothoora-nath, Roy Kistonath, and Roy Preonath; that when they were in joint possession of

the above property, he took an Ijarah, or lease, of the same, together with other properties, from them, on the 17th Maugh, 1257, for fifteen years, at a Junma of Rs. 125, and held possession thereof.

The Appellant, in his replication, denied the interest of Baboo Ram Rutton Roy, as well as the rights and [229] interest of the Respondents beneficially in the lands, and also the lease to Gopeemohun Mitter, and insisted that Roy Bykantnath Chowdry was alone the owner and registered proprietor of the lands in question, and that he had alone entered into settlement for it with Government, and was the sole legal owner thereof.

The joint answer of the Respondents, Mothooranath Chowdry, Kistonath Chowdry, and Preonath Chowdry, to the original and amended plaint, stated, that the suit was in fact by Baboo Ram Rutton Roy, who used the Appellant's name; that the rights and interests of Roy Bykantnath Chowdry alone, in the disputed lands, were sold by way of punishment in consequence of his failure to appear; and submitted that only his share could be confiscated by Government, although he was in fact registered in the Government records as the sole proprietor: and the answer further alleged, that in the year 1851 all the co-sharers let out the disputed property, with other lands, in farm to the Defendant, Gopeemohun Mitter, at an annual rental of Rs. 125, for a term of fifteen years, and that he was put in possession.

The hearing of the suit took place on the 17th of December, 1858, before E. Latour, Esq., the Judge of the Civil Court of the Twenty-four Pergunnahs, when, by a decree of that date, the Appellant was declared entitled, in virtue of the rights of Government, to possession of the lands in question, with mesne profits from the date of dispossession, the decree reversing the Order of possession made under Act, No. IV. of 1840, and cancelling the lease set up by Gopeemohun Mitter as fraudulent, with costs. In the judgment delivered by that Judge, he said, "I am of opinion that, by the act of sequestration, unop-[230]-posed by the Defendants at the time of the confiscation and sale by Government, as Government was in possession of the property, that the course for the Defendants to follow is to sue to set aside the sale to the extent of their title, making Government a party, and the principal Defendant to that action. Holding this opinion, I do not think I ought to express any opinion as to the exhibits in support of that title. I am of opinion, that this course is open to the Defendants within twelve years next following the date of the attachment, as the *causa causans*. I am of opinion, with reference to the claim of the lessee, that the lease put in is to disturb the purchase under a Government title, and to defeat it *per circuitum*. The Government had either a just title or a defective one. That can only be questioned in an action to establish an opposite title. I am of opinion, more particularly with reference to the Collector's letter of the 6th of November, 1855, and to the absence of all mention of this lease in the petitions of the brothers, that it is simply colourable, and that the Plaintiff is entitled, under his Government title, to be put in possession of what he purchased, in reversal of the award of the suit under Act, No. IV. of 1840, and in reversal and annulment of the lease set up by the Defendant, Gopeemohun Mitter, and with mesne profits from date of dispossession in execution, with costs."

Two separate appeals were instituted in the Sudder Dewanny Adawlut against this decree. One by Gopeemohun Mitter, which was, however, subsequently struck off for default, in consequence of his death intervening, and his heirs not appearing to prosecute the same. The other appeal was that of Respondents, Mothooranath Chowdry, Kistonath Chowdry, and Preonath [231] Chowdry. In their grounds of appeal objections were taken that the lands in question were their joint property, and that, therefore, the quota of Roy Bykantnath Chowdry alone passed to the purchaser from Government; and that there was no necessity for instituting a suit to set aside the sale; and that an auction sale did not convey any title other than that of the party whose right and interest are sold.

The appeal came on for hearing before Messrs. H. T. Raikes, C. B. Trevor, and G. Loch, three of the Judges of the late Sudder Dewanny Adawlut, on the 18th December, 1861, when a preliminary objection to such hearing was taken on the ground that the Respondents were not originally parties to the suit, the object of which was merely to set aside the lease set up by Gopeemohun Mitter; that his appeal having become abated by his death, and having been struck off for default on the part

of his heirs reviving the suit, there was really nothing remaining in dispute between the parties before the Court, which could be decided in the present suit. The Court, however, decided that, as the Respondents had been made Defendants, and their title to the property put in issue, their appeal could proceed; and the Court on the merits made its decree, by which it was declared, that the Appellant was entitled to possession of that amount of undivided share only which the Defendants had admitted belonged to Roy Bykantnath Chowdry, viz., 2 a. 8 g. share of the lands in dispute; and also that the costs should be borne and paid in proportion of the sums decreed and dismissed respectively. In the judgment delivered by the Sudder Court they gave the following reasons: "The Plaintiff urged, [232] that as an auction purchaser and a stranger, he could do no more than exhibit the title he had received from the Collector, which comprised the whole property; and that it was for the Defendants, who advanced the claim, to prove that the property was held by them in coparceny." The Court, however, held, that the presumption, arising from the family being an undivided Hindoo family, according to the Plaintiff's admission, was, that the property was joint, as alleged by the Defendants, and that before they could call upon the Defendants to prove their claim the Plaintiff must give some *prima facie* proof of the sole right of Roy Bykantnath Chowdry, whose interests alone he had purchased; and as he was unable to do this, the Court considered him entitled to receive possession only of the share of the lands which the Defendants admitted to belong to Roy Bykantnath Chowdry, viz., 2 a. 8 g. of the property in dispute. To this extent the Court made a decree, with mesne profits.

Against this decree the present appeal was brought. No appearance having been put in by the Respondents, the hearing was *ex parte*.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—This is a question of title derived under a Government sale, and depends upon the true construction of Ben. Reg. XI. of 1796, under which the lands were sold. By the section 2, cl. 3, of that Regulation it is provided, that if a Sudder Farmer holding a Farm from Government resists criminal process, his lease is to be declared forfeited by the Collector of the District; and the third section points out the manner [233] in which the Nizamut Adawlut is to proceed either against the person or by attachment of the lands or farm. Section 6 provides, that if the party, being absent, neglects to attend for a period of six months after the lands have been attached, the Governor-General in Council may pass such order as he may judge proper as to the future disposal of the lands. This was done by the Government sale, and there is now no controversy as to the regularity of the proceedings in respect to the sale. The Governor-General's Order was decisive and, as a matter of public policy, final. A sale under such Regulation differs essentially from a judicial sale. Ben. Reg. VII. of 1825, therefore, does not apply. That Regulation relates only to judicial sales in execution of decrees or other judicial process, to which the Circular Letter of the Sudder Dewanny Adawlut, dated the 10th of June, 1842, is confined.

The presumption of a joint interest in the lands in question, on which the decree of the Court below is based, is one which can only be made available and enforced among members of a joint and undivided Hindoo family when suing among themselves. When, therefore, one of a joint family sets up, as against the others, an exclusive claim to property as his own separate and self-acquired estate, such a presumption has never been held to extend to claims in respect of property registered in the sole and individual name of a person who happens to be a member of the family. Admitting that the Respondents have proved that they had some beneficial interest, or some right to the joint enjoyment of the rents and profits received by their brother, Roy Bykantnath Chowdry, as lessee under Govern-[234]-ment, such equitable interest might have been enforced against him, but could not in any manner prevent the legal effect of the attachment, and the forfeiture of the lease and lands, in consequence of the criminal default of the lessee, the legal holder of the lands. The Regulation deals with the lands only, and not with an equitable interest. So, under the old Feudal law a forfeiture to the Crown would act on the legal estate without reference to the beneficial interest of others. The Respondents are estopped, as against the Appellant and the Government, through whom the Appellant claims title as derivative purchaser for valuable consideration, from setting up what would be a secret trust in their favour, and thereby defeating the legal effect of the attach-

ment, forfeiture, and sale of the entirety of the lands. They allowed Roy Bykantnath Chowdry to be recognized as the sole owner.

Lastly, the suit was defective for want of parties. If it was intended to dispute the attachment, forfeiture and sale, the suit ought to have been so framed, and the Government made a party to the suit.

Their Lordships' judgment having been reserved, was now delivered by

The Right Hon. Sir James W. Colville (Feb. 28, 1867).—The lands which are the subject of this suit are described as three separate holdings forming part of the Government Khas Melials in the Twenty-four Pergunnahs. In 1855 they had been granted by the Government of Bengal to one Roy Bykantnath Chowdry, as the sole registered tenant thereof. His tenure is said to have been in the nature of a per-[235]petual lease: but the instrument or instruments creating it are not before us. He may be taken, however, to have been what is termed in the Regulation, which will be afterwards considered, "a Sudder Farmer paying revenue directly to Government." Some time in 1855, being charged with an offence, he absconded in order to avoid the process of the Criminal Courts; whereupon his estate was confiscated, and these lands, as part of it, were ordered by Government to be sold under the provisions of Ben. Reg. XI. of 1796. They were put up for sale on the 27th of April, 1855, and were purchased by one Thakoordoss Bannerjee, who on the 7th of July, 1856, transferred the interest thereby acquired to the Appellant. Under this title the Appellant claims the entire interest in the tenure under Government of these lands.

The Respondents insist that Roy Bykantnath Chowdry was a member of a joint and undivided Hindoo family, of which they are the other members; that these tenures, though taken in the sole name of Roy Bykantnath Chowdry, as the managing member, were acquired with the funds and for the benefit of the joint family: and that accordingly it was not competent to Government to confiscate or sell more than the fractional share and interest of Roy Bykantnath Chowdry, in this portion of the family estate. They urged this objection ineffectually before the Collector some days before the sale took place; they afterwards repeated it before the Commissioner and Sudder Board of Revenue: but they are said to have made no representations to that department of Government from which, under the Regulation, the Order for the sale emanated. Certain it is that their objections were [236]overruled, and that what was put up for sale and purchased by Thakoordoss Bannerjee was the whole interest in the lands under the tenures created in favour of Roy Bykantnath Chowdry. And the Collector put, as he thought, the purchaser into possession.

Before, however, the assignment to the Appellant, a dispute touching the possession of the lands arose between Thakoordoss Bannerjee, and one Gopeemohun Mitter, who claimed to be tenant thereof under a lease granted to him by Roy Bykantnath Chowdry and the Respondents jointly. There was the usual appeal to the Magistrate under Act, No. IV. of 1840. He held that Gopeemohun Mitter was in fact in possession, and his order was confirmed on appeal by the Zillah Judge. The result was, that the Appellant, having acquired the title of Thakoordoss Bannerjee, was driven to assert his right to the possession of the lands in the regular civil suit out of which this appeal has arisen.

The suit was originally against Gopeemohun Mitter and Thackoordoss Bannerjee. By supplemental plaint the Respondents were made parties to it. The material issues settled by the Judge were, first, whether the lease set up by the Defendant, Gopeemohun Mitter, was a *bona fide* lease, or merely colourable and in fraud of law: and secondly, whether the estate being joint, the Plaintiff could have any claim over and above the particular share of Roy Bykantnath Chowdry.

The Zillah Judge, by whom the cause was tried in the first instance, held that the lease was merely colourable and fraudulent, and that the Appellant, as between him and the lessee, was entitled to the possession of the lands. He further held, that the [237]question of title between the Appellant and the Respondents could not be properly tried in this suit: and that the proper course for the Respondents, if they had a good title, was to sue to set aside the sale to the extent of that title, making the Government a party to the suit.

But the lessee and the Respondents appealed against this decision, but the

former died pending his appeal, which, not having been revived, was struck off. The Respondents prosecuted their appeal, and the Sudder Court, overruling the objection that the suit had come to an end with the lessee's interest on the ground that there was a distinct issue of title joined between the Appellant and the Respondents, made a decree in their favour, and reduced the interest of the Appellant in the lands to the fractional share of Roy Bykantnath Chowdry. The present appeal is against the last decree.

It has been candidly conceded by the learned Counsel for the Appellant that the evidence in the cause may be taken as sufficient to establish that, as between Roy Bykantnath Chowdry and the Respondents, the lands in question formed part of their joint estate.

This being so, we have only to determine whether the decree of the Sudder Court is erroneous, either because, upon the true construction of the Regulation and the admitted facts of the case, the sale by Order of Government has given to the Appellant a good title against the Respondents; or because that question cannot be properly litigated and determined in the present suit.

The Regulation is a highly penal one, and should be construed strictly. That portion of it which relates [238] to the present case is contained in the 4th, 5th, and 6th sections. The 4th section provides that, after taking certain specified proceedings, the Magistrate is to order the attachment of any land or other real property held by the absentee in his jurisdiction, by requiring the Collector, if the absentee be a proprietor of land or Sudder Farmer paying revenue immediately to Government, to hold the land or farm in attachment until further notice; and prescribes the measures to be taken by the Collector on receiving such a requisition. The 5th section provides for the removal of the attachment on the attendance of the party; and the 6th section enacts, "Should the absentee neglect to attend for a period of six months after the lands have been ordered under attachment, the Magistrate is to report the case to the Governor-General in Council, who will pass such order upon it, and upon the future disposal of the lands, as he may judge proper."

In the absence of clear words indicating such an intention, it cannot be assumed that the Legislature intended to authorize the confiscation of the property of any person other than the delinquent. The Regulation makes no express provision for the case of joint proprietors of land, or persons jointly holding a Sudder farm of land. Let it be assumed that such a joint proprietorship, or joint holding, is ostensible as well as real, and that it appears on the Collector's Books, can it be doubted that in such a case the words "land or other real property held by the absentee" would be limited to his undivided share in the actual lands or farm? Again, suppose that the absentee is one of a joint family possessed of a Zemindary, of which one member only is registered [239] as owner. Their Lordships cannot think that upon the true construction of this Regulation the fact of such registration would either justify the confiscation of the whole Zemindary, if the absentee were the sole registered proprietor, or prevent the confiscation of the share of the absentee if he were not the registered proprietor. No analogy can be drawn from the doctrine of forfeiture in this country, where the doctrine is founded on tenure, and where there was a broad and marked distinction between law and equity, the Courts of Common Law taking no cognizance of equitable estates. And, if what is above stated be true of a Zemindary or other real property of which the absolute interest belongs to a joint family, it is difficult to see why it should not be true of a Farm enjoyed by a joint family as part of the joint estate, though taken in the name of one of its members. For the Regulation, at least in the part of it now under consideration, does not contemplate the forfeiture of the tenure, as between landlord and tenant. What it contemplates is the confiscation and sale of the tenure; and the course pursued in the particular case confirms this construction.

Again, there is no pretence for saying that a sale under this Regulation can carry with it the consequences of a sale for arrears of public revenue; that it sweeps away all sub-tenures or incumbrances created by the delinquent, or those through whom he claims. The tenure in question, so far as appears on these proceedings, was alienable. It was open, therefore, to Roy Bykantnath Chowdry to put his co-sharers in the estate into the full enjoyment of this Firm, and to

execute jointly with them, if they [240] were so minded, sub-leases of the lands. No actual conveyance would, under the Hindoo law, be required for the former purpose. Their Lordships, therefore, are unable to affirm the broad proposition, that under the Regulation it was competent to Government to confiscate and sell this Farm, so as to give to the purchaser a good title against the Respondents. The Zillah Judge, though he declined to deal with the question in this suit, has not so decided. The Sudder Court has decided the contrary.

It remains to be considered whether the Sudder Court was right in determining the question of title between the Appellant and the Respondents in this suit. The Appellant had by supplemental plaint made the Respondents parties to the suit, though under a kind of protest that it was unnecessary to do so; and this issue of title had been raised and joined between them. The only difficulty in the case is, that the lease of Gopeemohun Mitter, who was put forward as the tenant in possession, has been pronounced by the Zillah Judge to be simply colourable, and that the Sudder Court has not dealt with his finding on that point. Considering, however, that as between Gopeemohun Mitter and the Respondents the lease constituted the relation of landlords and tenant, and that the intervention of the landlords to defend rested on privy of title; and, further, that the effect of the proceedings in the Foujdary Court of the 31st of December, 1855, and the 29th of March, 1856, was to determine that the Appellant was out of possession, and to cast upon him the burden of recovering possession by proof of a good title, and that he has failed to do so except to the [241] extent admitted by the Sudder Court, their Lordships think that the decree under appeal is correct. They must, therefore, humbly recommend Her Majesty to dismiss this appeal.

NUGENDERCHUNDER GHOSE and another.—*Appellants*: SREEMUTTY KAMINEE DOSSEE and others,—*Respondents* * [Feb. 19, 1867].

On appeal from the High Court of Judicature at Calcutta.

Section 9 of Act, No. I. of 1845, enacts, that Collectors shall, at any time before sunset of the latest day of payment, receive as a deposit from any party, not being a proprietor of the estate in arrear, the amount of the arrear of revenue due from it, to be carried to the credit of the said estate at sunset aforesaid, unless before that time the arrear shall have been liquidated by a proprietor of the estate. And in case the party depositing, whose money shall have been credited to the estate as aforesaid, shall prove, before a competent Civil Court, that the deposit was made in order to protect an interest of the said party, which would have been endangered or damaged by the sale of the estate, he shall be entitled to recover the amount of the deposit, with interest, from the proprietor of the said estate. Held, upon a construction of this section, that it only gave a personal right of action against the proprietor, and did not create a lien on the estate [11 Moo. Ind. App. 260].

A. mortgaged his estate to B. The mortgagor died, leaving a childless widow his heir. A. had children, living, at his death, by a former deceased wife. The widow of the mortgagor, who was in possession, let the estate fall into arrears for Government revenue, when the representative of the mortgagee, in order to save the estate from public sale, paid the arrears. The mortgagee's representative afterwards brought a suit against the widow to recover the amount so paid, which suit did not raise any claim against the estate itself, but sought only to make the widow personally liable, and a decree was obtained against her to that effect. When execution of the decree

* Present: Members of the Judicial Committee,—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Richard Torin Kindersley. Assessor,—The Right Hon. Sir Lawrence Peel.

was sought to be enforced against the widow, by sale of the estate, the mortgagor's contingent reversioners intervened, and the Court held that execution could not issue against the estate of the mortgagor, which was not liable. A supplemental suit was then brought by the mortgagee's representative, to recover the amount of the decree so obtained, with interest, and for sale of the estate. The High Court held, upon the construction of the 9th section of the Act, No. I. of 1845, that the action to enforce the decree was confined to the widow's interest in her husband's estate, which estate could not be sold.

Upon appeal the Judicial Committee, in affirming the judgment, held, that the decree so obtained against the widow in possession, could only be enforced against her property in respect of such interest in her deceased husband's estate as she possessed.

Held, further, that there were two courses open to the mortgagee's representative, first, to have instituted a suit to enforce the mortgage, and to tack to the mortgage the amount of the arrears of revenue paid to save the estate, and for a sale; or, secondly, to have proceeded under the 9th section of the Act, No. I. of 1845, in a personal action.

The suit out of which this appeal arose was in the nature of a supplemental suit brought to obtain the benefit of a decree made in a previous suit, in which one of the Respondents, Gourmonee Dossee, was the [242] Plaintiff, and the Respondent, Kaminee Dossee, the widow of the late Hurrololl Mitter, the Defendant.

In the original suit a decree was made in the year 1853, in favour of Gourmonee Dossee. The interest in that suit was afterwards assigned to one Anundonarain Ghose, the father of the Appellants, for the amount named in the decree, with interest, which had been previously paid by her, as the mortgagee's representative, to the Government Collector, in order to preserve a Talook, hereinafter mentioned, which had been mortgaged, from a public sale then about to take place, for arrears of Government revenue due in respect thereof, though the default of Kaminee Dossee, the childless widow of the mortgagor, Hurrololl Mitter, [243] being as such in possession of the Talook, and bound to pay the Government revenue in respect thereof. This decree was affirmed on appeal by the Sudder Dewanny Adawlut, in December, 1855, on the ground that the payment of the arrears of Government revenue was necessary to guard the mortgagee's interest in the Talook, as, if the same had been sold, her rights as mortgagee would have been entirely lost. The amount so decreed not having been repaid, process of execution was taken out against the Talook in respect of which payment had been made, which was then still in the possession of Kaminee Dossee as the registered proprietor thereof. The Talook was then attached and was about to be sold by the Civil Court in order to realize the amount of the last-mentioned decree, when one of the Respondents, Sreemutty Dossee, intervened in the execution proceeding, and objected on the ground that she, as daughter of the mortgagor, and her two sons, were expectant heirs in reversion, contingent on their surviving Kaminee Dossee, the widow and heiress in possession, and that as such heirs, they would then be entitled to succeed to the Talook; contending that the original decree ought to be considered merely as a simple personal decree against Kaminee Dossee, and that the amount thereof as her personal debt, was not realizable from the Talook, of which she was in possession as widow. The Principal Sudder Ameen, by his judgment and summary Order, declared that the questions raised could not be decided in that summary proceeding, but ought to be determined in a regular civil suit, and that the attachment of the Talook should be withdrawn.

The suit out of which the present appeal arose, was, [244] in consequence, brought by George Smoult Fagan, the then Receiver of the estate of Anundonarain Ghose, the Appellants' father, against (among others) Kaminee Dossee, and the reversionary contingent heirs, praying that the amount of the original decree might be realized by selling the Talook.

The question on appeal substantially involved two points; first, the construction of sec. 9 of Act, No. I. of 1845; and, secondly, the frame of the first suit in respect of the relief sought by the Plaintiff.

By sec. 9 of that Act it is enacted, "that Collectors shall, at any time before

sunset of the latest day of payment, receive as a deposit from any party, not being the proprietor of the estate in arrear, the amount of the arrear of revenue due from it, to be carried to the credit of the said estate at sunset as aforesaid, unless before that time the arrear shall have been liquidated by a proprietor of the estate. And in case the party so depositing, whose money shall have been credited to the estate in the manner aforesaid, shall be a Plaintiff in a suit pending before a Court of Justice for possession of the same, or any part thereof, it shall be competent to the Judge of the Zillah in which such estate is situated, to order the said party to be put into temporary possession of the said estate, subject to the rules in force for taking security in the cases of Appellants and Defendants. And if the party depositing, whose money shall have been credited as aforesaid, shall prove, before a competent Civil Court, that the deposit was made in order to protect an interest of the said party, which would have been endangered or damaged by the sale of the estate, he shall be entitled to recover the [245] amount of the deposit, with interest, from the proprietors of the said estate."

The facts of the case were as follows:—

Huruloll Mitter executed a mortgage of a Talook, called Turuff Kalikapore, in favour of one Nobinkisto Sing, to secure the repayment of the sum of Rs. 43,430 4, with interest.

Huruloll Mitter died without male issue, and without having repaid the mortgage money, leaving the Respondent, Kaminee Dossee, his widow, and a married daughter, the Respondent, Sreemutty Dossee, who had two sons.

Kaminee Dossee on her husband's death, entered into possession of the Talook, and was registered as sole proprietor thereof in the Books of the Government Collector.

Nobinkisto Sing, the mortgagee, subsequently died, leaving the Respondent, Gourmonee Dossee, his widow, heiress and legal representative, him surviving, and as such she became entitled to the interest of her deceased husband as mortgagee.

In December, 1849, there were arrears owing to Government for revenue, payable on account of the Talook, amounting to the sum of Rs. 10,317, which the Respondent, Kaminee Dossee, failed to pay, and such default endangered the interest of the mortgagee, whose estate therein was thereby liable to be destroyed by a sale of the Talook by the Government Collector under the Revenue Sale Law, Act, No. 1 of 1845, sec. 26, to realize such arrears. Gourmonee Dossee, the heir and representative of the mortgagee, having received intimation of the default and the danger which threatened the estate, raised the amount necessary by way of loan from Anundonarain [246] Ghose, the late father of the Appellants, and paid off the arrears, amounting to Rs. 10,317.

The Respondent, Gourmonee Dossee, made repeated ineffectual demands on Kaminee Dossee for repayment of this sum of money, and on the 3rd of December, 1851, brought a suit in the Court of the Principal Sudder Ameen of Zillah Twenty-four Pergunnahs against her, to recover that sum, together with interest, amounting to Rs. 12,689. 14. The suit was heard by the Principal Sudder Ameen, on the 29th of March, 1853, when he was of opinion that Kaminee Dossee having made default, that Gourmonee Dossee had rightly made the payment, and so preserved the mortgaged Talook from sale, and decreed the sum of Rs. 14,337. 3, the money claimed, and interest from date of suit to day of payment, and costs.

Kaminee Dossee appealed to the Sudder Dewanny Adawlut; and the hearing of that appeal took place on the 4th of December, 1855, when that Court affirmed the decree of the Principal Sudder Ameen.

Gourmonee Dossee, and her late husband's brother's son, Nobinkisto Sing, subsequently assigned and transferred the last-mentioned decree to the Respondent, Girenderchunder Ghose, son of Anundonarain Ghose, then deceased, in consideration of the sum of money borrowed from him to discharge the Government arrears. He took the usual proceedings in the Zillah Court, to sue out execution under the last-mentioned decree, and the Talook was accordingly attached under the execution process of the Court, and thereupon a proclamation was issued that the same would be sold to realize the judgment debt, in execution of such decree.

[247] On the 25th of January, 1856, Sreemutty Dossee intervened in these proceedings, objecting to the sale, stating that the judgment debtor, Kaminee Dossee,

her step-mother, was a childless widow, and that in satisfaction of her personal debt the Talook to which her minor son, Kooman Rajendernarain, had a reversionary right, could not be sold in execution of the decree. Girenderchunder Ghose, as representing the decree-holder, by his answer denied that the amount decreed was a mere personal debt of the judgment debtor, Kaminee Dossee, but had been decreed against her as being in possession of the Talook as sole registered proprietress; that Gourmonee Dossee had borrowed from his father the money and paid it to the Collector in order to protect the Talook from sale for arrears of revenue due to Government; and that the decree under which execution had issued against that Talook, was for that same sum of money.

The hearing of the petition in this summary suit took place on the 18th of March, 1856, before Tarucknath Sein, the Principal Sudder Ameen, who made an order staying the sale, but declining to adjudicate on the question raised, which he considered ought to be determined in a civil action. This order was on appeal affirmed by the Sudder Dewanny Court.

In consequence, on the 16th of August, 1859, George Smout Fagan, the Receiver of the estate of Anundonarain Ghose, deceased, brought a regular suit in the Court of the Principal Sudder Ameen of Zillah Twenty-four Pergunnahs, against the Respondents, Kaminee Dossee, Gourmonee Dossee, Sreemutty Dossee, her two minor sons, Rajendernarain Deb, and Soorendronarain Deb, and Girenderchunder Ghose, and [248] also against the other Respondents, claiming as Putneedars, or lessees and tenants under Kaminee Dossee. The plaint set forth in detail the principal facts before mentioned, and sought the realization of the amount of the above-mentioned decree, together with interest and costs, by sale of the Talook, and reversal of the summary Order, as well as the alleged Putnee leases.

The answer of Sreemutty Dossee submitted, that the decree was for the realization of money due by Kaminee Dossee; that the Plaintiff, therefore, had no right to institute a suit for the recovery of the amount of that decree, by a sale of the Talook in question; that her sons were reversioners, and her step-mother, Kaminee Dossee, was entitled only to maintenance for her life out of the profits, after performing the straud and other ceremonies, to her deceased husband and his father, and that she and her son's rights could not be destroyed, the Talook not being liable to be sold.

The answer of Kaminee Dossee was, in substance, first, that the Plaintiff, who had become a representative by purchasing from Gourmonee Dossee her decree, was not entitled to any more right than what is mentioned in that decree; secondly, that the principal decree-holder, Gourmonee Dossee, instead of praying for the sale of the Talook mentioned in the original plaint, simply sued to recover the amount of the advance from her, and, therefore, by sec. 7 of Act, No. VIII. of 1859, the suit was liable to be dismissed as if it was a second suit instituted by Gourmonee Dossee herself, it would have been; thirdly, that with the object of liquidating her husband's debts she granted putnees of the Talook, [249] with the profits of which she had paid off her husband's debts, and that such putnees could not be set aside; and lastly, that as large sums of money were due to her from the late Nobinkisto Sing, who was the Executor to the estate of her deceased husband, she could not be held liable for the amount of the decree obtained by Gourmonee Dossee.

The Defendants, the Putneedars, relied on their Puttahs.

The hearing of the suit took place on the 9th of December, 1859, before E. Latour, Esq., the Judge of the Zillah Court, when he pronounced a decree in favour of the Plaintiff, declaring that the Talook was liable in execution, and ordering that the proprietary right therein generally should be brought to sale; but at the same time declaring that the validity of the alleged Putnee leases could not be decided in that suit, and that the Plaintiff should pay the Putneedars their costs. The judgment in which that decree was made stated, that the original decree in question in the suit was not one restraining the remedies open to the Plaintiff so as to confine the decree-holder to remedies personal to her; that there were no such words therein, as there assuredly would have been if the Court had intended to limit the decree; that the suit in which that decree had been obtained was brought against Kaminee Dossee as being in possession of the estate, and that the decree was against her in that capacity, and that the law made the proprietary interest responsible for any

sums advanced to protect the estate; and that also a statutory liability upon the proprietary title was created, by making the advance in question; that the original decree-holder brought her action against Kaminee Dossee being [250] in possession, and recovered judgment in general terms, that it was not usual to apply in anticipation for execution against any particular property; and that certainly the suit was not one brought personally as a personal action only against Kaminee Dossee; and finally held that the decree bound her in her character as in possession of the estate.

Sreemutty Dossee appealed against this decree to the Sudder Dewanny Adawlut at Calcutta, on the ground, that the decree sought to be enforced was against Kaminee Dossee personally, and the suit in which the decree was made was brought against her and sought payment from her solely; that neither the original decree-holder, nor the purchaser of that decree, could go beyond that and seek to attach and sell the estate to make good the amount recovered, and that, even admitting the peculiar character of the debt decreed, as being a loan to a widow on the plea of necessity for discharging the dues of Government, the estate could not be subject for such a loan without good and sufficient grounds.

Five other separate appeals were also instituted in the Sudder Dewanny Adawlut by the Putneedars.

The Plaintiff, Fagan, ceased to act as Receiver, and the Appellants were substituted for him in the appeal in the Sudder Dewanny Adawlut.

The six appeals were consolidated and heard together as one appeal, on the 15th of December, 1862, before the High Court of Judicature at Fort William, in Bengal, which Court had been substituted for the Sudder Dewanny Adawlut. Two of the Judges, Messrs. Trevor and Jackson, pronounced the judgment and decree of the Court in the appeals as follows:—"The only point which we have to determine in this appeal [251] is, whether as the decree in the suit brought against Kaminee Dossee by Gourmonee Dossee, for the recovery of a sum of money paid to protect her own interests as mortgagee, and to save the estate on which she held the mortgage from sale, though personal in its terms against Kaminee Dossee, does or does not, under section 9, Act, No. I. of 1845, give, to use the Judges' term, 'to the decree-holder a statutory lien on the estate.' Were the case one of first impression, we should even then have little hesitation, looking to the plain terms of the Act, which simply gives a right of action against the proprietors of the estate, in declaring that a decree in a suit brought under the section of the Act above cited, is only a personal one, and gives no equitable lien on the estate to the decree-holder, so that the property itself in the hands of the person on whose account the payment was made, or any purchaser from him, is liable for the amount decreed. But there is a decision of the late Sudder Court which is clearly in point. In the case of *Govindpersaud Pundit v. Mussamut Soondree Koonnur Debea* (see Decisions for 1856, pp. 867 and 868), the Sudder Court held distinctly, that a person who deposits money in the Collector's office under the provisions of section 9 of Act, No. I. of 1845, in order to save an estate from sale, does not thereby acquire a preferable lien, but his rights in execution of the decree against the Zemindar are precisely the same as those of an ordinary judgment creditor; that the law simply exacts that the party paying the deposit shall be entitled to recover the amount of it, with interest, from the proprietors of the estate, but that the intent of the law as gathered from the words of the Act was not that the party should have a lien on the estate. With this ruling we entirely concur. The Defendants, [252] Respondents, however, contended that the case of *Manickmalla Chowdhraïn v. Parbatty Chowdhraïn* (Decisions for 1859, pp. 515 to 521) establishes the principle contended for by them. On reverting, however, to that judgment, which was not an unanimous one, we find that the suit was not one under section 9, of Act, No. I. of 1845 at all, that is, it was not the case of a party not a proprietor with an interest to protect, but the case of a co-sharer paying in revenue on behalf of other sharers, who had failed to pay theirs, and who sued his sharers for their contribution; such being the nature of the case, the Court held that a co-sharer who has brought an action against a Hindoo widow for her share of the revenue which he had been obliged to pay in to save the joint estate from sale, could, after that widow had adopted a son, bring a second action against him on his obtaining possession of the estate, for so much of the first decree as remained un-

satisfied, and could in execution of this last decree bring the adopted son's estate to sale, as the payment was made under necessity and for the benefit of the estate which has descended to the son, and which would not have so descended had the payment not been made. Now, whether the judgment in that case be correct on all points or not, it is clear that it can have no bearing on the present case, which is an action under a special law, which gives parties under particular circumstances a right of action against particular persons, which they otherwise would not have had by law. We may, therefore, dismiss this case from our consideration, and looking to the terms of the Act itself, and the precedent of the Sudder Court above cited, we hold that the decree against Kaminee Dossee was a personal one against her; that, consequently, the [253] action of the Court, in execution, must be confined to her husband's interest in the estate, and that the rights of Kaminee Dossee's husband in the estate, as a portion of the estate upon which an equitable lien was acquired by the Plaintiff, cannot be brought to sale. We, therefore, reverse the Civil Judges' decision, and decree the Defendant Sreemutty Dossee's appeal with costs. As to the appeal of the Defendants, Putneedars, on the question of costs, we are of opinion that, as they have been made unnecessarily Defendants, and charged also causelessly with fraud, they are, on the Plaintiff's failing in his action, entitled to their full costs. We, therefore, decree these five appeals also with costs against the Plaintiff."

Nugenderchunder Ghose and Mohunderchunder Ghose, the sons and heirs of Anundonarain Ghose, appealed from this decree. As the Respondents did not appear, the case was heard *ex parte*.

The Attorney-General (Sir John Rolt, Q.C.), and Mr. Leith, for the Appellants.—

This suit involves a question of importance in India. It is whether the heir of the mortgagee, paying arrears of Government revenue to save the estate from sale for arrears, which the mortgagor's widow allowed it to fall into, is not entitled, under Act, No. I. of 1845, sec. 9, to a lien or charge on the mortgaged estate. We submit, that on general principles of equity the payer is entitled to have what she advanced treated as a charge, as in the analogous case of an insurance premium paid to keep up the insurance. Such payment creates a lien on the estate for the sum paid to save the estate. *Manickmalla Choudhrain v. Parbatty* [254] *Chowdhraim* (see Dec. of Sud. Court for 1856, p. 867); but the Court below held, on the authority of *Govindpersaud Pundit v. Mussamat Soondree Koonwur Deba* (see Dec. of Sud. Court for 1859, pp. 516, 521), that it was a mere personal charge. This conclusion, we submit, was erroneous. By the Hindoo law a loan made to a widow, for the purpose of discharging arrears of Government revenue, and so saving from sale the estate in which she is in possession as tenant for life, in her character of legal representative of her deceased husband, becomes *ipso facto* a charge on such estate, not only while in her possession, but also when it passes into the possession of the successive heirs of her deceased husband, whose rights of inheritance only accrue on the widow's death. Such loan is not considered or treated as her personal debt, but as one which is due from the estate of her husband. Similar to the case of a Manager or guardian, who has power, by Hindoo law, to mortgage or charge the estate in order to avert sale or loss. *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (6 Moore's Ind. App. Cases, 393), and cases there cited (*ib.* 407), *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh* (10 Moore's Ind. App. Cases, 454), *Gopee Mohun Thakoor v. Rajah Radhanat* (2 Knapp's P.C. Cases, 228); so also a widow can create a lien on her deceased husband's estate when it is for its benefit, which will bind the reversioner. Sum Dec. S. D. A. Cal. 1854, p. 209, tit. "widow." *Preaj Xurain v. Ajodhyapurshad* (7 S. D. A. Rep., 513), *Sheogovindpershad Singh v. Ramchund Doobe* (10 S. D. A. Rep., N. W. Prov., 133).

The Act, No. I. of 1845, does not limit or restrict the operation and application of such principle of law, [255] but gives rather additional facilities to all classes of persons in any way interested in the estate, provided they are not proprietors, to discharge arrears of Government revenue on default made by the proprietors, allowing such persons to make payments for that purpose directly to the Government Collector, and making it compulsory on that Officer to receive such payments, and carry the same to "the credit of the estate;" and further giving a right of action to the persons so paying against the proprietors as representing the estate, between

whom otherwise there might not exist any legal privity, to enable the former to recover, by means of an action and the judgment to be obtained therein, the amount advanced and paid by them on account of the estate, with interest. Now, at the date of the original suit Kaminee Dossee was, as widow of Hurrololl Mitter, the proprietor of the Talook, within the true meaning of the Act, and as such was the only person against whom the Plaintiff, who had paid and discharged the arrears of Government revenue on her default, could have brought her suit under the Act, in order to recover from the estate the amount paid by her; and under the decree obtained by the Plaintiff against Kaminee Dossee in the character of proprietor, the Plaintiff was entitled to issue execution against the Talook, and to have the same sold in order to realize the amount decreed. The Respondent, Sreemutty Dossee, as daughter, and her sons, Rajendernarain Deb and Soorendronarain Deb, as grandsons of Hurrololl Mitter, the deceased husband of Kaminee Dossee, were not, according to the true meaning of the Act, persons to be made parties Defendants in the original suit. They were properly excluded from the suit, being [256] only presumptive or expectant reversionary heirs of Hurrololl Mitter, whose several rights of inheritance are contingent on their respectively surviving Kaminee Dossee, in whom alone, as widow and heiress-at-law, the proprietary rights in the Talook became on the death of her husband and still remain vested; but Sreemutty Dossee and her sons improperly intervened in the summary proceedings in execution of the decree, in order to prevent the sale of the Talook; and by their so intervening, and the Principal Sudder Ameen's Order, of the 18th of March, 1856, made in such summary proceeding, this suit, being by way of a supplemental suit to the original suit, was rendered necessary to obtain an adjudication upon the claims and alleged rights of those persons, and to enforce the sale of the Talook. *Dilaram v. Roopchand Sahoo* (3 Ben. Sud. Dew. Rep., 24) is an authority that the purchase money can be recovered in a new suit.

The consideration of their Lordships' judgment was postponed, and now delivered by

The Right Hon. Lord Romilly (July 17, 1867).—The question, in this case, is whether, under the circumstances set forth in these papers, the Appellants are entitled to have a lien upon the Talook described as Turuff Kalikapore, recorded as No. 109, as against the Respondents, who are interested in that Talook, in respect of the arrears of revenue due from that Talook, which have been paid by the party the Appellants represent.

The Respondents do not appear, and it is, therefore, incumbent on the Court to examine closely whether the Appellants have made out their case and have established their right to have the Talook sold to discharge that amount.

The facts are shortly as follows: Hurrololl Mitter had become the owner of this Talook by purchase previously to the year 1842. In May, 1842, he executed a mortgage in due form to Nobokisto Sing to secure Rs. 43,340 with interest at twelve per cent. per annum.

Hurrololl Mitter, the mortgagor, died, leaving Sreemutty Kaminee Dossee, his widow, surviving him. She had no child, and after his death continued in possession of the Talook as his widow.

Hurrololl Mitter, however, had a daughter by a previous marriage, the Respondent, Mussumat Sreemutty Dossee, who is the mother of two infant sons, the grandsons of the mortgagor, Hurrololl Mitter. Nobinkisto Sing, the mortgagee, died shortly afterwards, and left Sreemutty Gourmonee Dossee, his widow, who in that character became entitled to all the rights of her husband as mortgagee of this Talook.

The revenue due to the Government for this Talook was not paid by the widow of Hurrololl Mitter, the mortgagor, and in December, 1849, Rs. 10,317 were due in respect of such revenue.

In consequence of the non-payment of this arrear, the Talook would have been put up for sale by the Government Collector, and would have been sold according to Act, No. 1 of 1845, discharged from the mortgage and from all other incumbrances. In order to save the mortgage and the Talook, Sreemutty Gourmonee Dossee borrowed from Anundonarain Ghose, on the last day for payment of the

revenue, which was the 28th of December, 1849, the amount necessary to discharge the revenue, viz., Rs. 10,317, [258] and he deposited that amount with the Collector just before sunset on that day.

The Appellants are two of the sons and heirs of Anundonarain Ghose, who is dead, claiming under a transfer made to one of them by Sreemutty Gourmonee Dossee of her rights to and interests in the Talook, under her decree against Sreemutty Kaminee Dossee of the 29th of March, 1853, which will be afterwards mentioned; and accordingly they have the same rights and powers which she possessed as regards this Talook under that decree, and not further. The question there was the same which is raised on this appeal, viz., whether the Appellants were entitled to a charge on this Talook, and to have it sold in its entirety to pay the amount of the money so paid to the Government Collector in December, 1849.

For the purpose of determining this question, it is desirable to consider what, after such payments, the rights of Sreemutty Gourmonee Dossee were against Sreemutty Kaminee Dossee and the Talook itself, and the course she adopted.

Considering that the payment of the revenue by the mortgagee will prevent the Talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the Talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the Talook as against all persons interested therein for the amount of the money so paid. But their Lordships are of opinion, that this is not the form in which the question comes before them, and that what they have to decide, is not whether such a [259] charge originally existed, or whether it does now subsist, but whether the Appellants can enforce such a charge in the present suit. For this purpose it is necessary to refer to the steps taken by Gourmonee Dossee to obtain payment. There were two courses open to her: she might have instituted a suit to enforce the mortgage and to tack to the mortgage the amount of the revenue paid by her to save the estate, and to have the estate sold to pay that amount; or she might proceed under the ninth section of Act, No. 1 of 1845. She might probably have united both these objects in one plaint; but the course which she did adopt was to sue the widow, Kaminee Dossee, alone, under the ninth section of the Act, No. 1 of 1845, not making the persons interested in the reversion after her decease party-Defendants to that suit, and not praying that the Talook in its entirety might be sold to pay the amount due to her.

The plaint does not raise any claim against the estate itself; the claim is against the widow, Kaminee Dossee, personally. It states, first, that the female Defendant, for the purpose of doing away with the mortgage loan, threw the Talook into arrears, and was endeavouring to have it sold; secondly, that the female Plaintiff, for the purpose of protecting her rights, and preserving the Talook from sale, borrowed the money from the father of the present Appellants, and caused the payments to be made. The words of the plaint which follow are these:—"The female Plaintiff has paid the money which the female Defendant ought to have repaid. The Plaintiff has frequently called upon her for it, but no payment at all is made up to this time:" and, after stating the amount, the plaint proceeds thus: "for the recovery of which amount this suit is instituted against [260] the female Defendant, and Plaintiff prays that the amount claimed, together with the interest thereof, due to the date of liquidation, be paid to her." The answer to the plaint merely contests the debt. It contends that no money was due on the mortgage, and that this would appear to be the case in a suit which had been instituted by the Defendant against the Plaintiff, seeking for an account against the Plaintiff as the Executrix of the husband of the Defendant. It is solely an answer directed to meet a personal claim, and accordingly the reply is to the same point, and relies on the ninth section of Act No. 1 of year 1845. [His Lordship read the section, *ante* [11 Moo. Ind. App.] p. 244.]

This section clearly authorizes the personal action, but it gives no remedy against the land, which it leaves to the then existing law.

The decree which was made in this suit is, as might be expected, no decree against the land, but it is a general decree against the Defendant, Kaminee Dossee. It is in these words:—"Let the female Plaintiff get the money claimed and interest due

from date of suit to day of payment, and costs, together with interest, according to practice, from the female Defendant. Costs on the part of the female Defendant are charged to her."

This decision was appealed from, and affirmed; but the only point which seems to have been argued and decided in that suit, either on the original hearing or on the appeal, was whether, while the other suit already mentioned was pending, for an account between the same parties, and in which Kaminee Dossee, the Defendant in this suit, claimed a large balance to be due to her from Gourmonee Dossee, the Plaintiff in the suit, which is the founda-[261]-tion of the present proceedings, the Plaintiff, as mortgagee, before the fact that anything was due to her had been ascertained, had such an interest in the Talook as entitled her to pay the arrears of the revenue. If she had, it followed as of course that under the ninth section of the Act, No. 1 of 1845, already mentioned, she could recover the amount in the suit in question.

Shortly after this, Gourmonee Dossee assigned the decree and all rights under it to Girenderchunder Ghose, the son of Anundonarain Ghose, in consideration of the money lent to discharge the arrears, in whose place subsequently the Appellants, the sons of Anundonarain Ghose, were substituted, and who have all the rights that Gourmonee Dossee possessed.

When execution was sought to be enforced against Kaminee Dossee, by a sale of the whole Talook, the Respondent, Sreemutty Dossee, the daughter of Hurrololl Mitter, and the mother of his two grandsons, intervened to prevent the sale of the entirety, insisting that as Kaminee Dossee was a childless widow, the son of Sreemutty Dossee, who was then a minor, had a reversionary interest in the Talook, which could not be sold to pay a personal debt of Kaminee Dossee. When the intervention took place, it appears that then, for the first time, the holder of the decree raised the claim that as the Talook in its entirety had been saved from sale by the payment of the arrears of the revenue, the Talook in its entirety was liable to be sold in order to obtain repayment of that amount.

This question was brought before the Principal Sudder Ameen in March, 1856. He was of opinion that, under that decree, the claim could not be [262] maintained. He refers to a case, in the Sudder Dewanny Adawlut, a decision of the 16th of May, 1841, Rajah Hurrendronarain Roy, p. 8, which determines that a decree against a Hindoo widow cannot be executed against the estate of her deceased husband, except when it is clearly specified in the decree that the estate is liable for it. The case, when referred to, fully bears out this construction. The words of the judgment are these:—"The decree is against B for herself—not against B as guardian of C, then a minor. B had only a life estate as widow, and the family property is not liable to sale for the personal debts. Whether this was originally a personal debt has not been judicially determined. But the decree as it stands is against B personally, and can issue only against her and her heirs. C is not her heir, and the family property is not her property, nor can that property be held liable till a decree be given for it."

The result of this decision was, that the application to make the Talook generally liable to pay the debt was refused, on the ground that the question could not be taken into consideration in an execution case, but that the question ought to be determined in a civil action. This Order was affirmed on appeal. Shortly after this the present Appellants were substituted for Girenderchunder Ghose; and thereupon in August, 1859, the suit was instituted out of which the present appeal has arisen. It was instituted by George Smoult Fagan, who had been intermediately appointed Receiver of the estate of Anundonarain Ghose, deceased. The plaint in this suit is in the following terms:—

"The particulars of the case are these:—The [263] Defendant, Gourmonee Dossee, borrowed a sum of money from the estate of Anundonarain Ghose, deceased, to pay the rent of Talook, No. 109, Turuff Kalikapore and others, as per the touzee of the Collectorate of this Zillah, the annual Sudder jumma of which is Rs. 25,730. 3½, for the protection of her interest as mortgagee of the Talook. For the recovery of the said sum of money, she obtained a decree from this Court in suit No. 97 of 1851, against the Defendant, Kaminee Dossee, which decree the decree-holder, Gourmonee Dossee, transferred to Govind Chunder Ghose, the then Receiver to the

estate of Anundonarain Ghose, under a deed of conveyance executed on the 17th of February, 1855, in lieu of the money due from her to the said estate. When, consequent on the execution of the decree by the said Receiver, a proclamation for the sale of the Talook was issued, objections were raised by Sreemutty Dossee and the fictitious Putneedars, Defendants, whereupon, by a summary Order passed on the 18th of March, 1856, the sale of the Talook was stayed. Hence has arisen the cause of this suit. I, as the present Receiver to the estate of Anundonarain Ghose, bring this suit to recover the amount of the said decree, together with interest and costs according to the scale below furnished."

But this plaint does not seek to obtain a determination that the money paid for the arrears of the revenue constituted a charge upon the Talook: all that it does is to constitute a suit to recover the amount of the decree, with interest and costs, and to have the Talook sold for that purpose. The manner in which this is put by the Judge of the Civil Court is, that the suit is, by the agreement of all parties, wholly [264] contingent on the decree obtained in the first suit. He states that the decree "was not one in restriction of the remedies open to the Plaintiff, so as to confine the decree-holder to remedies personal to Sreemutty Kaminee Dossee: she was in possession of the estate. The action was brought against her in that character and capacity, and the law makes the proprietary interest responsible for any sums advanced to protect an interest in the estate. The decree being passed upon the recitals in the plaint, that cannot now be impeached upon statements that no mortgage existed; we must take the fact as found, the case having gone to decree against Kaminee Dossee, as the party in possession of the estate."

The Judge then proceeds, after showing that the action was one not merely personal against Kaminee Dossee, but that it also bound her, in her character as possessor, to answer all the issues in favour of the Plaintiff with costs, as between the Plaintiff and Kaminee Dossee and Sreemutty Dossee. From this decree an appeal was preferred to the High Court of Judicature, when, on the 13th of December, 1862, a decree was pronounced reversing the decision of the Court below. It is important to observe that in the opinion of the Judges of the High Court they had not to decide the question whether, by payment of the revenue in arrear, the person who had such an interest in the Talook as to entitle her to pay the arrear, and who thereby saved the Talook from being sold, did not thereby acquire a lien or charge on the Talook to the extent of the money so paid and interest thereon, but that the question they had to decide was simply and merely whether that equity could be enforced in a suit brought under the provisions of section 9 of [265] Act, No. 1 of 1845, which was confined to the object authorized by that section, and which did not proceed against the persons who had an interest in the property in succession after the death of the widow in possession. This will appear plain by the passage in the judgment, which is to this effect, viz., "the only point which we have to determine in this appeal is, whether as the decree in the suit brought against Kaminee Dossee by Gourmonee Dossee for the recovery of a sum of money paid to protect her own interests as mortgagee, and to save the estate on which she held the mortgage from sale, though personal in its terms against Kaminee Dossee, does or does not, under section 9, Act, No. 1 of 1845, give, to use the Judge's terms, 'to the decree-holder a statutory lien on the estate.' Where the case of first impression, we should even then have little hesitation, looking to the plain terms of the law, which simply gives a right of action against the proprietors of the estate, in declaring that the decree in a suit brought under the section of the Act above cited is only a personal one, and gives no equitable lien on the estate to the decree-holder, so that the property itself, in the hands of the person on whose account the payment was made, or any purchaser from him, is liable for the amount decreed."

They then proceed to point out a distinction between the case cited by the Respondents in that appeal and the present case, and they decide that the decree against Kaminee Dossee was a personal one against her, and that consequently the action of the Court in execution must be confined to her interest in her husband's interest in the estate, and that the rights of Kaminee Dossee's husband in the estate, or the por-[266]-tion of the estate upon which an equitable lien was acquired, cannot be brought to sale. They, therefore, reverse the decision of the Court below, and allow the appeal of Sreemutty Dossee with costs. Upon the fullest considera-

tion that their Lordships have been able to give to this case, they are of opinion the Judges of the High Court came to a correct conclusion as to the construction of section 9 of Act, No. 1 of 1845, and that the decision of the High Court was correct, and ought to be affirmed.

They repeat that it is not, in their opinion, the question whether the person who pays the arrear of the revenue does not acquire thereby a charge on the Talook which he saves from sale, but whether, if he seek to enforce that right, he must not do so in a suit properly framed for that purpose, and not merely in a suit which is confined to a personal remedy against the person in possession of the Talook. If the person who so pays the arrears of revenue seek repayment only under the 9th section of Act, No. 1 of 1845, as against the person in possession of the Talook, who has but a limited interest therein, and confines his suit to that object, their Lordships concur with the opinion of the High Court that the decree so obtained against the person in possession can only be made effectual against the property of that person, including such interest as she had in the Talook.

That this was the character of the suit in this case originally is shown by the pleadings in the case, and by the observation of the Zillah Judge in the passage already cited.

That the present suit, in which this appeal is presented, was only one supplemental to the original [267] suit, and brought to enforce and extend the decree so obtained, is also shown by the consideration of the plaint itself, and observations already cited of the Zillah Judge in pronouncing his decree, which fact is confirmed by the observation of the Judges in the High Court. Their Lordships think that it is impossible for them, in a case where the Respondents do not appear, to upset a decision of the High Court, which, in substance, only affirms that an action brought under section 9 of Act, No. 1, 1845, is only a personal action, and that in an action which was personal against Kaminee Dossee, as the possessor of the Talook, only her property and her interest in the Talook can be affected, and that an equity which the Plaintiff possessed, and which she might have enforced against the owners in reversion also, cannot be enforced against them in a suit brought to extend and enforce a personal decree obtained against the possessor of the limited interest.

Their Lordships wish it to be understood that they leave unimpaired the general rule that in a suit brought by a third person, the object of which is to recover, or to charge an estate of which a Hindoo widow is the proprietress, she will, as Defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. In the present case she is charged by the Plaintiffs with having sought to destroy the estate by causing it to be sold for arrears of revenue. If such a charge be true, the reversioners are entitled to recoup out of her life profits, the money which is advanced to avert a sale, if they redeem, as they are entitled to do, the actual salvors; and it would be obviously [268] inequitable for a person with such knowledge of the dealings of the proprietress, determining to salve the estate, to seek indirectly its destruction by a sale of the whole estate under an ordinary execution, without giving the reversioners the means of protecting their interests, by making them parties to a suit the object of which, by a mortgagee who advances to save the estate, should properly be to have an additional charge declared in his favour on it, subject to redemption, and in default only of redemption seeking a sale.

Their Lordships, therefore, will humbly advise Her Majesty that the appeal ought to be dismissed.

[See *Baijun Doohy v. Brij Bhookun Lall Awusti*, 1875, L.R. 2 Ind. App. 282; *Dern-dyal Lal v. Jugdeep Narain Singh*, 1877, L.R. 4 Ind. App. 251.]

SEETUL PERSHAD,—*Appellant*: MUSSUMAT DOOLHIN BADAM KONWUR and Others,—*Respondents* * [Feb. 19, 20, 1867].

On Appeal from the High Court of Judicature at Fort William, Bengal.

It is necessary that a Plaintiff who sets up a Mookternamah, purporting to have been executed by a Hindoo widow, appointing a Mookter to do certain acts on her behalf, should establish such instrument by strict legal proof of its due execution. The absence of such proof is not compensated by any legitimate conclusions to be drawn from the other facts and circumstances in the case.

This suit was brought by the Appellant to recover, first, the sum of Rs. 2,09,978. 15. 8., which amount comprised the sum of Rs. 1,98,000 for principal and interest, alleged to be due under a Kistbundy, or [269] instalment Bond, said to have been executed by one of the Respondents, Hazaree Lall, as the Mookter of the principal Respondent, Mussumat Doolhin Badam Konwur, under an alleged Mookternamah, or power of Attorney, dated the 13th of March, 1861; and secondly, to recover the further sum of Rs. 11,978. 15. 8. as principal and interest for moneys said to have been advanced by the Appellant on account of Government revenue to save from sale the Talook, Rooppoor, in possession of the principal Respondent, a Hindoo widow.

The question in the suit was one of fact; depending on the evidence as to the due execution of a Mookternamah, alleged to have been executed by the Respondent, a Purdah nushen (secluded in the Zenana), of the existence of which it was insisted on behalf of the Respondent that she knew nothing, or of the Kistbundy, or certain other transactions, alleged to have been executed by the Mookter, under such power of Attorney. Mr. Tucker, the Judge of the Civil Court of Shahabad, before whom the case was heard, made a decree in favour of the Appellant. In the judgment Mr. Tucker stated, that, although he was of opinion that there was a deficiency of strict legal proof of the Mookternamah, if such document stood alone, yet he considered that that deficiency of proof was owing to the conduct of the principal Respondent; that the other documentary evidence in the suit substantiated the justice of the Appellant's claim, which was inconsistent with the defence set up by the principal Respondent. Upon appeal the High Court of Judicature, consisting of Messrs. H. T. Raikes and W. S. Seton Karr, reversed the decree of the Court of first instance on the ground that the alleged execution of the Mook-[270]-ternamah and instalment Bond by the principal Respondent was not legally proved, and they were of opinion that the absence of that legal proof was not compensated by any legitimate inferences arising out of other parts of the case. Hence this appeal.

The appeal, which was confined to the question of fact, namely, the genuineness of the Mookternamah, was argued by

Sir R. Palmer, Q.C., and Mr. Pontifex, for the Appellant, and Mr. Leith, for the first Respondent.

Their Lordships' judgment was delivered by

The Right Hon. Lord Romilly (July 17, 1867).—This is an appeal from a decree of the High Court of Judicature at Calcutta, which reversed the decision of the Civil Court of Shahabad. The question to be decided in this case is the validity or invalidity of a Mookternamah, appearing to have been executed by the Respondent in favour of Hazaree Lall. The case, as stated by the Appellant, is to this effect:—

Five brothers, of the name of Pershad Singh, had been owners of a Talook in the Zillah of Shahabad, called Talook, Rooppoor. One of them, Kalee Pershad Singh, died, leaving surviving him the Respondent, Mussumat Doolhin Badam Konwur, his widow.

* Present: Members of the Judicial Committee,—The Master of the Rolls (the Right Hon. Lord Romilly), the Right Hon. Sir James William Colville, and the Right Hon. Sir Richard Torin Kindersley. Assessor,—The Right Hon. Sir Lawrence Peel.

Kishen Pershad Singh, one of the surviving brothers, was the manager.

The Rajah of Doomrao, who was connected with the family, the Respondent being his sister-in-law, obtained a decree against the co-sharers in the Talook for money borrowed from him by Kishen Pershad Singh to pay the revenue in arrear. This decree bore date the 23rd of December, 1852. Before [271] 1860 the Appellant, Seetul Pershad, had obtained a decree in like manner against the co-sharers of the Talook, and another creditor, named Ram Pertab Singh, had obtained a third decree. No steps were taken to enforce these decrees until 1860. In the early part of that year the Rajah of Doomrao obtained an order for the sale of the Talook to satisfy his decree; but prior to the sale he purchased the two other decrees obtained against the co-sharers of the Talook.

The Talook was sold on the 2nd of July, 1860, and the Rajah of Doomrao was the purchaser, at the sum of Rs. 64,000. Thereupon the Appellant alleges that an agreement took place between the Respondent, Badam Konwur, and the Rajah of Doomrao, by which she was to be put into possession of the Talook in the following manner, viz.:—That the Respondent, Badam Konwur, was to execute the Mookternamah in question, appointing Hazaree Lall, who was a servant of hers, her Mookter, to borrow Rs. 180,000 from the Appellant, to be paid to the Rajah of Doomrao: that thereupon the Rajah was to execute an Utlanamah of the Talook in favour of the Respondent; that then Hazaree Lall was to execute a Kistbundy, or instalment Bond, on the part of the Respondent, and to deliver this to Seetul Pershad, the Appellant; and, finally, that a farming Pottah, on the part of the Respondent, was to be executed in favour of Mussumat Doolhin Champa Konwur, at a rent of Rs. 19,000 per annum for forty-six years, of which rent Rs. 14,725 were to be applied in payment of the Government revenue, and Rs. 4000 for the liquidation of the principal amount of the instalment debt. The total amount of this is [272] Rs. 18,725, which would leave a balance of Rs. 275 for the Respondent.

The Appellant further alleges, that upon this arrangement being come to, and for the purpose of carrying it into execution, the three instruments were executed, viz., the gift of the Talook to the Respondent, the widow; the lease to the Respondent, Champa Konwur; and the Kistbundy, or instalment Bond, in favour of the Appellant; and that the amount of Rs. 180,000 was paid to the Rajah of Doomrao, or the amount was accounted for to him, by Seetul Pershad, who acted as a general Banker, and was also the Treasurer of the Rajah of Doomrao.

The Appellant further alleges, that Champa Konwur, the lessee, entered into possession of the Talook, paid the first monthly instalment to the Appellant, but paid nothing more; thereupon the Appellant paid the Government revenue, and instituted this suit to recover against the Respondent the sum of Rs. 198,000 for principal and interest on the debt due to him, and also the amount paid by him for Government revenue, with interest. Such is the account of the transaction given by the Appellant, and sought to be established by the evidence produced. The Respondent denied that she ever granted or executed any Mookternamah to Hazaree Lall, or to any other person. Whether she had or had not executed this Mookternamah was the first and, indeed, the only material issue settled for adjudication in this case.

In support of the Appellant's case, the instrument itself was produced, purporting to be signed by the Respondent, and to be attested by three witnesses, Bhojawun Singh, Rooghoonath Singh, and Baboo [273] Hurrechurchurn Singh, and to be signed, sealed, and registered by the Kazi of Chainpoor. The Appellant called, as a witness, the Kazi himself, from whose deposition it appears that the instrument was brought to him by Hurrechurchurn Singh, ready executed, and attested by Bhojawun Singh and Rooghoonath Singh, both of whom accompanied him on that occasion. The Kazi deposes that Hurrechurchurn Singh told him the reasons why the instrument had been executed by the Respondent; but he does not state that Hurrechurchurn Singh, or either of the two witnesses who had then attested it, represented that he had been present at the execution of it. The Kazi further deposes that he knew Hurrechurchurn Singh of old, and, therefore, he caused his attestation on the Mookternamah to be made in his (the Kazi's) presence. Hurrechurchurn Singh, on whose representation the Kazi seems to have relied in registering the instrument, was not produced as a witness in the cause. The Appellant

alleged that he was kept out of the way intentionally to defeat his (the Appellant's) claim, but no evidence was adduced in support of that allegation. Bhojawun Singh, one of the witnesses to the instrument, was summoned as a witness by the Appellant; and a person answering to that name appeared before the Civil Court; but he declared that he was unable to read or write, and that he knew nothing about the Mookternamah. This person having been confronted with the Kazi, the Kazi declared that he was not the witness who had appeared before him. The real witness, Bhojawun Singh, was not produced.

The remaining witness, Rooghoonath Singh, stated that he could not read or write, and denied that he [274] had attested any Mookternamah. Steps were taken to confront the Kazi with this witness, for the purpose of identifying him, but without success. The Appellant says that the witness had absconded to avoid identification. Neither the Appellant nor the Respondent produced or examined Hazaree Lall, the supposed Mookter. The Appellant states that he made every effort to do so, but ineffectually, and he suggests that Hazaree Lall was kept out of the way by the Respondent, whose servant he was. It is stated in the judgment in the High Court of Judicature, that he was forthcoming after the decision of the case in the Civil Court, but no attempt was made on either side to produce him for examination when the case was heard on appeal.

In the circumstances above stated, the Judge in the Civil Court disregarded the absence of legal proof of the execution of the Mookternamah by the Respondent, and considering that the rest of the evidence afforded the strongest presumption of its genuineness, gave a decree in full to the Appellant. On appeal to the High Court of Judicature this judgment was reversed, the Court finding that the execution of the Mookternamah was not proved, and that the absence of legal proof was not compensated by any legitimate inference arising out of, or by any facts disclosed by, the other parts of the case.

With this opinion their Lordships concur. They agree with the learned Judges of the High Court in considering the whole of the transactions relative to the sale and subsequent gift of the Talook, in respect of which the loan was incurred, as transactions of a very questionable character.

[275] The claim is made for 2 lacs and Rs. 9978; this amount includes the payments of the Government revenue, yet the property was sold by auction for Rs. 64,000. The Judge in the Civil Court considered the discrepancy in value between Rs. 64,000, the amount of sale, and the Rs. 1,80,000, the amount of the loan, as evidence that the sale was collusive; but their Lordships see no reason to assume that one sum more than the other represents the real value of the Talook. The Judges of the High Court considered all this a mere paper transaction, without any real transfer of property. The following circumstances in the case may be referred to as confirming this view. The decree of the Civil Judge in favour of Seetul Pershad includes the payment of the Government revenue, but the receipts produced are given in the name of Kishen Pershad Singh, the Manager of the co-sharers. It appears that no change of name has taken place in the Collector's Books, and that Kishen Pershad Singh remains now, as he has heretofore been, the person liable to pay the Government revenue, and to whom the receipts for payment are given. This circumstance affects seriously the argument on which the Appellant mainly relied, viz., the fact that the Respondent is in the possession of the estate, and that this is not disputed by her; but if this possession is merely nominal, it is consistent with the view taken by the High Court, that the whole matter is nothing more than a paper transaction, while the actual *bona fide* possession of the Respondent is inconsistent with the absence of any change of name in the Books of the Collector, and with the Government revenue being still paid by Kishen Pershad Singh.

[276] In addition to this, the decree taken by consent in 1852; the purchase of the other decrees, one from the Appellant and the other from a stranger; the delay in enforcing them; the circumstance that Hazaree Lall was the Mookter of Kishen Pershad Singh, and of all the co-sharers; that the Respondent, as well as Champa Konwur, the person to whom the lease of the Talook is granted, are ladies secluded in the Zenana, and never appearing in public,—all are circumstances which cast a grave suspicion on the case, and tend to support the suggestion of the learned Counsel for the Respondent, which also seems to have been adopted by the Judges of

the High Court, viz.: that the whole transaction was a scheme concocted between the Rajah of Doomrao and Kishen Pershad Singh, to whom he was allied by marriage, to make it appear that the estate had been bought by the Rajah, and that it did not belong to the Pershad Singh family, while the real ownership and possession were to remain unaltered.

The Mookternamah itself is taken to be registered by the Kazi and not by the English Resident at Agra, as the other deeds were. The witnesses to the instrument itself are three; two of them are unable to sign their own names, and, therefore, their attestation is worth next to nothing; the third, Baboo Hurrechurchurn Singh, only signed the instrument at the request of the Kazi, and does not pretend to have been present when the Respondent signed. In truth, there is no attempt whatever to prove the signature of the Respondent herself by any one present at the time of such signature.

On the review of all the circumstances of the case, their Lordships concur in the opinion expressed by [277] the Judges of the High Court of Judicature, that there is no legal proof of the execution of the Mookternamah, and that the absence of such proof is not compensated by any legitimate inferences to be drawn from the other facts disclosed in this case. Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal, with costs.

LALLA NARAIN DOSS.—*Appellant*: The Estate of the Ex-King of Delhi (in possession of the Government of India),—*Respondent* * [July 10, 1867].

On appeal from the Court of the Judicial Commissioner of the Punjab.

By an Order of the Governor-General of India in Council, dated the 21st February, 1860, claims of loyal subjects of the British Government against the Ex-King of Delhi, or his estate, were to be heard and adjudicated upon by the ordinary judicial Tribunals of the British Government, with the view of the Government eventually paying such claims as might be proved, out of his estate in possession.

Under this Order, where a claim was made and was justly and fairly substantiated against the Ex-King in the investigation before the Judicial Commissioner, held that such claim ought to have been allowed irrespective of technical difficulties which might have attended legal proceedings against the Ex-King to recover the debt during his Sovereignty [11 Moo. Ind. App. 292, 293].

Government, in cases in which it has taken upon itself to provide payments of debts claimed against the estate of the Ex-King, when such claims are barred by Regulation or Act, is entitled to the benefit of the rule of limitation barring the claim [11 Moo. Ind. App. 292, 293], but

Seemle—The Regulations of Limitation do not apply in the circumstances of the position of the Ex-King, where a suitor had been denied justice under a plea of jurisdiction and exemption.

The Appellant in this case was a Banker, carrying on business at Delhi, and brought the present suit to establish his claim for principal and interest due on [278] a Bond for Rs. 35,882 10a., executed by the Ex-King of Delhi in favour of the Appellant's father, Ramjee Mull, otherwise Ramjee Doss, on account of certain money transactions between the Ex-King of Delhi and the Appellant's father.

The suit was brought under an Order by the Governor-General of India in Council, of the 21st of February, 1860, which directed all claims of royal subjects of the British Government against the Ex-King, or his estate, to be heard and

* Present: Members of the Judicial Committee,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colville, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor,—The Right Hon. Sir Lawrence Peel.

adjudicated by the ordinary judicial Tribunals of the British Government, with the object of the Government eventually paying such claims as might be proved out of his estate in their possession.

In 1858, after the mutiny had been put down and order established, the Governor-General in India in Council placed the Delhi territory (except a small portion) under the administration of the Chief Commissioner of the Punjaub, then a non-Regulation Province of British India. In consequence, Reg. V. of 1832, which had previously annexed the Delhi territory to the jurisdiction of the Courts of the North-Western Provinces at Agra, was repealed by Act, No. XXXVIII. of 1858.

The facts of the case were as follows:—

Previous to the year 1840, Mahomed Bahadoor Shaw, the Ex-King of Delhi, resided as a State pensioner in his Palace within the fort of Delhi, and he [279] continued to reside there until he was removed as a Prisoner by the British Government, when his property, real and personal, including his private estate, was seized and appropriated by the Government.

Ramjee Mull, the father of the Appellant, resided in Delhi, and carried on the business of a Banker there, in which character he had money transactions with the Ex-King. On the 10th of April, 1840, an account was taken, and there was then found due and owing from the Ex-King to Ramjee Mull in respect of some such transactions, including both principal and interest, the sum of Rs. 29,982 5a. The Ex-King, being in want of more money, and being desirous of raising it by a loan, applied to Ramjee Mull to advance and lend to him the further sum of Rs. 5900 5a. 10p.; and at the same time agreed, if he would do so, to give him a Bond, to secure the repayment, with interest, not only of that sum but also the balance of the previous account then due as aforesaid. The Ex-King also agreed to give to Ramjee Mull, by way of collateral security, an Order of Colonel Skinner, since deceased, and then the lessee of certain lands held by him of the Ex-King, to pay by instalments, out of the rent of his Jaghire, the money to be lent and secured by the Bond. Ramjee Mull assented to this; and accordingly advanced to the Ex-King, on the 15th of April, 1840, the sum of Rs. 5900 5a. 10p. The Bond in question was then written out, by Dewan Dhoonkul Singh, the confidential Minister of the Ex-King, and sealed by the latter, and delivered to Ramjee Mull, on payment of this amount.

Ramjee Mull, during his lifetime—and after his death the Appellant, up to the year 1850—received annually from Colonel Skinner, the lessee mentioned [280] in the Bond, sums of money, varying in amount, in part payment of the loan; but the whole of the principal moneys secured by the Bond, as well as arrears of interest, remained due to the Appellant in the year 1850. In that year the Ex-King applied to the Appellant to make him another advance and loan of money, which the Appellant refused to do, on the ground that he had not been repaid the former loan. It appeared that the Ex-King resented this refusal, and accordingly, at the last-mentioned date, issued an Order to Colonel Skinner not to pay any more money to the Appellant, which Order was complied with. The Appellant then petitioned the Ex-King to pay him the whole amount then due under the Bond, but without any success.

In the year 1852 it appeared there was remaining due in respect of the debt the sum of Rs. 36,000 for principal and interest; when the Appellant brought a suit against the Ex-King, to recover the same, before Mr. Morgan, the Civil Judge of Delhi. This suit was, however, thrown out on its being proved that the Ex-King had contracted the debt within the Palace and Fort. On that ground the Judge held that he was not amenable to the Court's jurisdiction, the Fort being considered and treated by the Court as if it had been a Foreign State.

The Appellant was unable to obtain any further payment from the Ex-King in respect of the Bond, and the whole of the principal and considerable accumulations of interest remained unpaid when the mutiny broke out. The Appellant's property, papers, and securities for money were all then plundered and carried off by the rebels and mutineers, and his [281] accounts and Books, in which were entries of the moneys received by him on account of interest, were all either lost or destroyed during the mutiny, and in the disturbances in Delhi. On the establishment of the British power part of the Appellant's property was recovered by the

Prize Agent, Captain Law, by whom, on the Appellant's loyalty to the British Government having been proved, the Bond in question was restored. Afterwards the Governor-General of India in Council seized and appropriated the property of the Ex-King, and published, in 1860, the before-mentioned Order, authorizing all claims of loyal British subjects against the Ex-King to be heard and adjudicated upon by the ordinary judicial Tribunals of the country.

On the publication of this Order, the Appellant lodged a petition of claim, which stated that the claim was made against the estate of the Ex-King of Delhi, for money lent to him, amounting, principal and interest, to the aggregate sum of Rs. 80,824 13a. 3p., calculated up to the 3rd of February, 1860; that the Plaintiff held a Bond, signed and sealed by the Ex-King, and bearing the signature of Mr. Morgan, the Judge of Delhi, before whom he had brought the suit on the Bond; that for some years the Appellant had received payments on account of interest from Colonel Skinner on behalf of the Ex-King; that he claimed payment, not from the pension, but from the private estate of the Ex-King, which then yielded an annual revenue of about two lacks of rupees; and the Appellant submitted that, as a lawful creditor of the Ex-King, he was entitled to have his claim satisfied out of that estate. The petition then prayed that the claim might be [282] investigated, as directed by the late Lieutenant-Governor of the Punjaub, and the amount due paid to the Appellant; and he submitted that in so paying him the Government would incur no loss, because the private estate of the Ex-King was more than sufficient to meet all lawful claims against him.

The Appellant filed a letter in Court, as supplementary to his petition, correcting the former account, which set forth the principal points in his case which he relied on. First, that the Bond which he submitted bore the seal of the Ex-King; secondly, that it bore the signature of Mr. Morgan, late Civil and Sessions Judge of Delhi, before whom he instituted a claim, under the Bond, of Rs. 36,000 against the Ex-King; and thirdly, that it bore the signature of the Stamp Officer by whom it was stamped previous to being admitted in Court as a legal document.

The account last mentioned showed a balance of Rs. 75,258 13a. 3p., of which Rs. 36,000 was claimed as principal, instead of Rs. 80,824 13a. 3p. mentioned in the petition of claim, as due to the Plaintiff from the estate of the Ex-King on 21st of July, 1860.

The Appellant was personally examined on oath by the Assistant-Commissioner, L. Berkeley, Esq., in support of his claim, when, after deposing to the amount due and owing to him, he deposed to the fact that all his papers and Books were lost in the mutiny, but that he had recovered the Bond from Captain Law in manner aforesaid. He filed the Bond and examined six witnesses. The two first were his own Gomastahs, who had been long employed in his banking business. These witnesses [283] proved the transaction relating to the Bond; the consideration for the same; the Order of the Ex-King on Colonel Skinner, and as to the receipt thereunder by Ramjee Mull and the Appellant of not more than Rs. 31,000 or Rs. 32,000 on account of the interest aforesaid; and lastly, the suit brought on the Bond in 1852, to recover the sum of Rs. 36,000 then due to the Appellant under the same. The second of these witnesses proved that he had entered in the accounts, in the course of his duty as such Gomastah, in the Bank, whatever sums of money had been received on account of interest, but that nothing had been paid on account of principal; and had been destroyed during the mutiny. The two next of the witnesses were persons who had been employed in the office of Colonel Skinner, then deceased; and they proved that instalments of different amounts were paid, under the Ex-King's Order, by the late Colonel Skinner to Ramjee Mull, and after his death to this Appellant, up to the year 1850, and to an aggregate amount of about Rs. 30,000 or Rs. 31,000, on account of interest, but that nothing had been paid on account of principal; and that the Ex-King had subsequently sent another Order to Colonel Skinner, prohibiting the payment of any more instalments, because His Majesty had asked the Appellant to lend him more money and had been refused. The remaining witnesses were the Record-keeper of the Judge's office, and the Serishtadar of the same office, who proved that the first suit was brought by the Appellant against the Ex-King in the Court of the Judge of Delhi, in 1852.

On the 8th of December, 1862, the Assistant-[284]-Commissioner delivered

judgment in the suit, in which, after stating the principal moneys sued for to be Rs. 36,000, the interest Rs. 37,208 13a. 3p. and the miscellaneous charges Rs. 2050, making the aggregate claims Rs. 75,258 13a. 3p., he proceeded as follows:—

“The Plaintiff sues for the above amount, and says the late Ex-King of Delhi was indebted to his father Rs. 35,882 10a., for which he holds a Bond, dated 13th of April, 1840, bearing interest at 12 per cent. In payment of this debt he received nothing towards the principal, but realized Rs. 32,000 for interest only up to 1850, when the Ex-King ceased all payments, in consequence of which, in 1852, he sued in the Judge's Court for Rs. 36,000. The claim was, however, thrown out, as the late Ex-King was not amenable to the Civil Court. The Plaintiff was required to prove, first, his loyalty; and second, that the amount claimed is due. To the first point he has produced authenticated testimonials which establish his loyalty beyond a doubt. It seems that on account of this debt, and for giving protection to Dr. Dopping, that he suffered at the hands of the Ex-King and mutineers. To the second point he has produced the original Sooka or Bond which he holds from the Ex-King, which was legalized by being stamped by the Collector before it could be admitted in evidence. He could, however, bring no account Books, as they were destroyed during the late mutiny, with his property; but he has produced two witnesses to execution of Bond, two to prove that Rs. 32,000 only was realized through the late Colonel Skinner up to 1850 for interest, after which all payments ceased; and, lastly, two wit-[285]-nesses to prove that the claim was thrown out by the Judge on account of jurisdiction. I consider the Bond of Plaintiff a reliable document, but there are no papers or Books forthcoming from which the amount actually realized could be estimated, and no other witnesses could, under the circumstances, be given. Two of them are retainers of the late Colonel Skinner, through whom Rs. 32,000 was paid to Plaintiff; two, again, are Plaintiff's Gomastahs, who kept his accounts, and who assert that more than Rs. 32,000 was not realized; the last two witnesses are the Serishtadar and the Record-keeper of the Judge's Court, who testify to Plaintiff's claim being instituted and thrown out on account of jurisdiction. The Plaintiff is a person of great respectability and standing, and I hardly think (judging from his position and character) that he would bring an unfounded action. It may, therefore, be assumed, that as he sued for Rs. 36,000 in 1852, the amount was then actually due, which I would recommend his receiving, with Rs. 1000 for cost of suit. With regard to interest, which Plaintiff insists on obtaining, firstly as a right; secondly, on the score of loyalty; thirdly, on account of his losses during the mutiny, I would leave the Government to decide, as I have not awarded it in any other case, on the Principle that the Government have, as a favour, taken on themselves to adjust the reasonable and just demand of the Ex-King's creditors, and the Plaintiff has already received Rs. 32,000 for interest on his debt. I, therefore, recommend the principal amount only.”

This judgment was then laid before the Commissioner of Delhi, Colonel G. Hamilton, who sent back [286] the proceedings to the Assistant-Commissioner for further inquiry, directing that the Appellant should be questioned as to whether he had ever made any application to the Resident for redress; and whether the claim was settled or rejected by that Officer; and directing also that inquiry should be made respecting the claim of Officers of the Residency, and officials employed under the Ex-King.

Further witnesses were examined, the effect of whose evidence was to prove that the Plaintiff brought his former suit in the Court at Delhi, in the regular way, against the Ex-King; that the Resident was not in the habit of hearing such complaints, except from those whom the King might send to him with a shooka, or order for the payment of money, and that without such an order the Resident declined to hear, and did not, in fact, hear any complaints, nor were any such preferred to him; and that the Resident did not interfere with the pecuniary transactions of the Ex-King, nor did he hear cases of debt against the King.

On the 16th of March, 1853, Mr. L. Berkeley, the Assistant-Commissioner, sent to Colonel G. Hamilton his written judgment as follows:—“In compliance with your instructions, I have questioned the Plaintiff regarding the circumstances alluded to by you, and taken the evidence of the following witnesses, namely:—Mirza Ilahee Buksh, Hakeem Ahsanalla Khan, Mokund Lall, Ballmokund, Jaiseeram, and

Lalla Mohesh Doss. The evidence of Hussn Beg and Jugul Kishore, two retainers of the late Colonel Skinner, and of two Gomastahs of Plaintiff, was taken before. All the evidence tends to prove the claim, and that Plaintiff [287] realized only the interest of the principal amount; the Bond was recovered by the Plaintiff from the prize Agents. The Ex-King was not amenable to the Courts for debts contracted within the Palace walls. He was liable to be sued for all other debts, and hence this suit. I find the Resident or Agent to the Governor-General at Delhi could only take up those claims which the Ex-King allowed him to do. The Resident had no authority to receive applications for settlement of debts contracted by the Ex-King without the consent of the latter. I have re-considered the case, and abide by my former recommendation, viz.—That the Plaintiff receive the principal of the amount sued for, should there be property forth-coming from which the debt could be satisfied."

The Commissioner, Colonel J. Hamilton, afterwards called Rajah Debee Singh as a witness; he corroborated the evidence given by the Appellant's witnesses as to the original debt, the execution of the Bond by the Ex-King, his order on Colonel Skinner, and also as to payments by him of moneys under that order. He produced the order on Colonel Skinner, and was asked how he came to hold it, and he replied:—"I found it in the old papers of the King. At one time the King wished the money in payment of the debts to creditors to be stopped, and got it himself from Colonel Skinner."

On the 22nd of April, 1863, the Commissioner recorded his judgment as follows:—"The document produced by Rajah Debee Singh confirms what I have stated above, and clearly shows that the Ex-King considered that he had finally settled the claims of the Plaintiff. The Plaintiff admits that from 1850 till 1857 he received no money, and [288] it is, therefore, certain, had the Ex-King now been alive, and *in statu quo*, the Plaintiff would have no better prospect of recovering his claim, supposing it to be quite just. It is the desire of the Government that faithful subjects should not be losers by the attainder of the Ex-King, but it does not profess to make them gainers by that event. I, therefore, dismiss the claim of the Plaintiff."

The Appellant appealed from this judgment to the Court of the Judicial Commissioner of the Punjab, and on the 28th of May, 1863, the officiating Judicial Commissioner, Robert Needham Cust, Esq., by his Order of that date, admitted the appeal. The hearing of the appeal took place before him, and on the 16th of June, 1863, he pronounced his decree, dismissing the appeal with costs. In his judgment: he said "It is admitted, and willingly admitted, that Lalla Narain Doss is a loyal subject and respectable citizen, but that gives no claim to a decree when the proofs are not sufficient. If the Government propose to reward well-wishers, they do so directly by pensions or jaghires, and not indirectly by decrees in doubtful cases. It may be possible that Rajah Debee Singh was disloyal. This does not vitiate his evidence in a matter which is within his cognizance. It must never be lost sight of, in the adjudication of this class of cases, that the hearing of any of them or the decreeing of any portion of them, is, on the part of the Government of India, an act of mere grace and benevolence—that no legal claim can be made out against Government, either in law or equity. The Court which investigates these cases is one of conscience, and decrees can only issue in those in which it is clear that had the King remained in power the Claimant had some chance of satisfaction. [289] It is notorious that money was advanced to the King, as most hazardous speculations upon very uncertain security, at exorbitant interest, and, as it appears in this case, without the guarantee of the existence of a Civil Court competent to redress injuries or breaches of contract. This claim was brought forward in 1860, the Bond is dated twenty years before. It is admitted that since 1850—that is to say, for ten years—no payments of any kind have been made. In 1852 a claim was lodged in the Civil Court of Delhi, and rejected for want of jurisdiction; this futile attempt does not affect the Act of Limitations. Six years is the limitation of a bonded debt, and the Appellant was out of Court before the mutiny broke out, as regards the procedure of the Punjab Courts. It is notorious that there was an Agent to the Lieutenant-Governor in charge of the King of Delhi, and that application might have been made to him in the matter of a debt claimed from the King:

the Agent might or might not have been able to do justice, had he been applied to; and not being able to do justice, the inference is, certainly, that the claim is a very doubtful one. A claim which the Agent to the Lieutenant-Governor was unable to support by his recommendation to the King, is not one which can be recommended to the Government of India to satisfy, in the place of the King. If no application was made to the Agent, it must be inferred that the claim was not one which the Appellant was willing to communicate to the Agent, and is, therefore, certainly not one which, after a lapse of ten years, can be recommended to be satisfied as an act of grace by the Government of India. The Appellant lays great stress on his being a Banker. As a Banker he must know that such things as bad debts [290] exist: this is one of them; and the Government does not undertake to satisfy all old Bonds and Book debts which were hopeless before the mutiny. My judgment is not formed on Rajah Debee Singh's evidence, but in reply to the Appellant's allegations, that Rajah Debee Singh was not examined in his presence. It is asked, why did not the Appellant, when he was examined by the Civil Judge with reference to the matter contained in Rajah Debee Singh's evidence, request to be confronted with him? His prayer could have been easily complied with then; he cannot make that objection now."

The Appellant preferred an appeal to Her Majesty in Council, under the Act, No. II. of 1863, which the Judicial Commissioner admitted, and the same now came on for hearing.

Mr. Leith, for the Appellant.—As the Plaintiff's case was established by evidence, and as he is admitted to be a loyal subject, the amount sued for by him against the Ex-King's estate ought to have been decreed by the Judicial Commissioner. The period of six years' limitation was erroneously applied by that Officer as a bar to the suit. By the Punjab Code, Part I. sec. I. cl. 16, which was in force at the date of the institution of the suit, the period of limitation was twelve years, calculated from the time when the cause of action arose. The last instalment paid upon the Bond was in 1850, so that twelve years had not expired, and the Appellant was, therefore, entitled to judgment in his favour. By the Act, No. XIV. of 1859, sec. 16, the limitation would be six years if the Bond had not been registered, but if that Act does apply, we are within the pro-[291]-visions of the exception contained in section 24 of that Act. Even if the period of twelve years had really expired, the Appellant was within the exception expressly allowed by the Punjab Code, which enacts that, in such cases, if "the Complainant can show that, from minority or other sufficient reason, he has been precluded from obtaining redress, he is entitled to sue," Part II. Procedure, sec. I. cl. 6. A provision similar to that contained in Ben. Reg. III., sec. 14, of 1793. Here the Appellant did show, by evidence in the suit, that such "sufficient reason" existed, by which he had been precluded from obtaining redress against the Ex-King of Delhi, as the Ex-King had availed himself of the plea that his contract under the Bond had been effected within the Fort, so as to exclude the case from the general authority and jurisdiction of the Courts of Law. No laches or neglect can be attributable to the Appellant.

Mr. Forsyth, Q.C., and Mr. Merivale, for the Government of India.—First, the Ex-King of Delhi, as a Sovereign power, could not be sued for a debt contracted in the Palace, as a judgment, if obtained against him, could not be enforced; consequently the Government of India, who stand in his place, is not under any legal obligation to pay the debt, which under the Order in Council is only a matter of grace and favour on their part. Secondly, the evidence establishes the fact that the alleged debt by the Ex-King was either paid off, or was the personal liability of Colonel Skinner; that he paid the amount of principal and interest out of the proceeds of his Jaghire, and the judgment of the Judicial Commissioner appealed from was right in so holding; but, thirdly, the right to recover the debt [292] is barred by the law of limitation applicable to the case. The Bond is dated in the year 1840, and the claim against Government is not preferred till the year 1860, a period of twenty years, and, therefore, the suit was barred. It is no answer that the Appellant instituted proceedings in 1852, as he did not sue in a Court of competent jurisdiction; such suit could not take the case out of the operation of the rule of limitation of twelve years.

Judgment was pronounced by

The Right Hon. Lord Cairns (July 10, 1867).—In the peculiar circumstances of a case of this description, in which the Government of India takes upon itself to pay out of the assets of the Ex-King of Delhi such claims as can be established against the Ex-King, their Lordships are of opinion, that the Government does no more than what is incumbent upon it, when it narrowly and jealously scrutinizes claims which are made; it being within the experience of all that where the claim is against, not the person who originally contracted the debt, but those who have taken upon themselves the duty of satisfying it, exaggerated and sometimes unfounded demands are made. Their Lordships also think that if in those circumstances a claim were made which was found to be barred by the letter of any Regulation or Act of limitations, the Government of India might well say, that they had not taken upon themselves to provide for the payment of State demands, and that they were entitled to the benefit of any rule of limitation of that kind. Subject, however, to these observations, their Lordships think that any claim which justly and fairly, in equity and conscience, [293] could be made and substantiated against the Ex-King, is a claim to be allowed in the investigation which the Government has instituted before its judicial Officers, irrespective of technical difficulties which might have attended legal proceedings against the King during his Sovereignty, leaving, of course, the question of the payment of that claim, when established, to be dealt with in reference to the assets out of which the payment is to be made.

Now, as to the Bond upon which the claim is made in this case, their Lordships think that the evidence establishes to their perfect satisfaction, as it appears to have established to the satisfaction of the Judges below, the *factum* and the existence of that Bond; and they conceive that no imputation can successfully be made against the Bond as an instrument in the first instance executed by the Ex-King. Their Lordships think that, with regard to the Punjab Code as to limitation of actions, it does not apply to the present case, because the claim is made, in their opinion, within the period actually allowed by that Code; and even if there were any doubt as to that, there is amply sufficient reason, from the position of the Ex-King, to account for an action not having been maintained against him within the period prescribed by the rule.

Then arises the question whether the whole amount of principal originally due upon the Bond remains due? No evidence appears to have been adduced tending to show any payment on account of principal. The Officer of the Ex-King, who was examined, by his evidence confirms that which is alleged by the Appellant, viz., that the whole sum remains due, and that nothing has been paid on account of principal. The witness who was last [294] examined, and who produced the documents which passed between the King and Colonel Skinner, also by his evidence tends to show that the only payments which were made were the payments through Colonel Skinner—payments which, by the very calculation and addition of them, would show that nothing could have been paid on account of principal.

It is said, however, that in the year 1852, when an action was attempted to be maintained against the Ex-King in the Civil Court of Delhi, an action which was defeated by the plea of want of jurisdiction, the claim made was a claim for Rs 36,000 alone. We have not got the proceedings or documents in that action. We have the evidence of the Appellant, who states that what was claimed in that action was the sum of Rs. 36,000. But their Lordships see no reason to doubt that if the claim in that action was upon the face of it described as a claim for Rs. 36,000, that Rs. 36,000 was nothing more than a short and compendious mode of stating the principal sum due upon the Bond. Their Lordships, however, finding that the claim in the action of 1852 was for this sum of Rs. 36,000 and finding also that in the detail of the claim in the present case the principal is taken at **that** amount, as on the 1st of January, 1852, and interest claimed from the 1st of January, 1852, only, are of opinion, that while the Appellant is entitled in the present proceedings to recover the amount of the principal of his Bond, he must be content to take his interest as from the 1st of January, 1852, until the present time.

Their Lordships, therefore, will humbly recommend to Her Majesty that the decree appealed from should be reversed, and that the Appellant should be [295] declared to have established his claim for the principal sum appearing on the face

of the Bond, with interest from the date that has been mentioned, together with the costs of his litigation in the Courts below, and that he is also entitled to the costs of this appeal.

[Commented on, *Rajah Salig Ram v. Secretary of State for India*, 1872, L.R. Ind. App. Sup. Vol. 119.]

RUTTONJI EDULJI SHET,—*Appellant*; THE COLLECTOR OF TANNA and THE CONSERVATOR OF FORESTS,—*Respondents* * [July 9 and 10, 1867].

On appeal from the High Court of Judicature at Bombay.

Held, upon the construction of a Government Cowl, in Khote tenure (lease for a limited period for the purpose of cultivation) of a large tract of swamp land, in the Island of Salsette, in Bombay, on which were forest trees, that the lessee could only cut trees growing on the lands demised for the purpose of clearance and cultivation, or for repairs, and that he had no right to fell and carry away for sale unassessed forest timber growing on the demised lands.

Suit by lessee against Government, claiming damages for prohibiting him from cutting forest trees for sale, dismissed.

The question in this appeal related to the right of the Appellant, a Parsee Merchant at Bombay, in his capacity of Khote of the village of Ghatkopur, in the Island of Salsette, to fell and carry away teak, blackwood, kheir, or other unassessed trees growing within the boundaries of that village, as specified in the Cowl, or lease, granted to him by the Government [296] for a term of ninety-nine years. The Appellant contended that the Government had no right to prohibit him from so doing, or interfere with him further than by levying tolls or duties for the transit along the public ways of the wood so felled when carried away.

The facts and circumstances of the case were these:—

On the 23rd of May, 1843, the Appellant presented a petition to the Government of Bombay for a lease of the above village, for the purpose of recovering the swamp land and converting it into salt batty crops, and forming salt pans. Upon this application the then acting Collector of the District of Tanna granted to the Appellant a Cowl for the village of Ghatkopur, bearing date the 31st of December, 1845. By the terms of this lease the village was granted to the Appellant in farm from the year 1844, for a period of ninety-nine years, on the revenue of the year 1842, on certain conditions specified in the lease. In the lease the quantity of land was specified, some of which was described as under cultivation and the rest as waste; the number of brab trees was likewise specified, amounting to 2568, of which 82 were on cultivated, and 2486 on waste land. The first condition provided, that the produce of waste land and waste brab trees was to be deducted from the Jumma-bundy (revenue settlement or rent), “in consequence of the waste land and brab trees having been given to you in Mafee (rent free) as specified below.” The rent was fixed at Rs. 1135. 14a. 7p.

The other important conditions in the lease were these:—

2nd clause.—“The waste land of the village, including Junglegurk, Naligurk, and Nowsad, etc., is hereby granted to you in Mafee for forty years from [297] 1844-45. You are to make the necessary outlay and bring it under tillage, out of the sweet waste land, one fourth within the term of ten years from the date hereof; and you should in the same manner continue to do so every ten years, so as to bring the whole of it under tillage within that period: in failure whereof the produce of

* Present: Members of the Judicial Committee—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colville, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor: The Right Hon. Sir Lawrence Peel.

the hay, amounting to Rs. 27 herein deducted, will be collected from you from the first to the last year of the exemption. You are to prepare the salt land for cultivation within five years from 1844-45, but if you fail to do so, a fine of Rs. 500 will be imposed on you, and after the expiration of forty years the full assessment, according to the prevailing usage of the country, will be collected annually from you on such land as may be under cultivation, as well as on such quantity as may remain waste out of the present waste entered into the public accounts."

3rd clause.—"The waste brab trees are in like manner made over to you, and after the expiration of forty years they will be surveyed and assessed according to the undermentioned rates, and the amount collected from you."

4th clause.—"You are prohibited from cutting down or destroying any brab, date, or other trees, liable to taxation, without the permission of the Collector."

"Should you, during the period of exemption, draw the juice from any trees, and at the expiration of that period allow them to rest with the view of obtaining them at a lower rate, the full tax on all such trees that may have been cultivated by you in any year during the term of exemption will be collected from you."

6th clause.—"The rights of the present pro-[298]-prietors of land, and other privileges of any description whatever, remain unaffected by this lease. It is clearly to be understood that this lease confers no right which Government does not now possess, and only such portion of the rights of Government as may be herein specifically granted is hereby granted to you."

16th clause.—"For breach of any of the conditions of this lease for which a specific penalty has not been laid down, Government is at liberty to inflict such punishment as may be provided by Regulations, and to cancel the lease and resume the village without reimbursing you for any expense you may have incurred. No claim for losses will be attended to."

25th clause.—"Should the inhabitants of your as well as of other villages be in the habit of carrying hay, wood, etc., annually from the jungles of your village, you are not to interfere with such practice."

32nd clause.—"There are in the aforesaid village about 150 beegas of swampy land which might be available for salt pans; you are, therefore, as proposed by you in your petition, to expend whatever sums of money may be necessary and convert the said lands into salt pans," within a certain period there specified and subject to certain penalties.

It appeared from the evidence of some of the Appellant's witnesses, that on more than one occasion after the granting of the lease, he cut and took away some of the forest timber on land comprised in the lease. In the year 1859 the Appellant put up to auction the right to fell and appropriate all the teak, blackwood, and kheir trees in the Junglegurk within the limits of the village of Ghatkopur. One Ruhimoo Kosum of Tanna was the highest bidder, and, in pursuance of his contract, [299] he cut down the greater part of the timber; but when the attention of Government was called to the fact, they put a stop to the cutting down of the remainder, and prevented the removal of the trees which had been felled.

In consequence the Appellant, on the 15th of November, 1860, filed a plaint in the Court of the Judge of the District of Konkun against the Conservator of Forests and the Collector of the Tanna District, and stated his cause of action as follows:—"All kinds of unassessed trees in the village of Ghatkopur are not allowed to be felled down; therefore, the claim for damages is laid in the amount of the value of the trees, Rs. 10,000."

The Collector of Tanna, by his answer, insisted that, under the conditions of the Cowl granted to the Appellant, he had no right to the forests, because the forests were not specially granted in the lease; and that when the Appellant first made application for a lease of the village, he asked for waste land merely for the purpose of making salt batty crops, and for forming salt pans.

Evidence was entered into on both sides. The evidence of the Appellant's witnesses was to the effect, that other lessees as well as the Appellant had been in the habit of cutting and turning to their own profit the unassessed timber on the lands leased to them, without interference on the part of Government. But they failed to produce in evidence, and could not say that they remembered, any lease similar to that held by the Appellant in respect of its containing no specific grant of the forest trees.

It was admitted that he had not felled any of the timber trees with the view or intention of bringing the land [300] into cultivation. On the other hand, the witnesses of the Respondents produced in evidence several leases (under some of which the lessees mentioned by the Appellant's witnesses had held), all containing some clause specifically granting rights over the trees in the villages respectively conveyed to them.

The judgment of the District Judge (H. P. St. G. Tucker, Esq.) was delivered on the 5th of June, 1863. The material passages are the following:—"The first point for the Court to determine is the law which is to be applied to the matter in dispute, and it is of opinion that, there being no Act of Parliament, or Act, or Regulation, of the Indian or Local Legislatures, declaratory of the rights of persons in the position of Plaintiff, or which lays down any rules for the interpretation of contracts, the decision of the Court must be governed by the usage of the country, and in the absence of any specific usage (to employ the words of Reg. IV. of 1827, sec. 26) "by justice, equity, and good conscience alone." In ordinary cases the personal law of the Defendant, where such law existed, would take precedence of equity and good conscience, but in this instance the real Defendants are the Government of Bombay, whose personal law must be held to be Statute Law of the Presidency, which, as above remarked, is silent with regard to the question under adjudication. Usage, so far as it has been shown to exist, and general principles of equity, must, therefore, form the foundation of the Court's judgment. The doctrine of the English Law, namely, that nothing passes to a Crown lessee but what is specifically granted, has the Court's full concurrence, for it is a rule founded on obvious principles of public policy, [301] and its application to any particular nation or community cannot fail to be beneficial. In the present case the terms of the lease itself require a strict adherence to the rule, for in clause 6 it is declared, 'And only such portion of the rights of Government as may be herein specifically granted is hereby granted to you.' Was, then, any proprietary right over the forests specifically granted by the lease to Plaintiff? The Court cannot find in the lease anything which can be justly construed into the grant of such a right. Clause 2, on which Plaintiff relies, runs as follows:—"The waste land of the village, including Junglegurk, Naligurk, and Nowsad, etc., is hereby granted to you in Mafee (*i.e.* free from rent) for forty years from 1844-45. You are to make the necessary outlay and bring it under tillage, out of the sweet waste land, one fourth within the term of ten years from the date hereof; and you should in the same manner continue to do so every ten years, so as to bring the whole of it under tillage within that period; in failure whereof, the produce of the hay, amounting to Rs. 27, herein deducted, will be collected from you from the first to the last year of the exemption. You are to prepare the salt land for cultivation within five years from 1844-45; but if you fail to do so, a fine of Rs. 500 will be imposed upon you, and after the expiration of forty years, the full assessment, according to the prevailing usage of the country, will be collected annually from you on such land as may be under cultivation, as well as on such quantity as may remain waste out of the present waste entered in the public accounts.' Now, it seems clear that the lands conveyed by this clause were the culturable waste lands of the village, *i.e.* the lands entered under the [302] head of 'Oshik' in the accounts, and described in the lease itself as subject to an annual assessment of Rs. 27 while they continue uncultivated, which assessment was remitted to the Plaintiff for forty years, on condition that he brought a certain portion under tillage during each interval of ten years. The fact that no express mention was made of the forests which were in existence at the time the lease was granted, and that they were not included in the prohibition to cut taxable trees, will not justify the conclusion that it was intended to confer on Plaintiff a proprietary right over the timber growing on these forests. It is evident from clause 6, that it was not the intention of Government to grant any rights to the Plaintiff that were not specifically set forth in the lease, and as there is no mention of any seigniorial rights over forests, mines, or quarries, such rights cannot be held to have passed to the Plaintiff. The evidence adduced by the Plaintiff has failed to establish that any lessees who hold on the same terms as himself possess the right of disposing of the timber growing in their villages at pleasure; the landlords whom his witnesses have deposed to have been in the habit of exercising such rights, with the exception of four, have been shown by the Defen-

dants to have specific grants of rights over trees in their leases. With regard to the remainder, it was for the Plaintiff to prove that they held under leases similar to his own; and as he had not done this, it may not unfairly be inferred that there were special grants in the leases of these persons also. Allusion was made at the trial to the rights of the hereditary Khotes of the Konkun, whose estates were acquired under the Marattah Government, over the timber growing in [303] their villages, but the Court has deemed it unnecessary to enter on the question of the rights possessed by those persons. The tenure of the hereditary Khotes and the holding of the Plaintiff rest on different foundation. The Plaintiff's title originated in his lease, and is limited by that deed. The only usage which the Plaintiff has established is, that on two occasions he cut such wood as he wanted from the forests, and that, on the last occasion, he sent the wood he had cut to Bombay; and that a previous lessee, who held the village for five years on a written lease, the terms of which are not known, did the same. Usage of this description confers no prescriptive right. The Court, then, holds, that neither by the terms of his lease, nor by any recognized usage, has the Plaintiff acquired an absolute ownership in the timber such as he has claimed by his acts; but it is also of opinion, that as Lessee for a long term, he possesses an equitable right to take from the forests at Ghatkopur such timber as he requires for the construction and restoration of his village residence and farm buildings, the formation and preservation of fences, and the making and repairing instruments of husbandry, as well as firewood for household purposes in the village. Such privileges are in most countries incident to farm leases, where not restrained by covenant; and it would seem from the evidence of the Defendant's witness, the Mamlutdar of Salsette, No. 38, that up to 1840-41 tenants of all descriptions were permitted to cut any wood they pleased in the forests adjacent to their lands. This licence was abused, and the Government, acting in the public interest, instituted a department for the conservation of forests; but the Court does not believe that it was ever intended to deprive either [304] the cultivators or superior landholders of the use of wood for legitimate farming purposes, which they had hitherto enjoyed. However this may be, it is shown by clause 25 of the lease, that at the time it was made, the Government admitted the right of the Ryots in Ghatkopur and other villages to take wood from the forests; and no special restriction having been placed on the Plaintiff, it may be presumed that it was not intended he should be placed in a worse position than his under tenants. The Court, therefore, holds, that, under the lease, he did possess the right to cut timber and firewood to the extent above stated, subject to the orders of Government with regard to the time and manner in which the timber should be felled and removed. On the second issue, the Court having declared the extent of the right which it considers to have been possessed by the Plaintiff under the lease, the remaining question to be determined is, whether he has suffered damage from any infringement of that right. It would appear that he has been the real trespasser, for he attempted to clear the forest, not for the purpose of extending the cultivation, but with a view solely to his private profit. The Government Officers were undoubtedly justified in stopping this illegal usurpation, and no damage can be claimed from them on account of any loss that the Plaintiff may have suffered through his own irregular proceedings. The Plaintiff has not established that the Defendants ever prevented his enjoyment of the limited right which the Court considers he possesses, and it is clear that the concession of this restricted privilege was never sought for by him, and was, therefore, never refused. The Court, under these circumstances, consider the claim for damage altogether [305] inadmissible, and it consequently decrees for the Defendants with all costs on the Plaintiff."

The Appellant appealed against this decree to the High Court of Judicature at Bombay. In his grounds of appeal it was urged, that the forest which the Appellant claimed the right to fell, grew on lands conveyed by the second clause of his lease; that as the fourth clause expressly prohibited the lessee from cutting brab, date, and other trees liable to taxation, it thereby implied that the lessee was entitled to cut all other trees; that the reservation in the sixth clause had no reference to the rights of property conveyed by the lease; that the District Judge should have treated the lease as if it had been granted by a private individual; and that it should not have been construed by the rules of law applicable to leases for years in England.

The appeal was heard by the High Court at Bombay, consisting of the acting Chief Justice Arnould, and the Justices Newton and Junardhun Vasood-ewji, on the 29th of June and 27th of July, 1864, when the Court gave judgment, affirming the decree of the District Court with costs.

The present appeal was from this judgment.

The case of the Appellant was, that, according to the true construction of the Cowl, the material portions of which are hereinbefore mentioned, the Appellant was only prohibited by that instrument from cutting down trees that were liable to taxation, and, therefore, had a right, according to the maxim "*expressio unius est exclusio alterius*," to cut down trees not liable to taxation, and, by a necessary implication, he also had a right to remove them; that he had the same [306] rights by custom as were exercised by other Khotes in the same Talooka, of felling and appropriating to their own use the unassessed trees within their respective boundaries; that the law of England, which had been referred to in the Court of First Instance, relating to the reciprocal or conflicting rights of Lessors and Lessees, or tenants in reversion or remainder, with respect to timber or trees, did not apply; and that at the time of the granting the Cowl there was not in force within the Island of Salsette any law restraining Lessees for years from felling or disposing of trees not liable to taxation growing upon their holdings, unless by express agreement.

For the Respondent it was contended, first, that the Cowl to the Appellant did not confer on him the right to cut down and appropriate the forest timber in question, and that nothing short of a specific grant could convey such a right; and, secondly, that the Appellant had failed to prove that there was any customary right on the part of a Lessee under a Government lease to cut down and appropriate to his own use such forest timber.

Bom. Regs., IV. of 1827, sec. 26; I. of 1808, sec. 4, cl. 1; and Acts, Nos. I. and IV. of 1865 were referred to in the course of the argument.

Mr. Manisty, Q.C., and Mr. T. Chisholm Anstey, for the Appellant, and Mr. Forsyth, Q.C., and Mr. Merivale, for the Collector of Tanna and Conservator of Forests.

Without calling on the Respondents' Counsel, their Lordships delivered judgment by

The Right Hon. Lord Cairns.—In this case a plaint was filed in the Konkum Dis-[307]-trict Court by the Appellant, and the complaint which he made was founded on a lease which was granted to him by the Acting Collector of the District of Tanna, on the 31st of December, 1845, of the village of Ghatkopur. The complaint was that, contrary to the terms of that lease, the Defendants did not allow the Appellant to fell unassessed trees in the village, or to apply them to his own use,—that is, to carry off the trees from the ground on which they grew, and to dispose of them to the use of the Appellant; that claim being on the face of it founded upon the lease which had been granted to the Appellant.

The evidence with regard to this timber is to be found in the testimony of Ruhimoo Kosum. That witness thus describes the timber:—"I know Ruttonji Edulji, the Plaintiff in this case. Three or four years ago I entered into a contract with him to cut all the teak, blackwood, and kheir trees, small and great, in the forests of Ghatkopur, for Rs. 4900. It was agreed that I should cut the trees at my own cost. I accordingly cut a portion of the trees, but was prevented from doing so by the Government authorities, and the trees cut down were attached, and, therefore, I could not remove the trees. I paid Ruttonji Edulji Rs. 1225 on account of the contract, but as the wood was not made over to me, Ruttonji Edulji paid me Rs. 1950, including expenses, etc." In answer to the Defendants' questions, he says,—“Some of the trees for which I had made a contract were timber trees, and some were fit for firewood, and had I carried out the contract I should have cut down all the teak, blackwood, and kheir trees, great and small. Some of the trees would only have been fit for fire-[308]-wood, other jungle trees fit for firewood would have remained in the forests of Ghatkopur. I took the said contract at a public sale, and there was a written agreement for the same. I have not brought it with me. The auction was held in the village of Ghatkopur.” Afterwards, in answer to the Court's questions, he says,—“If I had cut the trees according to

the contract, wood to the value of Rs. 1000 or Rs. 2000 would have been left in the jungle. Before I was prevented by the authorities from removing the wood, I sold about Rs. 300 worth of wood to the neighbouring villagers, and the said sum was accounted for."

Another witness of the Appellant, Manockjee Rustomjee, adds this: "There are jungle Gharaks at Ghatkopur, which are on the tops of the hills and on the banks of ravines. If the jungle were not cleared, rice would not grow, but other grains might grow there; but it is not the custom here to raise other grains; but grass would grow on the said land. When the Plaintiff got the village, in A.D. 1845, Government had no right to the jungles in the Talooka Salsette, nor did Government interfere. I have no knowledge whatever regarding the other villages of Government. The Plaintiff did not fell the trees on the jungle Gharak with the intention of bringing the land into cultivation."

The claim, therefore, is not to cut certain trees for the purpose of clearance or cultivation—not to cut certain trees for the purpose of repairs or consumption on the ground of which the Appellant is lessee—but to sell to a Timber Merchant the whole of the trees, large and small, upon the land, to be cut and carried away by him for his own purposes.

[309] It will be convenient now to observe the position of the Appellant under the lease upon which he grounds his claim.

The petition for that lease is in these terms:—"That your Petitioner is desirous of farming the village of Ghatkopur, on the Island of Salsette, and prays that your Honourable Board will be pleased to lease it to him on the same terms as villages have been granted to different individuals in Salsette. In submitting this application to your Honourable Board's favourable consideration, your Petitioner begs to state that he is aware there is in the village in question little or no waste land, whereby he could at present much benefit himself, but he is desirous of obtaining it to give effect to a speculation which he has had for a long time under consideration, viz. the recovering a large tract of swamp land, for the purpose of converting it into salt batty fields and salt pans. Your Petitioner wishes to lay out capital on the work contemplated, which, when finished, he feels assured, while it will benefit himself, will much improve the village, benefit the Ryots, and increase the revenue which Government derives from it."

Founded on that application, the lease was made on the 31st of December, 1845. It begins by stating that the Lessee had "petitioned Government on the 23rd May, 1843, that if the village of Ghatkopur Turf Trombay, Talooka Salsette, be allowed to you in farm, in the same manner as villages have been granted to other Farmers in Salsette, that you would reclaim certain swampy land, and that you would form salt pans and salt batty fields, whereby the inhabitants on the one hand, and the Government on the other, will be much benefited. Your application [310] having been duly reported upon by the Acting Collector, under date the 10th August, 1843, Government, in its Secretary's letter, dated 4th September following, No. 2903, intimated its sanction to the aforesaid village being granted to you in farm; accordingly it is hereby leased to you from the year 1844-45, for a period of ninety-nine years, on the revenues of the year 1842-43 (exclusive of the Abkary), on the following conditions." The objects, therefore, for which the lease was solicited, and the objects for which the lease was granted, were the reclaiming certain swampy land, and forming salt pans and salt batty fields, together with such incidental advantages as might be obtained from the use of the waste land as it then stood in the village.

It may be convenient to advert here to an argument which was much pressed upon their Lordships, namely, that inasmuch as the application had been for a lease to be made in the same manner as villages had been granted to different individuals in Salsette, therefore, as it was contended, this lease was upon whatever terms it might be found that leases had been made to other Farmers in that District.

Their Lordships are of opinion that, although the application was general, the response was specific and clear. The answer to the application was, that a lease would be granted on "the following conditions," which are described in the lease itself, and which, therefore, determine the contract, and the only contract, between the parties.

Proceeding with the lease. The first clause describes, as it states, the details of the boundaries, houses, inhabitants, lands, and the Jummabundy of the village.

It is important to observe that, among the details [311] of lands under this head, it is admitted there are no lands upon which the trees in question are growing. The lands described under the first head are the arable or cultivated lands of the village, and certain limited waste land described by admeasurement. It is admitted that they had not growing upon them any of the trees which are now in question. The second section of the lease provides that "the waste land in the village, including Junglegurk, Naligurk, and Nowsad, etc., is hereby granted to you in Mafee (that is to say rent free) for four years from 1844-45. It then provides that this waste land was to be brought under tillage, "out of the sweet waste land, one-fourth within the term of ten years from the date hereof; and you should in the same manner continue to do so every ten years from the date hereof; and you should in the same manner continue to do so every ten years, so as to bring the whole of it under tillage within that period," that is, so that at the expiration of forty years the whole might be under tillage and bring revenue to the Government accordingly.

It is to be observed here again, that it is admitted that the land upon which the timber now in question grows was not included under the second head. The contest, indeed, of the Appellant is, that for the land upon which that timber is growing he is under no circumstances to be called upon to pay rent.

The 32nd clause of the lease states,—“There are in the aforesaid village about 150 Beegas of swampy land, which might be made available for salt pans; you are, therefore, as proposed by you in your petition, to expend whatever sum of money may be considered necessary, and convert the said land into salt [312] pans, within five years from 1844-45,” under a certain penalty in the event of failure so to do.

It is admitted, again, that with regard to the lands specified under the 32nd head, none of the timber is growing upon that land. We have, then, under the 2nd and 32nd heads of the lease an enumeration of the whole of the land upon which any operation of farming or reclaiming was to be performed by the lessee. It is for the land specified under those heads, and for that land alone, that any rent or any assessment is to be paid by the lessee; and for the land upon which the timber in question is now growing no rent had already been paid, or is in any event to be paid.

Then there are a series of provisions, especially contained in paragraphs 6, 7, 9, 10, 11, 12, 25, 26, 27, 28, and 29, which provide for the preservation and protection of the possessory and other rights of the Ryots and other persons having pre-existing claims upon land in the village. Among them is an important section, referred to in the argument, the 6th, that provides as follows, “It is clearly to be understood that this lease confers no right which Government does not now possess, and only such portion of the rights of Government as may be herein specifically granted, is hereby granted to you.”

We are in a position, from this statement of the paragraphs of the lease, to understand distinctly the objects for which the lease was granted. The first object was to enable the Lessee to cultivate the arable land. The second object was to enable him, and to oblige him, to reclaim and bring under tillage certain specified waste lands—land other than that upon which this timber is growing. The third object was [313] to convert into salt pans 150 Beegas of land, being, again, land other than that upon which the timber in question is growing.

Over and above these three objects, he was to be styled the “Farmer” of the village; not that he was to have possession of other parts of the village, or to dispossess those already in occupation—not that he was to be the cultivator or Farmer of other parts in the English sense of the term “Farmer”—but, as the 12th section expressly provides, “In respect to the above-named village, you are considered Farmer thereof; you are, therefore, to exercise the authority vested in Farmers by chap. 6 of Regulation XVII. of 1827, or such as may be hereafter vested in them by any new enactment.”

Upon referring to this Regulation, it is apparent that the term “Farmer” is used, not as a cultivator of the ground, but as a Farmer of the public revenue,—a person, namely, who would stand between the Government and the Ryots as posses-

sors of the ground in the village; he being, as it were, the custodian or Ranger, taking care that the revenue of the Government was collected, and the rights of the Government as against the possessors in the village maintained.

At the time, then, that this lease was made, the whole of the land, and all the rights connected with the land, subject to such claims as third parties might have upon it, belonged to the Government. The trees upon the land were part of the land, and the right to cut down and sell those trees was incident to the proprietorship of the land.

The Appellant, therefore, who complains of an interruption such as is described in his plaint, must [314] ground his title to these trees, and the right to cut them down, either upon this, first, that it is a necessary incident of the lease by reason of the objects of the lease; or, secondly, under some positive law; or, thirdly, under some custom to be incorporated in the lease; or, fourthly, under the express terms of the lease.

Now, as regards the right to cut timber being necessarily incident to the lease, it plainly is not so. There was no work to be done, and apparently no right to execute any work, upon the land on which this timber grows. Clearance or cultivation of the other land might require the cutting of timber on that other land, but that right does not come into question in the present suit.

As to positive law, none has been cited to justify what has been done by the present Appellant. We were referred to Bombay Regulation I. of 1808 with regard to the Island of Salsette; but, so far as that Regulation is concerned, the whole drift and tenor of it, when it deals with timber at all, is in favour of the preservation of the right, and not of the surrender of the right, in the Government to the timber.

The Appellant, however, relies upon a custom which he says justified the cutting of timber; and evidence of that custom has been adduced.

Their Lordships would entertain very considerable doubt whether any evidence of custom could be allowed to control the express stipulations which they find in the lease of this village; but, turning to the evidence which has been given in support of the alleged custom, their Lordships find that several of the witnesses, speaking to that custom, admit that the villages upon which they say timber has been cut [315] down by the Lessees, were villages leased under written contracts,—contracts which dealt, in some way or other, with the subject of the timber; contracts, therefore, which prevented any general custom flowing out of the rights exercised by those tenants. Their Lordships find that other of the witnesses, when speaking of the timber cut on other villages, expressly state that timber has been cut, not as of right, but by permission of the Government. And their Lordships find generally with respect to all the witnesses, or all but one, that they are silent as to any information leading them to judge whether the timber which they say was cut, was cut for the purpose of repairs or other consumption in the villages, or was cut for the purpose of clearance or cultivation, or cut (as the right to cut is here alleged) for the purpose of sale or other disposition as property of the tenant.

Their Lordships, therefore, are of opinion that the allegation of custom entirely fails to be supported by evidence.

With regard, lastly, to any express right given by the lease itself, their Lordships can find none; on the contrary, the 6th clause, which has been already referred to, expressly declares that only such portion of the rights of the Government as may be therein specifically granted is thereby granted to the Lessee.

The 4th clause, however, was said by implication to confer the right to cut that timber. The words of that clause are these:—"You are prohibited from cutting down or destroying any brab, date, or other trees liable to taxation, without the permission of the Collector."

[316] Their Lordships, however, do not consider that this clause is susceptible of the implication which is derived from it by the Appellant.

In the course of clearing and cultivating the waste land which the Appellant was obliged to clear and to cultivate, it naturally would be requisite to cut down and remove the timber growing upon that waste land, and their Lordships read that permission as simply declaring that if, with reference to that timber which it would thus be necessary to cut down and remove, any of it was "brab, date, or

other trees liable to taxation"—even as to such timber, none should be removed without the express permission of the Collector.

Their Lordships, therefore, are of opinion that the case of the Appellant entirely fails; they concur with the judgments pronounced by the Judge of the District Court, and by the appellate Court at Bombay; and they will humbly advise Her Majesty that the appeal should be dismissed with costs.

[317] TAREENY CHURN BONNERJEE,—*Appellant*; WILLIAM MAITLAND and FREDERICK ADDINGTON GOODENOUGH,—*Respondents* * [July 11 and 12, 1867].

On appeal from the High Court of Judicature at Calcutta.

A. By Deed of trust charged real estate to secure, among other things, a debt alleged to be due by him to his grandfather's estate, on account of sums received by him from a debtor to that estate. A. at that time was in a state of indebtedness, which occasioned his afterwards becoming an Insolvent. Such Deed, in the circumstances, held, so far as related to A.'s alleged debt, fraudulent and void as against his Creditors.

On a Bill filed by the Assignees of the Insolvent to cancel such a Deed, the property being immoveable, and the parties (Defendants) claiming a lien thereon for *bona fide* debts, the remedy, if any equity exists, independent of the deed, would be by a cross Bill [11 Moo. Ind. App. 336].

The rule of the appellate Court is, that it will not, on a question of fact, reverse an unanimous judgment of the Courts in India, unless the very clearest proof is shown that such decision is erroneous [11 Moo. Ind. App. 338, 339].

The appeal in this case was brought from a decree of the High Court in Calcutta, varying and amending a previous decree made by two of the Judges of that Court, in its ordinary original civil jurisdiction, in a suit instituted by Richard Stuart Palmer, since deceased, and afterwards represented by the Respondents, his Executors, against the Appellant, together with Obhoychurn Bonnerjee, an Insolvent debtor, Ramessur Chowdry, a Trustee, and John Cochrane, [318] Official Assignee of the estate and effects of the Insolvent. The Bill prayed that it might be declared that a Deed of assignment in trust, dated the 25th of April, 1843, executed by Obhoychurn, a Trader in embarrassed circumstances, in favour of his Mother, Hurrosoondery Dabee, was fraudulent and void, and that the same might be set aside, as against the Plaintiff, and cancelled; that the Plaintiff might be declared entitled to an absolute estate in possession of one undivided moiety of certain real estate, which had belonged to Obhoychurn, the subject of the assignment, and the rents and profits; that the Defendants might be directed to let the Plaintiff into possession of the same without any disturbance from the above-named Appellant, who was entitled to the other moiety; and that, if necessary, the relief to be granted might be decreed to be supplemental to the relief granted in a former suit brought in the same Court, in which John Storm and others, Creditors of Obhoychurn, through whom the Plaintiff, as a purchaser, claimed title, were Plaintiffs.

The question raised in the suit was, whether the Appellant, as one of the residuary legatees in remainder under the Will of one Doorgachurn Chuckerbutty, deceased, was entitled to claim any benefit under the above Deed of assignment in trust, and which, by a final decree (made in the former suit above mentioned), had been declared and decreed to be fraudulent and void as against the Creditors of Obhoychurn and the Plaintiffs in that suit, but which last-mentioned decree had re-

* Present: Members of the Judicial Committee,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor,—The Right Hon. Sir Lawrence Peel.

served to Ramessur Chowdry, and Nemychurn Bonnerjee (since deceased), as Trustees under the Deed, and to all persons other than the Defendants in that [319] suit, namely, Obhoychurn and his Mother, Hurrosoondery, any rights and interests which they might have under the Deed.

The first of the two decrees made in the suit in which the present appeal arose declared that the Deed was not a good and valid security to Tareeny Churn Bonnerjee and the Executors of Doorgachurn Chuckerbutty, for Rs. 43,674 and interest, that sum being part of an alleged balance of account, namely, of Rs. 87,500, which formed the consideration of the Deed, dated the 25th of April, 1813; but that the latter should stand and be a good and valid security as far as the above Appellant was interested thereunder for the remaining part of the consideration therein mentioned. This decree at the same time declared, that the Deed was, on the ground of fraud, invalid against Creditors, not having been made *bona fide*, and executed for a good consideration, by Obhoychurn. Both parties appealed against that decree. The second of the two decrees was made by the High Court in its appellate jurisdiction, and it varied the decree of the lower Court, by decreeing, not only that the deed was fraudulent and void against Obhoychurn's Creditors, and in particular against the Plaintiff and those persons through whom he claimed title to the one undivided moiety of the real estate aforesaid, but also that the Appellant was not entitled to any interest or benefit under the Deed—first, because the latter was declared and decreed to be fraudulent and void; and, secondly, because, even if the Deed had been *bona fide*, there was no express trust therein declared in the Appellant's favour, and further, that he had failed to prove that he was interested in any part of the alleged [320] consideration mentioned in the Deed, or in the amount thereby secured.

The facts of the case were as follows:—

In July, 1825, one Doorgachurn Chuckerbutty, of Calcutta, died, possessed of considerable property, having made a Will, whereby he devised and bequeathed, as to his residuary estate, as follows:—"I give, devise, and bequeath the same to my only daughter, Sreenmutty Hurrosoondery Dabee, to and for the term of her natural life, and after the decease of my said only daughter I will and direct" (certain payments to be made to the daughters of such daughter) and then, "I give, devise, and bequeath all the residue of my said real and personal estate and property so hereinbefore bequeathed to my said daughter for life, unto all and every the sons of my said daughter; if there shall be more than one son, equally to be divided between the said sons share and share alike, as tenants in common," and he appointed Goureychurn Bonnerjee, Bissonauth Muttyloll, and Obhoychurn Bannerjee his Executors, the two first of whom alone proved the Will.

Doorgachurn Chuckerbutty, in his lifetime, had had money transactions with Mr. Marjoribanks, the Resident at Santipore, and at the time of his death was a Creditor of Marjoribanks for Rs. 20,000 and interest, due on a Bond.

The case of the Appellant was, that in the year 1822, Obhoychurn Bonnerjee was appointed Dewan to Marjoribanks, and in 1823 he acted as private Agent for Marjoribanks. After the death of Doorgachurn Chuckerbutty, his Executors being informed that Obhoychurn Bonnerjee was in the receipt of private funds belonging to Marjoribanks, expected [321] that he would, out of those funds, repay the amount due by him to Doorgachurn Chuckerbutty's estate, and although he appeared to have received large sums on account of Marjoribanks, he never paid it over either to Marjoribanks or the Executors; and it was stated by the Appellant that, in March, 1830, Marjoribanks wrote the following letter to Obhoychurn Bonnerjee: "You may as well bring up your private account with me and compare it with mine. It must be rather large against you; however, we shall have no difficulty in coming to a settlement." It was alleged that this settlement was effected by the amount due by Obhoychurn Bonnerjee to Marjoribanks, and which, according to the account as stated in his Books, amounted to Rs. 43,674, being transferred to the credit of the latter's account with the Executors of Doorgachurn Chuckerbutty, they debiting Obhoychurn Bonnerjee with that amount, and accordingly, on the 21st of August, 1830, Marjoribanks sent to the Executors the following draft on Obhoychurn Bonnerjee:—"Please to pay to Goureechurn Bonnerjee and Bissonauth Muttyloll, Executors to the estate of Doorgachurn Chuckerbutty, the sum of

sicca rupees forty-three thousand six hundred and seventy-four, being the amount balance of account between us.

43,674,
Santipore.

E. Marjoribanks,
21 August, 1830."

This draft was enclosed in a letter signed by Marjoribanks to the Executors, and at the same time the following letter was also written by him to Obhoychurn Bonnerjee:—"Obhoychurn,—On paying Goureechurn Bonnerjee and Bissonauth Muttyloll, Executors to the estate of your grandfather, the draft I [322] have given them for S. Rs. 43,674, all accounts between us are settled.—Your Friend,

E. Marjoribanks."

The draft was endorsed in blank by Executors and handed over to Obhoychurn Bonnerjee, together with the Bond of Marjoribanks; but instead of the money being actually paid by Obhoychurn Bonnerjee to the Executors, it was debited against him in their accounts, and he in his own account Books debited himself with the amount as due to the Executors, having given credit, as before mentioned, to Marjoribanks.

Soon afterwards Obhoychurn Bonnerjee began to engage in trade, and had large transactions with many houses, and from that time the sum of Rs. 43,674 was debited against Obhoychurn Bonnerjee in account with the Executors, and he obtained other advances from the estate. It was further alleged, that the account was prepared by Obhoychurn Bonnerjee in consequence of his Mother having called upon him for one, and that at her request he gave her a promissory note for Rs. 87,500, being the balance of account, making it payable twelve months after date. That during the year 1842 some of Obhoychurn Bonnerjee's shipments resulted in a loss, and gradually from that time he got into further difficulties; and when his promissory note to his Mother fell due she and her Attorney, Mr. Graham, threatened him with proceedings unless he entered into some arrangement, and that in consequence the Deed of assignment of the 25th of April, 1843, was prepared by Mr. Graham. It was between Obhoychurn Bonnerjee of the first part, [323] Hurrosoondery Dabee of the second part, Nemychurn Bonnerjee and Ramessur Chowdry as Trustees of the third part. It recited that Obhoychurn Bonnerjee was entitled, in the event of his surviving his Mother, to one clear moiety of the residuary estate of Doorgachurn Chuckerbutty; that he was indebted to Hurrosoondery Dabee in Rs. 87,500, for advances made out of that residuary estate, which she was liable to make good; that he had been applied to for payment; that he was unable to pay, but had agreed to execute the Deed as security; and it was thereby witnessed that he sold and conveyed to the parties of the third part "All that the undivided moiety, or share, right, title, and interest, whatever the same may be, of him, the said Obhoychurn Bonnerjee, of and in the several messuages, lands, tenements, and hereditaments following, being respectively formed of the said residuary estate of the said Doorgachurn Chuckerbutty, deceased, that is to say:" And then followed the description of the property "to have and to hold the same respectively (subject to and after the determination of the life interest of the said Sreemutty Hurrosoondery Dabee therein respectively) unto and to the use of them (the parties of the third part) and the survivor of them, his heirs, and assigns for ever," upon the trusts thereafter declared. A similar clause, assigning his moiety of the personalty, then followed, and the trusts declared were as follows, viz.:—"Out of the moiety of the personalty, or, if the same should be insufficient, out of the rents and profits of the moiety of the realty, or, if necessary, by sale thereof, to pay to the residuary estate the sum of Rs. 87,500, and interest at six per cent. and costs, and after full payment to [324] make over what remained of such moiety to Obhoychurn Bonnerjee to his own use. The deed contained the usual covenants for title and further assurance, power to appoint new Trustees, and a power of Attorney from Obhoychurn Bonnerjee to the Trustees.

Amongst other firms with whom Obhoychurn Bonnerjee had transactions was the firm of Mackillop, Stewart, and Co., which transactions went on from the year 1836. On the 23rd of August, 1845, that firm brought an action against Obhoychurn Bonnerjee to recover Rs. 50,816 and interest; and he having failed to appear to the action, a Writ of sequestration was issued, under which the Sheriff of Calcutta

seized the right, title, and interest of Obhoychurn Bonnerjee in certain portions of the property left by Doorgachurn Chuckerbutty, being six parcels out of the twelve parcels mentioned in the Deed, and the firm of Mackillop, Stewart, and Co. contended that Obhoychurn Bonnerjee had, in fact, obtained a moiety of Hurrosoondery Dabee's life interest in the property so seized.

Upon this Hurrosoondery Dabee brought an action of trespass against the Sheriff, and while it was pending Obhoychurn Bonnerjee, on the 4th of February, 1846, was declared an Insolvent, and Mr. O'Dowda was appointed his Assignee by the Insolvent Court of Calcutta; and on the 19th of February, 1846, Obhoychurn Bonnerjee filed his schedule in the Insolvent Court, in which he admitted the debt of Rs. 87,500 as due upon the aforesaid note in favour of Hurrosoondery Dabee. At the time of the insolvency he deposited his Books in the Insolvent Court.

[325] On the 6th of March, 1846, judgment having been obtained on the 16th of February, 1846, was signed in the action by Mackillop, Stewart, and Co., against Obhoychurn Bonnerjee for Rs. 64,865 9. 3.

On the 24th of February, 1846, the firm of Mackillop, Stewart, and Co. filed a Bill on the equity side of the Supreme Court at Calcutta against Hurrosoondery Dabee, Obhoychurn Bonnerjee, and his Assignee, alleging that Hurrosoondery Dabee had sold to Obhoychurn Bonnerjee one moiety of her life estate in Doorgachurn Chuckerbutty's property, and that Obhoychurn Bonnerjee, to defeat the rights of their firm under the sequestration, had, on the pretence of being indebted to her and Nemychurn Bonnerjee and Ramessur Chowdry, under a Bond, executed the before-mentioned Deed, re-conveying that property to her; and it prayed for a declaration that Obhoychurn Bonnerjee had a seizable interest in the estate, and to have the reconveyance declared fraudulent, and to have it cancelled and Hurrosoondery Dabee restrained from proceeding in her action of trespass.

Obhoychurn Bonnerjee and Hurrosoondery Dabee by their answers relied on the Deed of the 25th April, 1843, and submitted that it was valid and *bona fide*, and they denied the allegation of Hurrosoondery Dabee having ever assigned the moiety of her life interest as alleged.

The Court directed issues to be tried, as to whether Obhoychurn Bonnerjee had at the time of the seizure under the sequestration any seizable interest in the property attached, which, on the 18th of May, 1848, were found in the affirmative.

On the 13th of July, 1848, a decree was made in the suit, declaring that the Deed was, so far as the [326] interests of the Defendants, Hurrosoondery Dabee, Obhoychurn Bonnerjee, and O'Dowda were concerned, fraudulent and void as against the firm of Mackillop, Stewart, and Co., and that Obhoychurn Bonnerjee's interest was seizable and saleable under the sequestration, but it reserved the rights under the Deed of Nemychurn Bonnerjee and Ramessur Chowdry (who were not made parties to that suit) and all persons other than the three Defendants.

Hurrosoondery Dabee applied for a rehearing of the suit, but the decree was affirmed.

After the decree the Sheriff of Calcutta, under the Writ of sequestration, sold the right, title, and interest of Obhoychurn Bonnerjee, in the property so seized, to one Mackenzie, to whom the Sheriff executed conveyances.

On the 23rd of June, 1861, Hurrosoondery Dabee died, leaving Obhoychurn Bonnerjee and the Appellant her surviving.

On the 14th of September, 1861, Richard Stuart Palmer filed a Bill in the Supreme Court against Obhoychurn Bonnerjee and the Appellant, and John Cochrane as Obhoychurn Bonnerjee's Assignee. The Bill stated the proceedings in the suit above detailed, and further that on the 8th of July, 1858, Mackenzie sold and conveyed his interest to the Plaintiff, and claimed for him an absolute title to Obhoychurn Bonnerjee's moiety of the estate, and charged collusion between the Defendants to keep him out of possession, contending that the Deed of assignment, dated the 25th of April, 1843, was fraudulent and void; and the Bill prayed, first, that it might be declared that under the circumstances therein stated, the Deed was fraudulent and void as against the Plaintiff, and [327] that the same might be set aside as against the Plaintiff and cancelled; secondly, that the Defendant, Ramessur Chowdry, might be restrained by the Order of the Court from setting up or insisting upon the Deed, or using the same as against the seizer under

the Writ of sequestration, or against the title conveyed by the Bills of sale; thirdly, that it might be declared that, on the death of Hurrosoondery Dabee, the Plaintiff became and was entitled to an absolute estate in possession of one undivided moiety of the real estate, and of the rents and profits thereof; and that the Defendants might be directed by the Court to let the Plaintiff into possession of one undivided moiety of the rents and profits, and without any disturbance from Tareeny Churn Bonnerjee, as the person entitled to the other moiety thereof, or from any of the Defendants; fourthly, that the Defendant, Ramessur Chowdry and Obhoychurn Bonnerjee and Tareeny Churn Bonnerjee, and also Cochrane, as Assignee of Obhoychurn Bonnerjee, might be restrained by the Order and Injunction of the Court from selling, further meddling, or in any way dealing with the undivided moiety of the real estate, or with so much thereof as the Plaintiff was interested therein, and the rents and profits thereof; fifth, that an account might, if necessary, be taken of the rents and profits and other moneys, the product of the real estate, or of such portion thereof as the Plaintiff was interested therein, received by the Defendants, Ramessur Chowdry, Obhoychurn Bonnerjee, and Tareeny Churn Bonnerjee, or any or either of them, since the death of Hurrosoondery Dabee; and that the same, or a [328] moiety thereof, might be paid to the Plaintiff; and that, if necessary, the relief to be granted in that suit might be deemed to be supplemental to the relief granted in the former suit, wherein Storm and others were Plaintiffs, so far as related to Obhoychurn Bonnerjee, and also Ramessur Chowdry's claim to represent the interest of Obhoychurn Bonnerjee as Trustee for him in respect of one moiety of the undivided moiety; and so far as related to Tareeny Churn Bonnerjee as Executor; and so far as he might set up any claim as heir or representative of, or as deriving his title through, Hurrosoondery Dabee; and that to such extent the Defendants respectively might be held to be bound by the proceedings in that suit.

Before the hearing Palmer, the Plaintiff, died, leaving the Respondents his Executors, who revived the suit.

The cause came on for hearing on the 6th of February, 1863, before Sir Charles Jackson, and Walter Morgan, Esquire, two of the Judges of the High Court of Judicature, which had been substituted for the Supreme Court, and the hearing lasted several days. The Plaintiffs read as evidence, as against the Appellant, certain portions of his answer filed in the cause, being admissions as to the death of Doorgachurn Cluckerbutty, leaving him surviving the persons therein stated, and leaving property and a Will (but disputing the accuracy of the statement in the Bill as to the residuary clause), and admissions of the fact of some portions of the proceedings having taken place in the actions and suit as before mentioned and set out in the Bill, and of Obhoychurn Bonnerjee's insol-[329]-vency, and of the Defendants being subject to the jurisdiction of the Court. The Plaintiffs also examined as witnesses, Obhoychurn Bonnerjee, Raphael Z. Shircore, Henry George Temple, and Nobinchunder Mookerjee. The head assistant of the Official Assignees' office was called to produce from the Insolvent Court the account Books of Obhoychurn Bonnerjee's estate, but he produced only twelve Books, which he had found after strict search in the office; and he deposed to the fact of many Books in the Insolvent Office being destroyed. The Books produced were day-books (Rokurs) for the Bengalee years 1238, 1243, 1245, 1246, 1247, 1248, six in number; and ledgers (Khuttians) for 1237, 1238, 1239, 1241, 1247, and 1248, also six in number, there being both day-books and ledgers for three of these years, viz., 1238, 1247, 1248. A witness proved the execution of the conveyances from Mackenzie to Palmer. Another witness, Nobinchunder Mookerjee, proved the estate of indebtedness of Obhoychurn Bonnerjee, and the debt to Messrs. Mackillop, Stewart, and Co., which, it appeared, arose out of trade transactions between 1836 and 1845. Obhoychurn Bonnerjee was also examined as a witness for the Plaintiff, and stated the circumstances as to the origin of the debt forming the consideration for the deed.

On the 12th of February, 1863, the Court delivered judgment, and on the same day a decree was made declaring the Deed to be valid as a security to the Appellant only to the extent of the consideration money, exceeding Rs. 43,674 and interest, and not to be valid as a security to Obhoychurn Bonnerjee.

The Appellant appealed against this decree to the [330] appellate branch of the

High Court, upon the following grounds:—First, that although the Court had rightly held that the *onus* of proof lay on the Plaintiffs, the Court called on the Defendants to go into a case after the Plaintiffs had failed to make out a *prima facie* case, and that the circumstance that the evidence of the witness called by the Plaintiffs disclosed a somewhat suspicious case was wholly insufficient to establish an affirmative case of fraud. Second, that if the evidence of Obhoychurn Bonnerjee, the principal witness called by the Plaintiffs, was to be believed, it established the Deed of trust, and if it was not to be believed, there was no evidence affecting the Deed one way or the other. Third, that the Court treated the case as if the real question was, whether consideration for the deed was proved, whereas the real question was whether the Deed was proved to be fraudulent as against the creditors of Obhoychurn Bonnerjee; and all that was proved was that he, being a Trader in indebted circumstances, executed a Deed not purporting or shown to be voluntary, and not purporting or shown to be an assignment of all his property, and which, moreover, was an assignment by way of security only. Fourth, that upon the only facts stated, and the only case made by the Bill, raising the issue that the Deed was fraudulent *in toto*, the Court ought to have dismissed the Bill, instead of giving a decree partially in favour of the Plaintiffs. Fifth, that supposing the Defendant, Obhoychurn Bonnerjee, had not been bound by the former decree, no decree could possibly have been made against him, on the evidence given in the present case for the Plaintiffs, and that the Defendant, Tareeny Churn Bonnerjee, as the Court found, was not bound by the decree, and had [331] no notice of any fraud, could not be in a worse position than Obhoychurn would have been in on the above supposition; and, lastly, that nothing transpired during the case for the Plaintiffs, to raise any presumption or probability that there was any evidence bearing on the case one way or the other which the Defendants could have adduced.

The appeal was heard on the 3rd of July, 1863, before Sir Barnes Peacock, Sir Mordaunt Lawson Wells, and E. P. Lavinge, Esq., the Judges of the High Court.

At the hearing of the appeal the Appellant by leave of the Court, took the objection to the whole frame of the suit, that inasmuch as the original Plaintiff was simply a purchaser from a purchaser at the Sheriff's sale of Obhoychurn Bonnerjee's right, title, and interest, and not a Creditor of Obhoychurn Bonnerjee, he had no right in law to seek to set aside the assignment as one fraudulent against Creditors, he being an Assignee only of the party who executed the alleged fraudulent assignment. The Respondents also took an objection that the decree did not go far enough, and that it was erroneous in declaring the Deed to be a valid security to the Appellant at all.

The High Court varied the decree of the Court below, declaring the Deed to be fraudulent and void as against the Plaintiffs, and those through whom they claimed in the suit, and ordered the Deed to be cancelled, and declared that the Plaintiffs, on the death of Hurrosoondery Dabee, were entitled to an absolute estate, in possession of one undivided moiety of the real estate mentioned in the Bill, and of the rents and profits, and further ordered that they should [332] be put in possession, giving the usual consequential orders by way of injunction, and for payment of back rents and profits to the Plaintiffs, and ordered the Appellant to pay the costs of the appeal.

The appeal was from this decree.

The Attorney-General (Sir John Rolt, Q.C.) and Mr. J. Bell, for the Appellant.—First, the Court below, by holding that the Deed of the 25th of April, 1843, was fraudulent and void as against the Plaintiffs, instead of passing a decree for the benefit of the Creditors of Obhoychurn Bonnerjee (as one of whom the Appellant claimed), made a decree that was prejudicial to their claims, including that of the execution Creditor, if unsatisfied. Inasmuch, therefore, as the purchaser at the Sheriff's sale bought the right, title, and interest of Obhoychurn Bonnerjee, the money arising from such sale went to the execution Creditor, the Deed being subsequently declared void as against Creditors generally, and not only as against the firm of Mackillop, Stewart, and Co., the value of the property would materially increase the estate, and, having passed to the purchaser at the Sheriff's sale, it could never thenceforth be applied to the unsatisfied portion of the execution Creditors' claim, or to the claim of other Creditors, unless the purchaser at the Sheriff's sale

was, as purchaser of the right, title, and interest of the execution Creditor, held to be entitled to the estate only after payment of all claims of Creditors against it. The Court below was also in error in assuming that the Deed had been in the former suit declared void so far as Obhoychurn Bonnerjee was concerned, for the finding was that it was only void so far as [333] affected the firm of Mackillop, Stewart, and Co., and there was no evidence to show that the claim of that firm was not satisfied by the money received by them from the Sheriff on the sale of the property seized and sold by him under the Writ of sequestration. Another objection is, that the Deed comprised other property besides that contained in the conveyances to the Plaintiff in the original suit, and the Plaintiff not having or claiming to have any interest in such other properties, or any rights as Creditor of Obhoychurn Bonnerjee, the Deed ought not to have been ordered to be cancelled so as to deprive the parties interested under it of their right to the Rs. 13,873, due by Obhoychurn to the estate of his grandfather. Such debt is not in dispute, and must stand as a security for that amount.

Secondly, the High Court, in affirming the decree of the Lower Court upon the question of fact, that neither the evidence given by Obhoychurn Bonnerjee nor the Books produced at the hearing were to be believed, was wrong, because, as to the Books, the same were produced from the office of the Insolvent Court, where they had been for upwards of sixteen years previous to the hearing of the suit, and there was nothing whatever in the appearance of the Books or in evidence in the case to entitle the Court to impute to that witness fabrication of the Books, nor was there anything to entitle the Court below to impute to that witness the perjury that has been imputed to him. The circumstances of the case were not such as to justify the Court in holding itself bound by the conclusions of fact arrived at by the Court below from the evidence given in the cause, but the Court ought itself to have examined the [334] evidence and formed its own conclusions thereon. Nothing turned on the demeanour of witnesses, but the opinions of the Court below on the evidence was founded upon reasoning thereon which was unsound and clearly open to review. Even if Obhoychurn Bonnerjee's evidence was such as could not be relied on, no fraud was established.

Third, assuming that the High Court was right in finding that the Court below had come to a sound conclusion as to the Deed not being a valid security to the Appellant and Executors for the sum of Rs. 43,674, that Court was wrong in determining that the Lower Court had come to an erroneous conclusion as to the Deed being a valid security for the residue, and in so overruling that part of the decision of the Lower Court, the High Court reversed the finding on an issue of fact contrary to the evidence; but we insist that that Court was in error in holding that the Deed was one to which the principles laid down in the case of *Garrard v. Lord Lauderdale* (3 Sim. 1) were applicable. The Deed being one that could not be revoked by the settlor without the sanction of the *cestui que trusts*, of whom the Appellant was one. In *Preddy v. Rose* (3 Mer. 86) it was held, that Trustees who had no notice of an assignment were entitled to retain dividends in satisfaction of a covenant in a marriage settlement to pay a certain sum of money. Again, the Court ought not to have declared that the Plaintiffs were, on the death of Hurrosoondery Dabee, entitled to an absolute estate in possession of one undivided moiety of the real estate, and of the rents and profits thereof, but if any decree could be made [335] for the Plaintiff in the suit, it ought to have been one declaring that the Plaintiffs as the purchasers of the right, title, and interest of Obhoychurn Bonnerjee and as such purchasers, was entitled only to a decree for redemption of the moiety of the premises, upon payment of the moneys due under and by virtue of the Deed. Independently, however, of the Deed, the Appellant was entitled to the first charge upon the share of Obhoychurn Bonnerjee, for any moneys due by Obhoychurn Bonnerjee to the estate of the Testator, Doorgachur Chuckerbutty, and this right of the Appellant was wholly overlooked by the Court in making the decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Respondents, were not called on to address their Lordships.

Judgment was delivered by

The Right Hon. Lord Cairns.—Their Lordships are of opinion, that the only question in this case is the validity of the Deed which the Bill was filed to set aside.

It has been contended for the Appellant that, even supposing the Deed were out of the way, the Appellant, as against Obhoychurn Bonnerjee and those who claim under him, would be entitled to have a lien or security upon the share of Obhoychurn in the estate of the Testator for any money which might be coming from Obhoychurn to that estate; and that the Appellant would be entitled to that security or lien, not by virtue of the contract, but upon a well-known principle of equity independent of contract.

Their Lordships have very considerable doubt [336] whether, having regard to the Will in this case, and the nature of the property, viz. immovable or real estate, any such lien could be maintained; and further, the right to maintain a lien would depend on the proof of the two debts due from Obhoychurn to the estate, which, if not proved for the purpose of maintaining the Deed in this case, would of course not be proved for the purpose of maintaining an equity independent of the Deed. But, putting aside those difficulties, their Lordships think that if any such lien could be introduced, or be attempted to be enforced, the attempt to enforce it could only have been made by other proceedings, viz., by a Bill in the nature of a cross-bill filed by the Plaintiff, insisting upon that equity, and undertaking to prove the facts which it would be necessary to prove in order to give effect to the equity, if the equity did exist.

Their Lordships, therefore, address themselves to consider the question of the validity of the Deed.

Now, in the first place, an objection has been made to the title of those who were the Plaintiffs in the suit below to impugn that Deed. It is said that the Plaintiffs in the revived suit represent, as they do, Palmer, the sole Plaintiff in the original suit: that Palmer was merely purchaser at the Sheriff's sale, who took a conveyance from the Sheriff of all the interest of Obhoychurn in the property in question; and it is contended that he and the Plaintiffs must take that interest as Obhoychurn held it, and that, because Obhoychurn could not set aside the Deed which he had executed, therefore, no more can those who claim by sale from the Sheriff.

There might be considerable foundation for that argument, if the execution had gone against Obhoy-[337]-churn, and the sale had been made by the Sheriff of his property, and then, without anything more, a conveyance to the purchaser under that sale had been executed by the Sheriff. But that was by no means the case with regard to the execution we have now to deal with, because, after execution levied and before sale, the first suit was instituted which is referred to in the Bill in the present suit. That first suit was instituted by the firm of Mackillop, Steward, and Co., against Obhoychurn and against his Mother; and the result of that was that, before any sale took place, a decree of the Court was made, by which the Court declared that the Deed in question, so far as related to the Defendants in the suit, and their respective interests and claims thereunder, was fraudulent and void as against the Plaintiffs in the suit,—reserving, nevertheless, to Nanychurn Bonnerjee and Ramessur Chowdry, the Trustees under the Deed, and to all persons other than the Defendants in the suit, all their rights and interests under or by virtue of the Deed.

Therefore, before any sale took place, there was a determination of the Court in a suit to which the Creditors were parties,—to which Obhoychurn and his Assignee were parties,—to which Hurrosoondery, the Mother of one of the parties to the Deed, was a party,—a determination that the Deed was fraudulent and void as against Creditors; and after that determination it was that the property was sold.

Now, it is perfectly clear that the object of obtaining that decision was that the property on the sale might fetch the higher price that would result from the decision, the Court having declared that the Deed in question was no impediment to a purchaser obtain-[338]-ing possession of the property which had belonged to Obhoychurn.

Their Lordships think, therefore, that if the title of the purchaser under the sale is a title which, in consequence of that decree, is in no way affected by any right of Obhoychurn or of Hurrosoondery. It is true, the decree reserves the right, if there be any right, in third parties; notwithstanding the decree, therefore, the conveyance by the purchaser would be no impediment to third parties asserting a right.

if they had a right, under the Deed. But that leaves open this question, and this only, whether any third party—the Appellant, for instance—had such a right? And upon that point their Lordships will express their opinion in their observations on the next part of the case.

Passing, therefore, from this subject of the title of the Plaintiff in the original suit to sue, their Lordships proceed next to consider the main question of fact which has been raised, and which has occasioned so much argument in the case. That is the question of fact with regard to the large debt of Rs. 43,674, professed to be secured with interest by the Deed.

Now, the learned Judges in the Courts below,—the two Judges in the primary Court and the three Judges in the Court of appeal,—have all arrived, without hesitation, at the conclusion that that debt of Rs. 43,674 was not a *bona fide* debt due from Obhoychurn; and it would be far from consistent with the rules which their Lordships have always laid down in dealing with cases of this kind for them to reverse a decision upon a question of fact thus unanimously arrived at by five Judges, unless the [339] very clearest proof were adduced to their Lordships that that decision was erroneous.

It is true that only the two primary Judges had before them the witnesses, or the witness, who were or was examined; but the three Judges of the Court of appeal, conversant with testimony of the kind which has to be dealt with in this case, were of opinion that the two Judges of the Court below had arrived at a just conclusion upon evidence that was never adduced.

But passing from the great respect which, upon a question of this kind, would be shown to the determination of the Judges below upon a question of fact, their Lordships have examined with care the whole of the evidence which was before those learned Judges, and they are of opinion, that there is no ground whatever to be dissatisfied with the conclusion at which the learned Judges arrived.

It appears that Obhoychurn, at an early age, had been sent by his family into the employment of Mr. Marjoribanks. It is clear from the evidence that Mr. Marjoribanks was largely indebted to the estate of the Grandfather of Obhoychurn, and there is abundant ground to conclude that the reason for which Obhoychurn was placed in the service of Mr. Marjoribanks was that he might, as far as possible, recover and realize for the estate of his Grandfather the debt which was due to that estate from Mr. Marjoribanks.

Large sums, beyond all doubt, were received by Obhoychurn in the course of that employment under Mr. Marjoribanks; nor do their Lordships intimate any doubt but that these sums, in the year 1830, had amounted to the sum of Rs. 43,674; but the question [340] is, what did Obhoychurn do with that money? Did he appropriate it to his own purposes, leaving himself the debtor to his Grandfather's estate; or did he pay it over, from time to time, to those who represented his Grandfather's estate?

Now, the story which is told upon that subject by Obhoychurn appears to their Lordships to be utterly incredible. He says he received the money. He admits that he did not pay it over, but he is unable to account in any satisfactory way for his application of the money,—as to how he employed or spent it, or as to where he invested it; and it is extremely difficult to believe that those who sent this young man into the employment of Mr. Marjoribanks for the purpose of obtaining payment for his Grandfather's estate of the money in question, should have taken no care to secure that money as it was received by Obhoychurn from time to time.

There are certain Exhibits, the genuineness of which is not challenged, and which are appealed to by the Appellant in corroboration of the statement which he has made. But assuming that Obhoychurn, from time to time, received from Mr. Marjoribanks the amount of Rs. 43,674 for the purpose of satisfying the debt due by Mr. Marjoribanks to his Grandfather's estate, and assuming that Mr. Marjoribanks owed that amount at one time to the Grandfather's estate, these Exhibits are really nothing more than the formal record or evidence which might be made, or might be preserved, as between Mr. Marjoribanks and the Grandfather's estate, at the close of their dealings in 1830.

Mr. Marjoribanks commences by writing a letter on the 25th of March, 1830, to Obhoychurn, in which [341] he desires him to bring up his private account with

him, Mr. Marjoribanks, and compare it with his Book: he says it must be rather large against Obhoychurn: however, he adds: "We shall have no difficulty in coming to a settlement."

These are expressions by no means inconsistent with Obhoychurn having been, from time to time, receiving moneys which otherwise would have belonged to Mr. Marjoribanks for the purpose which has been referred to.

It appears that a few months afterwards, on the 21st of August, 1830, Mr. Marjoribanks wrote a letter, addressed to Obhoychurn, desiring him to pay to the two acting Executors of his Grandfather's estate, Rs. 43,674—to pay that sum to the Executors—not to pay it to their order, and not, in point of fact, making any negotiable instrument for the payment of the amount. Mr. Marjoribanks, it appears, sent that order to the two acting Executors, and it reached their possession. At the same time, Mr. Marjoribanks wrote a note to Obhoychurn in these terms:—"On paying Goureechurn Bonnerjee and Bissonath Muttyloll, Executors to the estate of your Grandfather, the draft I have given them for S.Rs. 43,674, all accounts between us are settled."

The acting Executors, in whose favour the draft was made, appear to have signed their names on the back of it, and to have handed it over to Obhoychurn, and at the same time to have given to Obhoychurn two Bonds from Mr. Marjoribanks, by which Mr. Marjoribanks had become bound to the estate of the Grandfather for a sum almost the same in amount as that for which the draft was made.

Now, it appears to their Lordships entirely con-[342]-trary to what would be, and what must be presumed to be, the natural course of business on such an occasion, to suppose that these Executors would have handed back this draft endorsed by themselves to Obhoychurn, and to have handed over to Obhoychurn the evidence which they had against Mr. Marjoribanks of the debt due from Mr. Marjoribanks to the estate, thereby releasing Mr. Marjoribanks, and thereby putting in the hands of Obhoychurn the evidence of any sum due from Mr. Marjoribanks, unless, in point of fact, the estate had at that time received payment in some shape or other of the whole of the sum of Rs. 43,674.

Again, passing from the year 1830, and going down to the year 1843, when the Deed was executed, it appears to their Lordships incredible that those who were interested in protecting the estate of the Grandfather, would during that period have remained perfectly quiescent, taking no security and exacting no payment from Obhoychurn in respect of that amount, if the amount really were due from Obhoychurn.

The Books of Obhoychurn have been produced. They appear to have been appealed to on behalf of Tareeny Churn Bonnerjee, and it is possible that under an Act of the Legislature on the subject, they might have been admissible, but, if so, only as corroborative evidence of the testimony of Obhoychurn; and their Lordships do not dissent from the view of the learned Judges below, that if they are right in concluding that the evidence of Obhoychurn is not to be received as truthful, neither can these Books kept by Obhoychurn be considered as satisfactory evidence of that which when taken by itself is not more credible.

[343] Their Lordships, therefore, agree with the learned Judges that there is no evidence whatever which can be relied upon that this sum of Rs. 43,674, which, with the interest thereon, is part, and a very large part, of the amount secured by the Deed, was a *bona fide* debt due from Obhoychurn.

Now, this question of fact being once determined, the consequence appears to their Lordships to be inevitable. They are compelled, arriving at this conclusion of fact, to hold that the Deed professing to secure that amount on the estate of Obhoychurn was a Deed executed with intent to defraud and delay the Creditors of Obhoychurn. He was much pressed by his Creditors at the time the Deed was executed, and insolvency supervened very shortly afterwards.

But then it is said that the Deed secured the further sum of Rs. 13,873, and that there is nothing to impeach the statement that this was a debt due from Obhoychurn to the estate of his Grandfather, and that the Deed, therefore, at all events, should stand as a security for that amount.

It appears to have been considered by the Court below that on the principle of the appropriation of payments, it might be taken that there were payments on

the opposite side of the account which would wipe out this lesser sum. But their Lordships do not rest their decision upon that ground. If the Deed was executed with a view to defraud and delay Creditors, and if the facts which have been referred to with regard to the sum of Rs. 43,674 are sufficient to show the Deed was executed with that intent, it appears to their Lordships to be utterly impossible for any party to that Deed, or any person [344] claiming under those who were parties to that Deed, to maintain the Deed for any purpose whatever.

The Deed is one which, in that view of the case, is not executed to secure the Rs. 13,873, but it is a Deed executed to defeat and to delay Creditors; the Deed, therefore, utterly falls to the ground, and cannot be maintained, as their Lordships think, as a security for any sum whatever.

Upon the question of the form of the decree, their Lordships, agreeing entirely with what has been done by the Court below in point of substance, consider that the decree has, in point of form, gone too far in providing for the cancellation of the Deed, the Plaintiff in this suit not being interested to cancel the Deed as a whole, but being interested only to remove the Deed out of the way of the assertion of his own rights in regard to the property which he has purchased; and their Lordships think that portion of the decree which retains the Deed for cancellation should be omitted.

Their Lordships, therefore, with that alteration, will humbly recommend to Her Majesty to affirm the decree in other respects, and to dismiss the appeal; and the alteration their Lordships have made is not of that kind which, according to their General rule, would induce them to vary their view with regard to the general costs, therefore, they will humbly recommend that the appeal be dismissed with costs.

By an Order in Council, it was ordered, that the decree of the High Court in its appellate jurisdiction be varied by striking out the words "and it is ordered that the said Indenture be retained by the Registrar for the purpose of being cancelled," and that in all other respects the decree be affirmed, with costs.

[345] GUNGA GOBIND MUNDUL and Others.—*Appellants*: THE COLLECTOR OF THE TWENTY-FOUR PERGUNNAHS and Others.—*Respondents* * [Feb. 22, 25, 26, March 4, 1867].

On Appeal from the High Court of Judicature at Fort William, Bengal.

Where the claim to land in the twenty-four Pergunnahs in possession of another, is barred by the twelve years' prescription, provided by Ben. Reg. III. of 1793, sec. 14, his title is extinguished, and although a party to a suit in which the Government claims the land, he cannot avail himself of the Government's right of prescription of sixty years to resume and assess the land, on the footing of the relation of Landlord and Tenant between himself and the Government. So held by the Judicial Committee, reversing the decree of the High Court at Calcutta, in an ejectment suit instituted by Government for possession of lands situate in the Twenty-four Pergunnahs, alleged to be held by Mal and not La-khiraj tenure.

The provision of the Code of Civil Procedure (Act No. VIII. of 1859, sec. 355), which requires the Judges who admit fresh evidence on an appeal, to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought to be strictly complied with.

The cases of *Gardiner v. Fell* (1 Jac. and Wal. 22) and *Freeman v. Fairlie* (1 Moore's Ind. App. Cases, 305), recognized and supported [11 Moo. Ind. App. 359 *et seq.*].

The suit out of which this appeal arose, was instituted by the Collector of the Twenty-four Pergunnahs, to recover the possession of 21 beegahs 8 c. 4 c. of land, in

* Present: Members of the Judicial Committee.—The Master of the Rolls (the Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley, Assessor,—The Right Hon. Sir Lawrence Peel.

Mouzah Chandpoor, Pergunnah Khaspore, in the District of the Twenty-four Pergunnahs, of which the Appellants were in possession.

The Collector's case in the Court below, and on appeal, was, that the land was Mal (rent paying) land, [346] in respect of which the Government was receiving rent, and was not La-khiraj.

The Appellants, in answer, contended first, that the Collector did not establish this fact; secondly, if so, the Regulations of limitation of suits from long possession was a bar to the suit; and thirdly, that in any event, as the Government alleged that they were then actually in receipt of rent in respect of the land, the Collector was not entitled to maintain an action of ejectment to recover possession.

The facts, in substance, were these:

The land in question, is part of the Twenty-four Pergunnahs, of which the Government is Zemindar, and was purchased by the Appellants' ancestors in 1826, for Rs. 26,200, as La-khiraj, and they had been in quiet possession of it ever since. It appeared that, before this purchase, the land belonged to one Bandopadhia, and before his purchase, it was for many years the property of John Burrows and his father Beuben, who acquired it from one Richard Johnson, who was admitted to have been the holder of it in the year 1783. From that year downwards, Johnson, the Burrows family, Bandopadhia, and the Appellants and their ancestors successively held the land and received the rents; they dealt with it as La-khiraj, and no rent was ever assessed upon or paid in respect of it to the Government. At the time when Johnson held the land in 1783, it formed the northern portion of a dagh (block) of land, then measured at beegahs 46:0:10. Another portion of which beegahs 46:0:10, to the immediate south of and abutting upon it, was, after the purchase by Reuben Burrows, and in the year 1787, sold to a Colonel Wilford, who in the year 1815 devised it to Bebee [347] Khanum, and that land had also always been dealt with as La-khiraj, and no rent paid to the Government in respect of it.

In the year 1857, a claim was set up to 21 beegahs of the land by one of the Respondents, Prince Gholam Mahomed, who claimed the proprietary right in it, as having purchased it and other land, amounting altogether to beegahs 42:16:8, from one Robert Brown, in 1855; and he instituted against the Appellants and the Government three suits to obtain possession of such land. In those suits the Prince alleged that the land in dispute was Mal land, held formerly under a Pottah by the Government to one Colonel Green, the predecessor in title of Brown, the Prince's vendor, and alleged that in 1856 the Government had granted him a Pottah.

The Appellant, Gunga Gobind Mundul, by his answer in the suits, set out his title, relying as well upon the facts before stated attending the acquisition of the land as upon the *bona fide* length of possession, and alleging that a lease of part of the land had been granted by one of the Burrows to one Chedam Ghose at least as far back as the year 1811, and under which the land had been always treated as La-khiraj, had been purchased as such by the Prince Gholam Mahomed in the year 1833; and had, in the receipts for rent taken by him, been invariably described as La-khiraj land.

At this stage of the proceedings the Prince Gholam Mahomed applied to the Revenue Commissioner by a petition, dated the 10th of May, 1860, praying that the Government might be made a co-Plaintiff with him, or that a separate suit might be instituted on behalf of the Government, and tried with the three suits, [348] engaging to pay the costs of the Government in any such proceedings. The Commissioner, however, refused to sanction any such course; when the Prince applied to the Collector of the Twenty-four Pergunnahs, who acceded to it, and on the 13th of June, 1861, instituted a suit on the part of the Government of India, in the Civil Court of Zillah Twenty-four Pergunnahs against the Appellant, Gunga Gobind Mundul, and others, making Prince Gholam Mahomed a *pro forma* Defendant, to recover possession of 21 beegahs, 8 cottahs, 4 chittacks, being the northern portion of 42 beegahs, 16 cottahs, 8 chittacks, of land, in Saheban Bagecha, Holding No. 1, appertaining to Mouza Chandpore, in Pergunnah Khaspore, the Government Khas Mehal, by overruling the plea of rent-free tenure, and by maintaining the Mal right. The plaint stated the particulars of the case on the part of the Government, and the claim of the Defendants to hold the lands rent free, and it prayed that the suit might be decided simultaneously with the three suits brought by the Prince.

The Appellants, Gunga Gobind Mundal and Romani Dossee, by their answers, which were in substance the same, insisted, first, that the suit should be dismissed as barred by adverse possession, under Ben. Reg. II. of 1805; secondly, that the Government could not adopt resumption proceedings in respect of lands of less area than 100 beegahs; and thirdly, that the Government, being in receipt of the rents, had no cause of action; and they insisted that the lands in dispute were their own property and rent free; that before the year 1790 Mr. Johnson purchased about 35 beegahs of La-khiraj lands in Chandpore. That Mr. Johnson sold the lands in dispute, [349] which formed the northern part of those 35 beegahs, to Mr. Burrow, who, by a Will, dated the 2nd of August, 1792, left the property to his son, John Burrow; that on the 22nd Bhadro, 1233 B.S. (6th September, 1826), John Burrow sold to Huranundo Badhopadhia (called also Haranund Banorjia) and on 2nd Kartick (17th October) in the same year, Huranundo sold to Oodoy-narain Mundul and Hurnarain Mundul; that Gunga Gobind Mundul was the heir of Oodoy Narain and Romona Dossee of Hurnarain. The answer also alleged, that the lands to the south of the lands in dispute were sold by Mr. Johnson to Welford, on the 1st of February, 1787, who gave them to Khanum Jaun, from whom they were purchased by Chunda Churn Biswas.

The other Defendants, who claimed 5 cottahs within the disputed lands, by their answer raised the same objections as were raised by the above Appellant, and they alleged that the lands claimed by them were purchased on 12th Poos, 1244 (1837), from the widows of the two sons of Anundo Chundro Tewanee, who was, as they alleged, the son and successor of Gungaram Tewanee, and they alleged that 3 beegahs 4 c., of which the 5 cottahs formed part, were rent-free lands.

The issues for trial were fixed by the Judge of the Zillah Court, when the Judge expressed himself as follows:—"This is simply an ejectment action. We have to determine whether the lands are within or beyond the boundary of Holding No. 1. as set forth in the plaint, and, therefore, in the present ejectment suit, no question of resumption can be entered into. The case being dealt with as one of boundary, the only interruption to which action will be, adverse [350] possession, with the *onus* of proof upon the Defendants setting up the plea. In bar, that the action of the Plaintiff is estopped by limitation of time. On the merits. For the Plaintiff, that the lands are within the Holding No. 1, the property of Government. For the Defendants, that the lands are not within the boundary of Holding No. 1; but La-khiraj lands distinct from the Mal lands of Government.

The evidence taken in the three suits by the Prince Respondent, were referred to in the suit by the Collector.

That suit came on for hearing on the 28th of December, 1861, before the Civil Judge, E. Latour, Esquire, who had inspected the lands in dispute in person, and made a skeleton plan from such inspection. That Judge, after stating that the subdivisional holdings first began about 1833, was of opinion, that there was not sufficient evidence to identify the lands in dispute with those in Holding No. 1, in respect of which alone rent had been paid, and gave judgment against the Collector on both issues in his suit, and also against the Prince in his three suits.

Against this decision the Collector and the Prince appealed to the Sudder Dewanny Adawlut.

On the 13th of August, 1862, the Collector presented a petition, praying that certain Exhibits, including the original Register Book for the year 1816, might be received in evidence.

The Register Book was not, however, produced until the hearing of the appeal, and it was then found to contain entries which purported to show that the quantity, 46:0:10, was the quantity mentioned in the [351] Chittahs of 1783 (but which appeared in no other Government Record, either before or after the year 1816) was included in a Rent Bill under the Jumma of Rs. 39:13, mentioned in the Terij papers of 1833. These entries were at the end of the Book.

The appeal was heard before Sir Charles Jackson and W. S. Seton Karr, two of the Judges of the High Court of Judicature, and on the 23rd of January, 1863, the Court gave Judgment declaring the Government entitled to possession of the disputed property, with costs of suit, but dismissing with costs the three suits instituted by the Prince Gholam Mahomed. The effect of the Chittahs of 1190, the

Register Book of 1815 and 1816, and a Map of 1845 was fully considered in the Judgment. With respect to the Register Book the Judgment went on to say, "We were referred to the signature of the Collector in these pages of the Book as suspicious, but we have inspected the Book, and have satisfied ourselves that the signatures corresponded with the other signatures of the Collector in the preceding entries, and on the whole we see no reason to doubt the genuineness of the Register Book." On the whole, the Court found that Lot No. 1 was the same property as that mentioned in Dagh No. 1, and that the property in Dagh No. 1 was the same as was transferred by Johnson to Green, and from Green to Brown, and from him to the Prince. The Court then proceeded to consider whether the Appellant, whose case was a mere assertion of a La-khiraj title, and who could not, therefore, be presumed to have been in possession before 1790, was entitled to set up the defence of the Regulation of Limitation of suits as against either the Government or the Prince. As against [352] the Government, the Court was of opinion, that he had clearly no right; first, because the Government had sixty years allowed them, and the suit had been instituted by them within that time; and secondly, because a party relying on a La-khiraj tenure was not allowed to set up a plea of limitation when he could not show a La-khiraj title before 1790, the Revenue Law of the country treating all such tenures as absolutely null and void. The Court was, however, of opinion, that the Defendants were entitled to set up the plea of limitation as against the Prince.

The Appellant, Gunga Gobind Mundul, presented a petition for a review, upon the ground that, as the Register Book of the years 1815 and 1816 was filed for the first time in Court on the day of trial, he had had no opportunity to search for, and procure certain documents, which were filed with the petition, and which would, as the Petitioner alleged, show that the entries in the Register Book, relied upon by the Court, were false and fabricated.

The petition for review came on to be heard in the High Court, on the 13th of April, 1863, before W. S. Seton Karr, who refused the application with costs. As regarded the objections urged against the Register Book, and the weight to be attached to the documents, filed with the petition, the Judge stated his opinion, that "when we heard this appeal in January last, some new evidence, not adduced before the Lower Court, was presented to us on appeal, in the shape of a Register Book of the proprietors of land in the Government Khas Melials, situate in this part of the Twenty-four Pergunnahs, dated the years 1815, 1816. This Book was then admitted by us on the testimony of the Collector of the Twenty-four [353] Pergunnahs, who satisfactorily accounted for its custody, and for its non-production up to that time. A very careful re-inspection of the Register Book has quite satisfied me that, as a whole, it is genuine, and to be depended upon. It was produced by the proper Officer, and from its proper place. It is quite according to practice that there should be such a register of proprietors; the successive entries are in order of date; they show briefly the particulars of each application for transfer, and mention the title deeds, with names and dates, and they bear the legible signatures of the successive Collectors appended to order, directing that transfer should be recorded, and new Portahs should be made out. So far, as a whole, the Book must be taken to be genuine, and of unquestionable authority. This being the case, and the entry in the Registry not being shaken by the new evidence, any further evidence could not carry a case for review one step further."

Against the decree of the 23rd of January, 1863, the present appeal was brought.

Mr. Field, Q.C., and Mr. Pontifex, for the Appellants.—The evidence adduced to prove the identity of Holding No. 1, of 1833, with Dagh No. 1, of the Chittah of 1783, is altogether insufficient and untrustworthy, and in fact no such identity existed. The Register Book of 1815-1816 was improperly admitted as evidence. The entry there of a jumma in Green's name is the only fragment of evidence in the suit. If it was a genuine document, why was it not produced earlier? The entry bears on the face of it evidence of its being fabricated to meet the case. [354] The Respondents' title to the land as Mal, was not proved; for the entries in the Registry Book only amount to a presumption of conveyance, but are no proof of title; on the contrary, the evidence established the Appellants' title; it shows that the land in dispute has for more than sixty years been in the actual uninterrupted

rent-free enjoyment of the Appellants and their predecessors in title. It is to be regretted that the difficulties which the Appellants' case in the Court below presented to the Respondent, the Prince Gholam Mahomed, in his three separate suits, induced the Government to take up his case, and on their part to bring a suit against the Appellant for possession only, without seeking a declaration of their right to assess as Mal tenure. The unfairness of this proceeding cannot be too strongly condemned. The Appellant and his ancestors at that time had been in *bona fide* possession as purchasers for more than thirty years, and the Prince's claim was absolutely barred by the Ben. Regulations of Limitation of Suits, III. 1793, sec. 14; VII., 1795, sec. 8; and II. of 1803, sec. 18. To avoid the effect of those Regulations he has been allowed to shield himself under the claim of the Government, who assert, contrary to the fact, that the lands were never La-khiraj, but Mal tenure, and that the prescription of sixty years prevail. *Maha Raja Dheeraj Rajah Mahatab Chund Bahadoor v. The Bengal Government* (4 Moore's Ind. App. Cases, 466). If the Government, as they allege, are in actual receipt of the rent of the Holding No. 1, the present suit is not maintainable. A Court of equity will not give relief by making a declaration as to a claim which may be made by another under [355] circumstances that may or may not happen: *Jackson v. Turnley* (1 Drew, 617), Code of Civil Procedure, ch. I., sec. 15.

Mr. Forsyth, Q.C. (with whom was Mr. Macnaughten), for the Collector of the Twenty-four Pergunnahs.—First. The title of the Government to the land in dispute was sufficiently proved. The right of the Government to the Twenty-four Pergunnahs is distinct from their sovereign rights in India. These Pergunnahs were in the year 1764 given as a jaghire by the then ruling power to Lord Clive, and on his death in 1775 came to the East India Company as Zemindars, 5th Rep. East Ind. Comp. pp. 407, 410. The Twenty-four Pergunnahs differ from the ordinary relation between the Government of India and their subjects. In ordinary circumstances, the Zemindar is the Farmer who pays the revenue to Government, and collects it from the Ryots, the cultivators of the soil, but in the Twenty-four Pergunnahs there are no Zemindars to pay the revenue to the State, the Government is the Zemindar, and as such capable of granting Leases or Pottahs, and had full right to grant the Pottah to Prince Gholam Mahomed of the lands in question. The Court below has complicated the case by treating it as one of La-Khiraj and not Mal tenure, but the case really is one of boundary, and the Appellant has failed to prove that the land in dispute was, as he insists, rent-free, or that it was ever granted or registered as La-khiraj, as he was bound to do if the claim could be sustained. The Burdwan case (4 Moore's Ind. App. Cases, 466); [356] Regs. XIX. of 1793, sec. 22; II. of 1819, sec. 28. Secondly, the Registry Book of 1815-1816 was properly admitted in evidence on the appeal. There it is shown that Green, through whom Appellants claim, paid a jumma, and that identifies the land in question. [Lord Romilly: What privy is there between the Appellants and the person making such an entry in the Book? Such entry cannot be admitted as evidence against them.] The Books came out of the proper Officer's custody, and must be presumed to have been regularly kept. All the evidence goes to show the identity of the land with the description in the Register. Then, lastly, unless the Appellant can show adverse possession without payment of rent for a period of sixty years, the claim of the Government's right to sue is not barred. Reg. II. of 1805.

Sir R. Panner, Q.C. (with whom was Mr. Leith), for Prince Gholam Mahomed.—With regard to the Appellants objection to the Government suing on behalf of this Respondent, the answer is, that he stood as to them in the ordinary relation of landlord and tenant. Under the Pottah of 1856 from Government he had all the right the Government could give; he was, therefore, clearly entitled to rely upon the Government's prescription, and his right to sue was not barred by the Regulations of Limitation II. of 1805, or by the Appellants' possession for twelve years. The land in question is proved to be within the Government Zemindary of the Twenty-four Pergunnahs, and the alleged La-khiraj tenure set up and relied on by the Appellants was not established by the evidence, as was necessary. [357] *Maha Raja Dheeraj Raja Mahatab Chund Bahadoor v. The Bengal Government* (4 Moore's Ind. App. Cases, 466).

Their Lordships, without calling for a reply, delivered judgment by

The Right Hon. Lord Romilly.—This is an appeal from a decree of the High Court of Judicature, at Calcutta, which reversed a decision of the Civil Court of the Twenty-four Pergunnahs in favour of the Appellants. The suit, the decision in which gives rise to the present appeal, was brought by the Collector of the Twenty-four Pergunnahs on behalf of the Government of India, against Gunga Gobind Mundul, and Sree Mutty Rurmonee Dossee, described as Defendants, and Prince Gholam Mahomed and certain other persons, members of the Mundul family, named in the plaint, and described as the occupiers of five Cottahs of the disputed land, who, together with the Prince, are also described as *pro formâ* Defendants.

The Prince, though called a *pro formâ* Defendant, is really one of the persons principally interested in the subject in dispute. His title is adverse to that of the Munduls, and he is making common cause with the Collector. On what ground he is inserted as a Defendant, it is not easy to discover.

The Prince had instituted three suits for the recovery of the property which is the subject of this suit, against the Appellants. He divided his claim into three suits, in conformity to the rules of procedure established in the Courts of the country, in consequence of the separate interests of different [358] members of the Mundul family, in portions of his property, of which his claim embraced the whole. The suits of the Prince, numbered 43, 44 and 45 of 1857, raise precisely the same question as that which is raised in the suit of the Collector before mentioned, viz. whether the lands sought to be recovered formed part of holding No. 1. and were part of that portion of Colonel Green's estate, which, as the Prince contends, has passed to him by title. In all the four suits, the decision was against the Plaintiffs in the Civil Court. In the judgment of the High Court it is stated, "It has been admitted by the Counsel on both sides, that in the Court below all parties agreed that this appeal (that is, the appeal in the Collector's suit) and appeals Nos. 122, 123, and 124 (that is, in the Prince's suits) should be heard together and treated as one consolidated case, and that all the evidence should be taken as in one cause."

In the Collector's suit alone is there any appeal. That suit, though it asks "a declaration overruling the plea of a rent-free tenure," which is not properly the subject of that jurisdiction, is properly treated in the Civil Court as an ejectment suit, and it was admitted by Mr. Forsyth, who appears for the Collector, to be a suit in the nature of an ejectment suit. For such a suit, which supposes that the Plaintiff was put out of possession, it is necessary for him to allege and prove his title to the possession. The Collector sues for the Government, being entitled to sue to enforce their claim to the possession. It appears, however, in this suit, that both the Prince Gholam and the first and second Munduls claim derivatively from the same person, Johnson: the judgment of the High Court finds, as a fact, that [359] "the property was originally the property of Johnson." By this word "property" here, is evidently meant absolute ownership; though it may be by a grant from the East India Company, as the Zemindars of the Twenty-four Pergunnahs. The well-known cases of *Gardner v. Fell*, and *Freeman v. Fairlie* (1 Moore's Ind. App. Cases, pp. 299 and 305), and the observations of Lord Lyndhurst in the latter case on the subject of Pottahs, exclude any supposition that such absolute ownership of lands by private persons could not exist at that time in that part of India, as against any claim of the Government to possession of the lands. In the latter case, his Lordship terms "the rent" "a jumma or tribute," and says "the Pottah, therefore, proves no part of the title, it is the conveyance that gives parties a right to claim the Pottah." The Pottah is evidence of title. If there were anything in the nature of the title of the Government to lands in the Twenty-four Pergunnahs, or any usage or custom in force there, which gave a less permanent interest to the possessors of proprietary right, some authority for, or some evidence of such a variation from, and limitation of the general law, should have been adduced to their Lordships. Their Lordships themselves are aware of nothing to take these titles out of the operation of the principles established by the cases above referred to; consequently, upon the evidence in this suit, it appears that the Government had not, at the time of Johnson's possession of block No. 1, any title to the possession of these lands. If, as the Government contend, these lands were rent-paying lands, the title of the Government was simply [360] to the rent, the nature of which was that of a jumma or tribute; and if the

holders of these lands asserted then, or subsequently, a groundless claim to hold them free of rent, as *La-khiraj*, that claim would not destroy their proprietary right in the lands themselves, but simply subject their owners to liability to be sued in a resumption suit, the object of which is, not to obtain a forfeiture of the lands, but to have a decree against the alleged rent-free tenure, involving the measurement and assessment of the lands, and the liability of the person in possession, if he wishes to retain possession, to pay the revenue so assessed. If, at any period during Johnson's possession of these lands, or subsequently, a title to the possession of the lands themselves had accrued to the Government, by any act or omission on the part of the owners of the lands working a forfeiture, that title should have been alleged and proved. But so far from this being attempted to be established, the Collector treated the lands as belonging, by title, to the holding of the Prince, and the Prince as fulfilling the ordinary obligations of the owner of the land, to pay the rent or *jumma* of them. The title of Richard Johnson existed in 1783, and from that time downwards there is no proof of any act entitling the Government to take possession of the lands; there is no evidence, on which any reliance can be placed, that the title of the *Munduls*, be it what it may, commenced by violence; but assuming that such proof existed, in what way can a dispute between two private owners, whether as to boundaries or lands, divest the title of either to possession in favour of the Government, if the latter have merely a rent or *jumma*? The title to sue for dispos-[361]-session of the lands belongs, in such a case, to the owner whose property is encroached upon; and if he suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favour of the party in possession; see *Sel. Rep.*, vol. vi., p. 139, cited in *Macpherson, Civil Procedure*, p. 81 (3rd ed.). Now, in this case, the family represented by the Appellants is proved to have been upwards of thirty years in possession. The High Court has decided that the Prince's title is barred; and the effect of that bar must operate in favour of the party in possession.

The title, then, of the Prince to recover these lands as against the *Munduls* is extinguished; then how can the extinction of the proprietary owner's right in favour of the party in possession, confer any right to possession simply on another person not having a title in remainder, if he had not a title to possession whilst the right and remedy remained? Supposing that, on the extinction of the title of a person having a limited interest, a right to enter might arise in favour of a remainderman or a reversioner, the present case has no resemblance to that. The interest of the person in possession is not a limited but an absolute interest; the title to the lands is one inheritance, the title to the *khiraj* or rent is another. Though these lands are treated as part of the *klhas mehals*, yet there is no proof in this case of any relation of landlord and tenant ever existing between Johnson and the Government; Johnson appears to have been the absolute owner, and no reversion to have existed in the Government. It is not the case of a lease at all, still less of a lease of temporary duration; it is the case of an absolute ownership of the lands; and the title of the Govern-[362]-ment rather resembles a seignory than that of a lessor with a reversion.

In the Civil Court, the title of the Collector to sue was put upon the ground of the relation of landlord and tenant; and of the right of the landlord to sue in order to protect his tenant, and to assert his title as landlord. But such is not the real relation between the parties which the evidence discloses. Prince Gholam took, by conveyance, from Brown; he states his title to have been derivative from Johnson, who conveyed to Green, who conveyed to Brown, who conveyed to the Prince a title to the absolute ownership never interrupted.

There is no relation of Landlord and tenant in such a case between the Government and the owner of the lands, who is the landlord, and not a *Ryot*. The Government has a title to the rent or *jumma*. By whatever name it be called, the right and title is to the rent substantially; it does not include a right to the possession of the lands, though such a right might arise by forfeiture, or extinction of the ownership.

It is of the utmost consequence in India that the security which long possession affords should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands,—contiguous owners are apt to charge one another with encroachments. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be

proved, a purchaser may take that title in safety ; but, if the party out of possession could set up a sixty years' law of limitation, merely by making common cause with a Collector, who could enjoy [363] security against interruption? The true answer to such a contrivance is, the legal right of the Government is to its rent ; the lands are owned by others : as between private owners contesting *inter se* the title to the lands, the law has established a limitation of twelve years ; after that time, it declares not simply that the remedy is barred, but that the title is extinct in favour of the possessor. The Government has no title to intervene in such contests, as its title to its rent in the nature of jumma is unaffected by transfer simply of proprietary right in the lands. The liability of the lands to jumma is not affected by a transfer of proprietary right, whether such transfer is affected simply by transfer of title, or less directly by adverse occupation and the law of limitation.

Their Lordships are, therefore, of opinion, that this dispute as to the identity of the lands, which is substantially the cause of action of the Prince alone, cannot be kept alive longer than the legal period of limitation of twelve years, by the expedient of inducing the Collector to make common cause with him. The judgment appealed against says, " if the Government recover against the Defendants, the Prince substantially recovers also." But the Prince has never surrendered or intended to surrender his estate to the Government. He has simply taken a new Pottah ; that Pottah is not the title, but the evidence of title. If the title of the Prince to possession was inconsistent with a title in the Government to the possession, and the law of limitation has extinguished that title of the Prince in favour of the Munduls, the Defendants, their Lordships are entirely at a loss to see in the arrangement between [364] the Collector and the Prince, any ground in law or equity for making a decree which substantially restores him to what he has lost by laches, supposing the title under which he claims to have been originally good.

If, however, it were considered that the Collector could sue for the possession of the lands upon the title shown to be in the Prince, or that the Prince, by reason of the suit being in the Collector's name, could get the benefit of the sixty years' limitations, the question whether the Respondents have proved a title sufficient to evict the Appellants from the lands in dispute would still remain to be decided. The Collector rests on the title of the Prince. That title is derivative through mesne transfers from Johnson. The place, the Sahiban Bageecha, is said to have been the residence of European Gentlemen. It seems probable that both Johnson and Green were British subjects ; if they were British subjects these lands could not have been orally conveyed by Johnson to Green. It is not shown, therefore, by the Plaintiff, on whom the burden of proof lies, that the entries in the Register could of themselves operate as a conveyance. They must, at the highest, amount only to evidence from which, with other matters, a conveyance might be presumed. Had the possession of the lands been enjoyed by virtue of and consistently with the title asserted by the Plaintiffs, there would have been legal grounds for making such a presumption ; but there has been a long adverse possession, and there is no sufficient proof of a contemporaneous possession consistent with the title insisted on by the Plaintiffs. The presumption of a conveyance is resorted to, when such presumption is made, to sup-[365]-port a long possession ; but here it would be applied to defeat a long possession. If possession be not consistent with a title, which is to be supported by a presumption of a former conveyance, that very possession would furnish ground for building another presumption on the first, viz. of a subsequent re-transfer or reconveyance. In such a case, therefore, as the present, the defective link in the claimant's title cannot, in the opinion of their Lordships, be supplied by presumption. Then, as it is not shown that these lands could have been transferred orally, and as no direct evidence exists of a conveyance, and as the state of the possession does not support a presumption of one having existed, the question which is asked by the Judge of the Civil Court as to the missing link, is at once pertinent and unanswered. Again, the title from Green to Brown, the immediate vendor to the Prince, has not been traced or proved. It has been assumed that it is sufficient for the Respondents to establish that the lands were part of the rent-paying lands comprised in Holding No. 1. But even this fact has not, in their Lordships' opinion, been satisfactorily made out. Both parties agree that the lands in dispute lie in block No. 1, which, by the Chittahs of 1783, appears to have belonged to Johnson, and

to have contained 46 beegahs 10 cottahs. The inference which the Respondents draw from the Register Book at page 213 is, that this parcel of 46 beegahs 10 cottahs, was subject to a jumma of Rs. 39. 13a. : that it had been transferred, before 1816, from Johnson to Green : that a fresh Pottah for it was then granted in the name of Green : and that it is identical with the joint holding mentioned in the [366] Terij of 1833 under the head of Pergunnah Khaspore. It is, however, clear on the face of the Terij, that that holding had been supposed to comprise only 30 beegahs : that on a remeasurement it had been found to comprise 42 and a fraction : and that in consequence of the remeasurement the jumma of Rs. 39. 15a. had been raised to Rs. 56. 14a. 1p. But no satisfactory or consistent explanation has been given how or why a holding which, in 1816 was taken to contain 46 beegahs 10 cottahs, and as such was assessed at Rs. 39. 15a., was at some intermediate period between that date and 1833 taken to contain only 30 beegahs : and having, on remeasurement, been found to contain 42 beegahs and 16 cottahs, was treated as subject to a higher jumma than that assessed upon it when it was supposed to be 46 beegahs 10 cottahs. Mr. Forsyth thought that there must have been two measurements, of which the first, being inaccurate, had reduced the quantity of land to 30 beegahs,—and that the first estimate of 46 beegahs 10 cottahs was a conjectural one. It does not, however, seem probable that if this original estimate had been tested by measurement, the measurement would have been so inaccurately made. Again, Sir Roundell Palmer's theory is that the original block No. 1 may have contained some 16 beegahs and 10 cottahs of rent-free lands : that the rent-paying lands were, therefore, taken to be only 30 beegahs, but were found, on remeasurement, to be 42 beegahs and 16 cottahs. This theory implies that block No. 1 contained, in fact, about 59 beegahs of land. The learned Judges of the High Court admit the difficulty, but say that it is not insuperable, and seems to incline to some [367] such explanation as that offered by Mr. Forsyth. These hypotheses, which are not consistent, are all, in their Lordships' opinion, of too conjectural a character to be received in explanation of an admitted difficulty, in order to defeat a title founded on long possession. It may be observed, too, that all of them, and indeed the Register Book itself, are not consistent with the case made by the Collector in his plaint, which is founded upon the transfer of the 46 beegahs 10 cottahs, less 3 beegahs and a fraction, from Johnson to Green. The question of the identity of these lands appears to their Lordships to be one of extreme doubt and difficulty. They are by no means prepared to say that the Appellants have made out that the lands in dispute are identical with the parcels of the conveyance under which they claim title : or have proved a title under which they could recover if they were out of possession. But the burden of proof is on the Respondents,—it is for them to establish, by sufficient and satisfactory evidence, the identity of the lands conveyed to the Prince by Brown with those sought to be recovered from the Appellants : and their Lordships are of opinion, that they have failed to do so. If their Lordships had thought otherwise, and that the suit was to be determined upon proof of this identity, they would have felt it very difficult to refuse to send the cause back for a new trial. For the strength of the Respondents' case is the Register Book :—that Book was first produced in the appellate Court, under circumstances in which the Appellants may have been, in some measure, taken by surprise : and they may, in the documents produced in support of their unsuccessful application for review, have the means of meeting the inferences to be drawn from that Book. Objection to reception of those documents here was taken and allowed : and their Lordships have excluded them from their consideration. Upon the whole case, however, and for the reasons already given, their Lordships are satisfied that the suit of the Collector was properly dismissed by the Zillah Court : and that this judgment, notwithstanding the fresh evidence produced, ought to have been affirmed by the High Court.

Their Lordships wish it to be understood that this judgment leaves the subject of the liability of these lands to be assessed for jumma wholly untouched. All that they decide, is the question of proprietary right, as between the contending private owners.

It may be right to observe that, in their Lordships' opinion, the provision in the Code of Procedure, which requires the Judges who admit fresh evidence on an appeal, to record their reasons, though not a condition precedent to the reception of the

evidence, is yet one that ought at all times to be strictly complied with. It is a salutary provision, which operates as a check against a too easy reception of evidence at a late stage of litigation, and the statement of the reasons may inspire confidence and disarm objection. Their Lordships will humbly advise Her Majesty that the decision of the High Court be reversed with costs; and that the decision of the Civil Court, so far as it dismisses the Plaintiffs' suit with costs, be affirmed, and that this appeal be allowed with costs.

[369] MUSSUMAT CHEETHA, and after her death, her daughter, MUSSUMAT JUSOONDAH,—*Appellant*; BABOO MIHEEN LALL, and after his death, his son, AJODHIA PERSHAD,—*Respondent* * [July 16, 17, 1867].

On appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

Where an estate was originally ancestral, belonging to a joint and undivided Hindoo family, the presumption of law being that a family once joint retains that *status*, can only be rebutted by evidence of partition, or acts of separation; and the *onus probandi* lies on the party who claims a share in such estate to prove that it is a divided family.

The entry of the name of one member of a joint family, as Lumbadar (the party liable for the assessment of the revenue) on the Registry, being for fiscal purposes, is not *per se* sufficient evidence to establish the exclusive proprietary right of the party whose name is so registered, and the rights of co-partners *inter se* are not affected by such registration [11 Moo. Ind. App. 382, 383].

The Appellant, Mussumat Cheetha, the Widow of Damodur Doss, was the Plaintiff, and the Respondent, Baboo Miheen Lall, son of Koonj Kishore Doss, the eldest brother of Damodur Doss, the Defendant, in the suit brought in the Zillah Court of Mynpoorie. The object of the suit was to obtain possession of Hurheerpore and ten other villages in the Etawah district, with mesne profits for three years, together with interest. The parties to the suit were members of a joint undivided Hindoo family. The villages in question formed part of an [370] estate which was inherited by three brothers named Koonj Kishore Doss, Damodur Doss, and Shama Doss, in undivided shares. The share of the third brother was subsequently divided off; and the Plaintiff claimed to succeed, in default of male issue, as the Widow of Damodur Doss, to eleven of the remaining villages, under an alleged deed of relinquishment, or sale, by which the share of Koonj Kishore Doss was alleged to have been transferred to her late husband. On the other hand, the Defendant, who had been in possession for nearly twelve years, denied that any such transfer or sale had taken place, and contended that the shares of his father and Damodur Doss not having been divided, or exclusively vested in the latter, the Plaintiff was precluded by the Benares school of Hindoo law prevailing in the North-West Provinces from inheriting.

The facts of the case were as follows:—

It appeared that the Zemindary to which the villages in question in the above-mentioned suit, with others, appertained, formerly belonged to Teek Chund, a Banker, residing in Etawah, and that he was the Father of three sons, named Koonj Kishore Doss, Damodur Doss, and Shama Doss, who succeeded at his death as his heirs. The estate then passed out of the family, and it appeared that two several settlements between the years 1210 Fusly (1802-3 A.D.) and 1215 Fusly (1807-8 A.D.) were made of the lands of the Zemindary with strangers as Farmers. The third settlement of this estate took place in the year 1216 Fusly (1808-9 A.D.).

* Present:—Members of the Judicial Committee,—The Right Hon. Lord Romilly, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor,—The Right Hon. Sir Lawrence Peel.

On the 30th of September, 1808, Damodur Doss presented a petition to the Officer in the District in which the estate was situate, stating that he had [371] been unjustly deprived of the Zemindary, which he described as consisting of 30 Mouzahs and 11 biswas, in the Talooqua Juggra Mow, etc., in Zillah Etawah, by the native Government anterior to the British rule in India; and praying that possession in perpetuity might be granted to him of the estate, and that he might pay the Government revenue. It also appeared, that Koonj Kishore Doss, previous to the 17th of May, 1809, also made an application to the Collector in respect of seven Mouzahs, included in Talooqua Bijaolee, and forming part of those in the suit, for a separate settlement of them as proprietor, he undertaking to pay the Government revenue for the same. An Order was accordingly made by the Collector, subject to the confirmation of the Governor-General.

Subsequently, Koonj. Kishore Doss presented another petition respecting the same seven Mouzahs, which stated, that as the Perwannah of the Court, desiring Petitioner to file an application for the settlement of Mouzahs Bijaolee, etc., from 1218 to 1219 Fusly, on a jumma of Rs. 8000 per annum, was received by the Petitioner, he begged to represent that Damodur Doss, his own Brother, who was the proprietor of this property, and whose name was recorded in the proceeding, would attend in Court, and submit for the Court's consideration his application and Kabooleat, etc., in due form; and the Petitioner prayed that the application of Damodur Doss might be granted, and that he might be recognized as the proprietor, to which arrangement Petitioner himself was in every way willing. Upon this petition it was ordered, that an application be received from Damodur [372] Doss, with the concurrence and consent of the Petitioner.

On the 2nd of September, 1810, Damodur Doss made an application for the settlement of Talooqua Bijaolee to be concluded with him as Zemindar, on a jumma of Rs. 16,000 of the currency of 45 from 1818 to 1819 Fusly; and the Petitioner agreed to and accepted the jumma proposed, clear of all expenses, such as sayar and cesses on Travellers, and abkaree revenue, excluding all villages and lands held rent free, and those relinquished in charity, as Bishun Birt and Birumpooter, and other charitable grants, without demur or objection; and stated that the estate consisted of nine villages.

A settlement was accordingly made with Damodur Doss for seven villages, which were recorded in his separate name, the other seven villages having been recorded in the name of Koonji Kishore Doss.

In consequence of inability to pay the arrears due for Government revenue, the fourth settlement was made with Farmers, excluding Damodur Doss as well as Koonj Kishore Doss, and the latter ceased from that time to have any further interest in any of the villages in question.

The fifth settlement took place in 1225 Fusly (1817-18 A.D.), when Damodur Doss succeeded in getting the whole fourteen villages recorded in his own separate name as proprietor (eleven of which were the subject of the present suit). That settlement remained in force up to the settlement subsequently made under Ben. Reg IX. of 1833.

It appeared that the other brother, Shama Doss, made an attempt before the Collector to establish his [373] claim to a joint share in the above villages; but his claim being denied and opposed by both Damodur Doss and Koonj Kishore Doss, he was left to his remedy by suit.

A settlement was accordingly made with Damodur Doss alone, Koonj Kishore Doss assenting, and Shama Doss's claim put aside; and this settlement was confirmed by the Sudder Board of Commissioners.

Orders were then addressed to the Ryots and cultivators of the several divisions of the estates in question, in which were comprised the villages, in each of which it was declared by the Government Officer that the Ryots were to consider "Damodur Doss as the Zemindar and accepted rightful Malguzar of the above estates, and duly pay the rents to him."

The sixth settlement took place in 1840, when Damodur Doss, as proprietor in possession, applied to enter into it in respect of his estate: and previously to its being made, separate public notifications respecting the villages in question were issued by the Government Collector.

By the proceedings of the Settlement Court of Zillah Etawah, on the 22nd of September, 1840, the former settlements were recited, that on investigation, under Ben. Reg. IX. of 1833, into the right and title, etc., etc., of the above estate, it was found that the Zemindary right therein belonged to Damodur Doss; that he had filed his applications for the new settlement of the villages in question, had executed the Ikrarnamahs (agreements containing the terms and conditions on which he held the same, and undertaking to pay the revenue); [374] that the notifications aforesaid had been issued; that the term given in them had expired; and that no Objector or party claiming any interest had appeared, and the settlement made with him alone; it being declared in the proceedings that it had been proved that he was sole proprietor and Malguzar.

At the time of this settlement Damodur Doss caused a statement to be recorded in the Wagib-ool-urz, or administration paper, to the effect, that the name of Baboo Miheen Lall, his nephew, the Respondent, should be recorded after his death as proprietor of three Houzahs, viz., Jugsora, Setpoor, and Nundunpoor, he having made them over in gift to him for his support, and specifying the same in the Ikrarnamah Malguzary (agreement for payment of revenue); Damodur Doss retaining the remaining villages.

On the 21st of January, 1841, Damodur Doss died, leaving the Appellant, Mussumat Cheetha, his Widow, and as such his heir according to Hindoo law, him surviving.

On the 23rd of March, 1841, Baboo Miheen Lall took steps to get himself recorded as proprietor by presenting a petition to the Collector, wherein he stated the settlement made with Damodur Doss; that he was in possession and occupancy of the estates of the deceased, and praying that his name might be recorded in the Government registry as Zemindar in place of that of the deceased Damodur Doss, and the name of Damodur Doss expunged.

After inquiries, the name of Baboo Miheen Lall was recorded by the Collector as Zemindar of the above villages.

In consequence, a plaint was filed by Mussumat [375] Cheetha, on the 30th of December, 1852, in the Zillah Court of Mynpoorie, and sought to recover possession of the eleven Mouzahs before mentioned, and to obtain entry of her name in the Collector's Books, together with mesne profits, against Baboo Miheen Lall, since deceased, as principal Defendant, then in possession of the estate, and Buldeo Pershad and Juggernaath, son of Shama Doss, deceased. The facts above mentioned were set forth in the plaint.

The two Defendants, Baboo Miheen Lall and Buldeo Pershad, put in their answers. In the answer of the former it was, amongst other things, alleged and submitted, that the claim of the Plaintiff was groundless, opposed to the Shasters and family usage of both parties, and in contradiction to the Will and agreement of the Plaintiff's husband; and that, with the exception of an allowance for her support, the Plaintiff had no right or title to possession over the Zemindary then in the possession of the Defendant. The answer referred to the papers of the Collector's office, the Ikrarnamah or agreement of Damodur Doss, and the petitions alleged to have been filed by herself as proofs in support of his answer; and Baboo Miheen Lall submitted, first, that the Plaintiff having no male issue, according to family usage and the doctrine of the Shasters, she had no right or title to succeed to the estate of her husband, which was an undivided and hereditary Zemindary, in opposition to or supersession of the Defendant's superior right; secondly, that both the Plaintiff's Husband and the Defendant, Baboo Miheen Lall, continued as partners, and proprietors of equal [376] shares in the estate, and that there was a perfect understanding between them, no accounts being ever rendered to either party, or followed by a separation of interests; but that, on the contrary, the Plaintiff's husband, during his lifetime, constituted the Defendant proprietor of his entire possession, and appointed an allowance of Rs. 25 per mensem for the Plaintiff's daily expenses and apparel, in case she should decide on living separately, before a meeting of her relatives and the Gomashtahs in employ, and the principal residents of the place who might be living at the time; the allowance being independent of expenses required for the ceremonies necessary to be performed for her daughters. That both the Defendant and the Plaintiff were thankful and contented with this

arrangement; and the Plaintiff continued to receive the allowance of Rs. 25, fixed by her Husband from the Defendant, from the day of her separation to the month of Jet, 1258 Fusly, and that allowance the Defendant was willing to allow her.

The answer of Defendant, Buldeo Pershad, stated that, according to family usage, the Plaintiff had no right to possession in the hereditary and undivided Lumberdary property; that Baboo Miheen Lall, the Defendant's elder Brother, was the rightful proprietor, and that he himself had a share in it on partnership with his elder Brother.

The answer of the Defendant, Juggernaut, son of Shama Doss, disclaimed all interest, and alleged that the villages of his father, belonging to the same hereditary property, had been divided off, and were held separately by him, and since his death by the Defendant.

[377] The evidence of the Plaintiff consisted of the depositions of witnesses, who supported the averments in the plaint as to the exclusive and separate possession of the villages in question by the late Damodur Doss under the Revenue settlements; and the witnesses deposed to the effect, that Damodur Doss and his wife lived separate from his Brothers; that Koonj Kishore Doss, the Defendant's Father, never held possession since he relinquished his possession of the seven villages and claim to a settlement of these, or the other seven villages aforesaid; and that Damodur Doss made no Will or testamentary disposition giving his Widow Rs. 25 per mensem as alleged in the answers of Defendants. The evidence of the Defendants consisted of the depositions of witnesses, by which the Defendants endeavoured to establish that the estate in question was ancestral, and had never been divided; that Damodur Doss's brother, Koonj Kishore Doss, and the Defendants since his death, had continued to have a joint interest in the estate with Damodur Doss.

The hearing of the suit took place before the Principal Sudder Ameen (Moulvi Syud Mahomed Vilayut Ali Khan) on the 28th of July, 1853, when he made a decree in favour of the Plaintiff, finding that the villages in question were the property of the late Damodur Doss, and that his Widow and heir rightly succeeded thereto; that the character of ancestral property had ceased to belong to the villages. He also found against the alleged testamentary disposition of Damodur Doss, as to the allowance of Rs. 25 per mensem to the Widow, not crediting the witnesses of the Defendants.

Baboo Miheen Lall being dissatisfied with this [378] decree, appealed against the same to the Sudder Dewanny Adawlut at Agra.

Pending the appeal Baboo Miheen Lall died, leaving Ajodhia Pershad, his son and heir, who revived the suit.

On the 31st of May, 1854, the hearing of the appeal took place before Messrs. Begbie, Smith, and Dick, three of the Judges of the Sudder Dewanny Adawlut, when a decree was made bearing that date, reversing the decree of the Zillah Court, and finding that the estate continued to be joint ancestral estate; and that Damodur Doss did not acquire it as sole owner, but that he held possession partly as owner and partly as the representative of his brother, Koonj Kishore Doss; that the subsequent record of the name of Damodur Doss, and the statements contained in the documents and proceedings drawn up at the settlement under Ben. Reg. IX. of 1833, did not alter his possession; that there had been no claim preferred by his nephew, Baboo Miheen Lall, or denial on his part, or assertion of an exclusive property which would constitute his tenure of the Mouzahs in suit an adverse possession; and dismissed the suit with costs.

Mussumat Cheetha appealed to Her Majesty in Council against this decree. She having died, Mussumat Jussoondah, her daughter, the present Appellant, who had a son living, revived and prosecuted the appeal:—

Mr. Leith, for the Appellant:—The weight of evidence establishes the fact, that the estate in question was the sole and separate pro-[379]perty of the late Damodur Doss, and so descended to the Plaintiff, as his Widow and heiress-at-law according to the Hindoo law: *Katama Natchier v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 543). The principal Defendant was estopped by the proceedings before the Settlement Officer and by his own acts subsequent to the death of Damodur Doss, claiming as his separate and personal heir, from afterwards setting up in defence to this suit that he was joint owner with Damodur Doss, and entitled to succeed to

the same as joint estate, to the exclusion of the Plaintiff. Even if the decree of the Sudder Court was right in declaring the estate joint property, and, therefore, descendible to the Nephew in preference to the Widow of the deceased, yet the same is defective and erroneous in not having at the same time decreed to the Plaintiff, as Widow, a sufficient maintenance out of the estate.

Mr. Busby, for the Respondent, was not called on to address their Lordships. Judgment was delivered by

The Right Hon. Sir James W. Colvile.—The Plaintiff, whom the present Appellant represents, commenced her suit in December, 1852, to recover possession of certain villages, to which she claimed title as Widow and heiress of one Damodur Doss, who died in 1841. The original Respondent, the nephew of Damodur Doss, had been in possession of the property for upwards of eleven years before the institution of the suit. These villages being situated [380] in a Province governed by the law of the Benares school, it was necessary for the Plaintiff, in order to make out her title to eject the Respondent, to establish that the property claimed was the separate estate of Damodur Doss. And it being admitted that this property was originally the ancestral estate, or part of the ancestral estate, of a joint and undivided Hindoo family, she had to make a case sufficient to rebut the well-established presumption of the Hindoo law, that a family once joint retains that *status*, unless it is shown to have become divided; and that the ancestral property of such a family remains joint, unless it is shown, by partition or otherwise, to have become separate.

The family originally consisted of three brothers, Shama Doss, Damodur Doss, and Koonj Kishore Doss. It is admitted on all hands that Shama Doss separated himself from his brothers, and took his share of the ancestral estate as separate property. It is, however, clear upon the evidence (and if the fact be not admitted, it is hardly disputed on the part of the Appellant) that the two other brothers continued joint after the separation of Shama Doss; and further, that for many purposes Damodur Doss and the Respondent (being his nephew, the son of Koonj Kishore Doss) were members of a joint family at the time of Damodur Doss's death.

In what way, then, did the Plaintiff in the suit seek to relieve herself of the heavy burden of proof which the law in these circumstances casts upon her? She has neither alleged nor proved that a formal partition ever took place between Damodur Doss and his brother. Nor has she alleged or proved that any conveyance of his proprietary right was ever executed by the latter [381] to the former. But she relies on certain settlements of the revenue, and other proceedings before the Collectors, the effect of which was, that these villages, which at one time were all recorded in the name of Koonj Kishore Doss, at another were recorded partly in his name and partly in that of Damodur Doss, came ultimately to be all recorded in the name of Damodur Doss, as if he were the sole Zemindar thereof, or, at least, the sole Lumberdar, or person liable for the due payment of the revenue assessed thereon. And from these proceedings she would have it inferred that Koonj Kishore Doss had duly parted with or relinquished his proprietary interest in the villages, and allowed them to become the separate estate of his brother. Mr. Leith has candidly admitted that this inference cannot legitimately be drawn from the mere fact that the villages were recorded in the sole name of Damodur Doss. He does not dispute the correctness of the proposition laid down by the Sudder Court, that, "as the law stands, the mere record of one name does not establish the exclusive proprietary right of the individual so recorded." But he contends, that particular statements and expressions to be found in their proceedings, which he says must be taken to have been made and used with the knowledge and assent of Koonj Kishore Doss, or of his son, the Respondent, are sufficient to raise the inference in question, and to make out the title of the Plaintiff.

To this argument their Lordships cannot assent. Both the plaint and the decree of the Principal Sudder Ameen refer the alleged relinquishment of proprietary right to the date of the fifth settlement, which took place in 1818, and in the lifetime of Koonj Kishore Doss. But it is obvious on the face [382] of the proceedings, that on that occasion the villages were treated as the joint property of the two Brothers, though the settlement was, with the consent and at the request

of Koonj Kishore Doss, made with Damodur Doss alone; whilst, on the other hand, a claim put forward by Shama Doss was treated as an adverse claim of proprietorship; for the enforcement of which he was referred to a civil suit. Koonj Kishore Doss's petition, which signified his consent, neither relinquished nor disclaimed his interest in the villages: it prayed only that Damodur Doss's application to be regarded as Proprietor be granted, the Petitioner being perfectly satisfied with the arrangement. No other or subsequent act imputing a transfer of proprietary right by Koonj Kishore Doss is either suggested or proved; and he died before the sixth settlement, which took place in 1840.

If, then, the Appellant's title rests, as it seems to do, upon the alleged transfer or relinquishment of right by Koonj Kishore Doss in 1818, statements made and expressions used in the course of the settlement of 1848 are material only in so far as they reflect light upon the true nature of the transaction of 1818.

Nothing can really turn upon expressions in those public documents, to the effect that Damodur Doss was sole Zemindar and without partners, because whenever property is, for whatever reasons, recorded in the sole name of one of several co-proprietors for fiscal purposes, it must obviously be part of the arrangement to make him who is to pay the Government revenue, and through whose hands the collections from the Ryots must, for that purpose, pass, appear to be the sole owner. Yet it is admitted, that [383] one so recorded may be really what we should term a Trustee for the other member of a joint family, and that the rights of the co-parceners *inter se* may not be affected by the arrangement. The expressions, therefore, in the Ikrarnamah importing that on the death of the Lumberdar, or person settling for the revenue, his son or next heir, or even an appointee, shall be substituted for him, are all consistent with such an arrangement, the essence of which is that the person in question shall be made ostensibly and on the face of the Revenue records the sole owner of the Zemindary rights. Any argument drawn from such expressions seems to their Lordships to be too weak to supply the failure of positive proof of the title set up by the Appellant.

The same answer may be made to the argument which Mr. Leith founded on the nature of the Respondent, Baboo Miheen Lall's, application to the Revenue authorities to be admitted as heir to his Uncle on the death of the latter. On the face of the Revenue records Damodur Doss was the sole registered proprietor. It was, therefore, only as his heir that the Applicant could claim to be substituted as sole Zemindar and ostensible owner in his place. A suggestion of joint interest was unnecessary, if, indeed, it would not have been improper, on that occasion. And it is to be observed that, inasmuch as it appeared before the Collector by the Kanoongoe's reports that Damodur Doss had left a Widow, the claim of his Nephew as heir implied that the property was not the separate estate of the deceased, and that the succession to it was to be governed by the law which regulates the descent of the property of a joint and undivided Hindoo family.

[384] Their Lordships have hitherto dealt, as the argument before them dealt, exclusively with the documentary evidence. Of the parol evidence it is sufficient to say that each party has produced that which, if believed, would go far to prove his or her case; that the statements of the witnesses for the Plaintiff are, in most respects, in direct conflict with those of the Defendant; and that it is only by its consistency with the documents and the admitted facts of the case that the truth of the testimony on either side can be tested.

One serious difficulty of the Plaintiff was to explain the long possession of the Respondent, Baboo Miheen Lall, and her failure to take proceedings for nearly two years after the alleged quarrel between them. The case made on her pleadings, and sworn to by her witnesses, is that he held possession as her Agent, rendering, for a considerable period, accounts to her. But this story is unsupported by the production of any documents or other corroborative proof, and is, in their Lordships' opinion, a most unsatisfactory explanation of the Respondent's possession.

The proofs, therefore, adduced by the Plaintiff below seem to their Lordships insufficient to support the case made by her, and to rebut the strong presumptions of the Hindoo law which she had to meet. But against these proofs their Lordships have to set not only the inferences arising from Damodur Doss's petition when about to proceed on a pilgrimage to Gyah, the deposition of his Mookter, Sookhe

Lall, in October, 1839, and the petitions presented on behalf of the Plaintiff, which are referred to in the judgments, but the almost conclusive evidence contained in the account Books.

[385] That these Books were proved with the strictness which would be required in our Courts cannot be said; but they seem to have been received according to the course of the Indian Courts. No objection to their reception was made in the first instance; they were submitted by the Judge to the examination of Mahajuns appointed for the purpose, who were questioned by him upon them. Nor does it appear that their genuineness or correctness was ever very formally or directly impugned, though some objection may have been taken to the proof of them.

The course of the argument here induces their Lordships to regret that these material documents were not strictly proved, but they were sent up to the appellate Court as part of the record; and in these circumstances their Lordships think that, according to the course of these events, the appellate Court was justified in considering them as part of the evidence in the cause; and that the conclusions which they drew from them were correct. But even if this part of the evidence were withdrawn, their Lordships would be of opinion, that no sufficient ground has been shown for disturbing the judgment of the Sudder Court; and they will humbly recommend to Her Majesty that this appeal be dismissed with costs.

[386] THAKOORAIN SAHIBA and CHOWDREE JAI CHUND,—*Appellants*:
MOHUN LALL and others.—*Respondents* * [March 4, 1867].

On appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

According to the Benares school of Hindoo Law prevailing in the Mithila country, a Sister's son, in the absence of lineal heirs, has no title to succeed as heir to his deceased Uncle's ancestral estate.

Suit by a sister's son against his Uncle's Widow to set aside an adoption made by the Widow to her deceased husband. Held, reversing the decree of the Sudder Dewanny Adawlut at Agra, that, as Sister's son, he had no *locus standi* to sue as reversionary heir for his deceased Uncle's estate, or to challenge the Widow's adoption.

The suit out of which this appeal arose was instituted by the Respondent, Mohun Lall, as one of the expectant or reversionary heirs of Chowdree Oodai Chund, deceased, contingent on his surviving the first Appellant, in respect of a quarter undivided share in the Zemindary of Biswalee, and to set aside the adoption of the second Appellant by the Widow of Koor Inderjeet Sing, herein-after mentioned.

The question on the appeal was confined to the title of Mohun Lall to sue, which right was denied by the Appellants, on the ground that, as Koor Inderjeet Sing died childless, and was succeeded by the first Appellant, his Widow, with a power of adoption, which had been exercised by the adoption of the second Appellant, the Respondent, Mohun Lall, as a [387] Sister's son, according to the doctrines and rules of the Benares school of law prevailing in the Mithila country, in which the Zemindary of Biswalee, in Pergunnah, Chupra Mow, is situate; was excluded from the inheritance, even if the first Appellant were to die. By the decree appealed from the Sudder Dewanny Court at Agra held that Mohun Lall, as a Sister's Son, was as expectant heir entitled to sue; and set aside the adoption on the ground that the authority to the first Appellant to adopt was not established. Hence this appeal.

* Present: Members of the Judicial Committee,—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Richard Torin Kindersley. Assessor,—The Right Hon. Sir Lawrence Peel.

The facts were as follows:—

The founder of the family was Chowdree Oodai Chund, who self-acquired the estate, constituting the Zemindary. He died in the year 1816, leaving an only son, Koor Inderjeet Sing, who succeeded to the Zemindary. He also left him surviving two Widows. His third and eldest Wife died in his lifetime, and had one daughter, also deceased, who was the Mother of the Respondent, Mohun Lall. The second Widow, who survived him, was the first Appellant, the Mother of Koor Inderjeet Sing. Koor Inderjeet Sing married Mussunat Maharanee, and died without issue, leaving his Mother and Mussunat Maharanee him surviving, having, as alleged, verbally authorized her to adopt a Son to him, in pursuance of which power she some time afterwards, in the year 1834, adopted the second Appellant. Mussunat Maharanee died, leaving the second Appellant a minor, and in consequence the first Appellant managed the affairs of the Zemindary.

The present suit was brought in the Zillah Court of Furruckabad, by the Respondent, Mohun Lall, and his brother, Thakoor Doss, against the first Appellant [388] and others, claiming, in the absence of male issue, as maternal grandsons of Chowdree Oodai Chund, one half of the Zemindary, and seeking also to set aside the adoption. The Appellant's answer, among other defences, denied the Plaintiff's right of heirship, and relied upon the validity of the adoption.

The Principal Sudder Ameen (James Mercer, Esq.), by his decree, dated the 9th of August, 1850, found, first, that the adoption had properly taken place; and secondly, that the claim was barred by limitation of time; and dismissed the suit.

An appeal from this decree was taken to the Sudder Court at Agra, which Court affirmed the decree appealed from.

Two other suits were brought by the same parties relating to the same matter, though raising different issues, and various proceedings were had thereon. Mohun Lall, who alone carried on the original suit, limited his claim to one-fourth share of the estate, having obtained a review of judgment of the first suit, that suit was remitted back to the Zillah Court, and restored to its order on the file. Fresh issues were then recorded, the material one being, first, whether Mohun Lall was entitled to inherit as maternal grandson of Chowdree Oodai Chund, and had a right to sue; and secondly, as to the validity of the adoption.

The Principal Sudder Ameen sent a case for the opinion of the Pundit of the Sudder Dewanny Adawlut at Agra, as to Mohun Lall's right to sue: to which the Pundit (Ram Nath), returned the following answer:—

“After the death of C. and his Wife, the entire paternal estate of C. reverts to the Mother of C., [389] that is, to the Widow of A., according to the doctrine of ‘Jagbalk.’ After the death of the Widow of A., the estate will descend to the maternal grandsons of A., and transfer of the estate by the female without the consent of the maternal grandsons will be invalid. After the death of the female, the maternal grandsons are entitled to succeed to the property. 2. The Widow of C. was competent to adopt a son after the death of her husband, in his nonage and without issue, provided (according to the doctrine of Busisht) she had received her Husband's permission to do so, and the son she had adopted was not the eldest son of his Father. The conditions of adoption are, that Brahmins be fed, and alms be given to the poor.”

By the decree of the Principal Sudder Ameen (Cazee Inayuk Hossein Khan), on the remit of the suit, in which, as already stated, Mohun Lall alone claimed a fourth share of the estate, it was declared that the adoption was invalid, and that Mohun Lall had a right as expectant heir to sue. Against this decision an appeal was brought by the Appellants to the Sudder Dewanny Court at Agra, when it was contended that the Respondent was not the immediate reversioner, and not entitled under the Hindoo law to inherit at all.

The Sudder Dewanny Court (consisting of Messrs. W. Wynyard and W. Roberts) by a decree, dated the 18th of April, 1863, affirmed the decision of the Sudder Ameen. The material part of the judgment of that Court, as affecting the question at issue, was in these terms:—“In regard to the competence of the Plaintiff to sue, we observe, that the opinion of the Hindoo Law-Officer, obtained by the Principal Sudder Ameen, is distinctly in favour of the pretensions of the Plaintiff. [390] No decided case has been quoted to show that this opinion is not consonant with the

Shasters current in Benares. The weighty opinion of Sir W. Macnaghten, Vol. II., p. 87, is quoted in opposition to the Pundit. The Pundit of Zillah Behar, in his *Bywusta*, interpreting the text of Yājñyawalkya, a Wife, Daughters, both parents, Brothers, their Sons, sprung from the same original stock, distant kindred, etc., stated that in default of heirs down to the Brothers' son, the gotraja (kinsmen sprung from the same original stock), inherit; on failure of such heir, the distant kindred; and that the Sister's son is ranked among the latter who should succeed after the former. This opinion is conformable to the law as current in Mithila, Benares, and the other Provinces, as the followers of those schools do not rank the Sister's son among the series of heirs enumerated in the text of Yājñyawalkya. We think that this opinion, when fully considered, is not adverse to the pretensions of the Plaintiff. The Pundit, whose opinion is approved, does not say that a Sister's son is one of the heirs enumerated; but he says that a Sister's son (*vide Shoe Sahai and Others v. Mussumat Oomed Koonwar*, where Sisters' sons' sons were allowed to inherit under the law of Mithila and Benares (Benares Sud. Dew. Ad., Vol. VI. p. 301); *vide* remarks at 302) is ranked among the latter (*i.e.* distant kindred, who should succeed after the former). He had previously said, in the note to p. 85, that, according to the law of Benares, the Sister's son is not expressly mentioned as heir; but he adds, at all events he can come in only in default of all Samanodacas, or lineal descendants as far as the fourteenth in degree. It has not been shown to the [391] Court that there exists any other Claimant who, being of the Samanodacas, or lineal male descendants of the fourteenth degree, or of distant kindred (Bundoos) taking priority over Plaintiff, has a prior right of reversion. For the right of a Sister's son to succeed, *vide* Morley's Dig., Vol. I. p. 326, note. *Raj Koonwarree Kirpa Moyee v. Raja Damodur Chunder*. Decision of Lower Provinces, 20th February, 1845, p. 27. We do not think, therefore, that the Plaintiff is to be regarded in the light of stranger, and as one who has no claim to inherit. We, therefore, affirm the decision of the Principal Sudder Ameen, and dismiss the appeal with proportionate costs."

The present appeal was from this decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants.—There is a preliminary objection, which is fatal to the suit. The Respondent, Mohun Lall, had no *locus standi*, and was not entitled to sue. He had as a Sister's son no interest, as expectant or reversionary heir, according to the Benares school of Hindoo law, to the Zemindary; therefore, his suit ought to have been dismissed without calling upon the second Appellant, Chowdree Jai Chund, to defend his title to possession as adopted son. The title set up by Mohun Lall in his plaint, and under which he now claims one-fourth of the estate, was based solely on the allegation that he was one of the expectant or contingent reversionary heirs of Chowdree Oodai Chund, deceased, and as such entitled to succeed next after the death of his Widow, the Appellant, Thakoorain Sahiba, whereas the title to the Zemindary must be deduced through and immediately from Koor Inderjeet Sing, [392] his son, who died seized of the same as an absolute estate of inheritance, and by whom his Widow, since deceased, first succeeded as heir, and continued in possession till her death, on which event the first Appellant, as Mother of Koor Inderjeet Sing and his next heir, would succeed, if the adoption of the other Appellant, Chowdree Jai Chund, was set aside. The Widow of a person dying without issue by nature or adoption represents the inheritance similar to a Tenant in tail by the English law. *Katama Natchier v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 543). The Respondent could not by any possibility succeed as heir, he being a Sister's son, and as such excluded by the doctrines and rules of the Benares school, which governs the right of succession in this case. The Mitacsharā, Ch. II. sec. 5, par. 3. W. H. Macnaghten's "Hindu Law," Vol. I. pp. 28, 36; Vol. II. p. 85, note. Strange's "Hindu Law," Vol. I. Ch. VI. p. 147 [2nd Ed.]. Eberling "On Inheritance," pp. 79, 82. Morley's Dig., Vol. I. tit. "Inheritance," p. 326, note. A Sister's son is expressly excluded in the table of succession in Vivada Chintamani (Trans. by Prossonna Coomar Tagore), the law prevalent in Mithila, as held in *Rajchunder Narain Chowdry v. Goculchund Goh* (1 Ben. Sud. Dew. Rep. 43). The Court was misled by the Buwusta of the Pundit, which being irreconcilable with the Text writers, and opposed to the well-known doctrines of the Benares school, it was the duty of the

Court to have examined the Pundit to explain the grounds of his opinion on the discrepancy with those authorities, *Myna Boyee v. Ootaram* (8 Moore's Ind. App. Cases, 400). Independently of these conclusive authorities, the [393] Sudder Court at Agra has lately solemnly overruled their finding in the case now in appeal, in that of *Mussumat Mooneea v. Dhurma* (a). Even if the title to the estate was to be deduced through, and immediately from, Chowdree Oodai Chund, yet the Re-

(a) MUSSUMAT MOONEEA and MITHOO,—*Appellants*; DHURMA,—*Respondent*.*

This was a regular appeal (No. 20 of 1866) from the decision of W. S. Pater, Esq., the Judge of Agra, and heard on the 13th of June, 1866, before F. B. Pearson, Esq., and R. Spankie, Esq., Officiating Judge of the Sudder Dewanny Adawlut, North-West Provinces, Agra.

It was a claim to establish title to real estate in the town of Agra, and to prevent alienation by the Appellants.

The case was thus set forth in the Judge's decision:—

"The Plaintiff states that Mussumat Mooneea has illegally adopted Mithoo as her husband's heir. Her husband, Mool Chund, Uncle of the Plaintiff, died about two years ago. A Hindoo Widow cannot adopt an heir. The income from the property is ample for her during her lifetime.

"The Defendants in reply urge, first, that the Plaintiff, as Nephew, has no title to oppose the adoption; second, that Mool Chund himself acquired the property, and not by inheritance; third, Mithoo is a relative of the deceased Mool Chund, and the adoption is legal. Mithoo was brought up by him during six years, and shortly before his death Mool Chund authorized me to adopt him."

The material issues were—first, was the Plaintiff, as nephew of Mool Chund, entitled to oppose the adoption of Mithoo; second, did Mool Chund authorize his wife, Mussumat Mooneea, to adopt Mithoo? and third, is Mithoo a relative of the deceased Mool Chund, and is the claim void on that score?

Upon these issues the following judgment was pronounced:—"I find, first, that the Plaintiff is Nephew of the deceased Mool Chund, and is so entitled to oppose any illegal adoption by Mussumat Mooneea; second, it is not shown that Mool Chund authorized Mussumat Mooneea to adopt Mithoo. Had he done so, Mithoo would sooner have been adopted by her. It appears that a misunderstanding had arisen between Mussumat Mooneea and the Plaintiff's wife; and upon that Mussumat Mooneea sent for Mithoo from a distant village, and then represented him to be the adopted heir of Mool Chund, and this occurred only about six months ago, as shown in the evidence on both sides; third, Mithoo is not shown to be related to the deceased Mool Chund, but only one of the brotherhood, or connection. I decree in favour of the Plaintiff, with costs."

On the appeal to the Sudder Court it was contended, amongst other objections, by the Respondent, that the Plaintiff, being Mool Chund's sister's son, could not inherit his property, and, therefore, the suit should have been dismissed as barred by the Hindoo Law.

The Sudder Court's judgment was in these terms:—"We think it unnecessary to refer to the other pleas, and confine ourselves to the objection in bar of the suit. We are of opinion that the objection is fatal to the suit. We are aware that there is a ruling of this Court in the case of *Sohiba Thakoorain and Chowdree Jai Chund v. Mohun Lall*, dated 18th of April, 1863, which declares that a sister's son may inherit his maternal uncle's property, but this decision only accepts him as an heir in the absence of any lineal male descendant of the fourteenth degree, or distant kindred. We, however, observe that the weight of precedent and opinion is against this ruling. Macnaghten, Vol. II., p. 87, does not admit of such a claim; nor does Strange, Vol. I., 147. We do not find a Sister's son in the table of succession in the Mitacshara. The Sister's son appears to be regarded as sprung from and belonging to a different family. In the Madras Presidency he would not inherit. Madras Sud. Ad. Dew.

* This case not having been reported in the Court below, and being recognized and confirmed by the judgment of their Lordships in the present appeal, is here inserted.

[394]-spondent was not one of the nearest reversionary heirs, expectant on the determination of the estate of his Widow, inasmuch as it appears that he claimed as the Son of a Daughter, and that there were two other Daughters of Chowdree Oodai Chund alive, who by [395] the Hindoo law were his nearer and immediate heirs. Again, the Court below was wrong in casting the *onus* on the Appellants of proving that there was no nearer heir than the Respondent, and treating him as in the class of Hindoo heirs called Bundoos, or distant kindred, although he never could be heir. The *onus* of proving himself, which he failed to do, the immediate and nearest heir in expectancy of Koor Inderjeet Sing properly lay on him as Plaintiff, seeking to dispossess the Appellant, Jai Chund Chowdree, and to set aside his adoption.

Mr. Piffard, for the Respondent.—The objection now taken to the Respondent's right to sue is untenable. It is not for the Respondent to show that there were no intermediates entitled before him. As maternal grandson of Oodai Chund, he is entitled to the reversion of his self-acquired estate, after the deaths of Inderjeet Maharane and Thakoorain Sahiba; Koor Inderjeet Sing having died without issue. By the Hindoo law, after the Brother's sons, the Sister's son succeeds. *Vyavahāra-Mayūkha*, Ch. IV. sec. 16 (Trans. by Borrodaile), referred to in *Venayek Anundrow v. Laxumebae* (9 Moore's Ind. App. Cases, pp. 520-528), and adopted in that case. It is admitted that a Sister's son cannot claim as one of the Bundhoo, or distant kindred, who are especially enumerated in the *Mitacshara*, Ch. II. sec. 6, and of whom the nearest is the Father's Sister's son. It is admitted, also, that there is no authority for placing the [396] Sister's son, as the Court below did, next after the *Samanodacas*. The text of the *Mitacshara* explicitly declares that after the *Samanodacas* shall come the Bundhoo. Now, the Sister's son cannot be interpolated between these two classes, to neither of which he belongs. The true place of the Sister's son is with gotraja, or kinsmen who are also Sapindas, or connected with the deceased by funeral oblations; that is, that the relationship to the deceased is so near, that they are entitled, in the absence of still nearer relations, to conduct the funeral rites, and present the funeral cake. This is placed by some Text writers at the fifth, by others at the seventh degree. Persons more remotely connected, although in the absence of any nearer relative they may conduct the funeral rites, are not, according to the Hindoo law, permitted to offer the funeral cake, but the libation of water only. *Mitacshara*, Ch. II. sec. 5, par. 6. The authority of Macnaghten and Strange, relied on by the Appellant, are really not independent authorities, but are based upon and refer to the *dictum* laid down in the case of *Rajchunder Narain Choudry v. Goculchund Goh* (1 Ben. Sud. Dew. Rep., 46; see also W. H. Macnaghten's "Hindu Law," Vol. II., Case 6, p. 125), in which it is taken for granted that the Sister's son, not being expressly mentioned in the *Mitacshara*, is excluded from inheritance. This is extrajudicial, as it was expressed on a point on which the Court was not called upon to decide, and is, therefore, not entitled to any weight. It is true that an opinion has prevailed among English Text writers that the law of Benares, which is subject to the *Mitacshara*, differs from the law of Bengal on the right of inheritance of a Sister's son, but that opinion is founded upon a misconception of [397] the effect of what is laid down in the third, fourth, and fifth pars. of the 2nd Chapter of the *Mitacshara*, and by not appreciating the true effect and meaning of the words "Gotraja," "Samanodaca," and "Bundhoo." If the contention of the Appellant be correct, the *Mitacshara* presents the anomaly of totally excluding the Sister's sons from inheritance, while it admits the sons of both the Father's Sister and the Grandfather's Sister; and this without a single passage in the Text enjoining such exclusion. But this anomaly disappears if the wording

1859, p. 249, quoted in p. 14, Appx. translation of Law of Inheritance according to the *Mitacshara*, and the *Mitacshara* has paramount authority in that part of the Country. We are further confirmed in our opinion on this case by a decision of the High Court, dated the 6th of September, 1864 (Morgan and Shumboonath Pundit, Judges), which rules that a Sister's son is no heir where the *Mitacshara* (the authority in Benares) prevails. We, therefore, consider the Plaintiff has no *locus standi* in Court, and that his suit should have been dismissed on that account. With this view of the case, we decree the appeal and reverse the decision of the Lower Court, with costs."

of the Mitacshara is carefully considered. "Gotraja" means a kinsman, and includes all near relatives, both agnates and cognates. "Bundhoo" means a distant kinsman, and by itself would include all distant kinsmen, both agnates and cognates. "Samanodaca" means a relative bearing the same surname or family name; according to Hindoo law, as interpreted by Yājñavalkya, or rather in the Commentary on his Institutes by Vignāneswara, called "The Mitacshara." The relatives of the deceased who are not further removed from him than the fifth degree may, whether agnates or cognates, offer the funeral cake, and are called Sapindas. Of them an instance is a Daughter's sons; they are undoubted Sapindas, although they are not Samanodacas, inasmuch as they bear the surname of their Father, and never of their maternal Grandfather. The rule is inflexible, that no Hindoo can marry into a family bearing the same family surname, however remote the connection. Should there be no Sapindas, the only person who can perform the funeral rites, with any advantage to the soul of the deceased, are his Samanodacas, or kinsmen bearing the same family name, and these, when not Sapin-[398]-das, can make no oblation but the common libation of water. Thus we have three classes—first, the Sapindas, who may be Samanodacas or not, but must be near kinsmen, and their oblations afford most benefit to the deceased; second, the Samanodacas, who, though distant, can afford some benefit; and third, the Bundhoo, distant kinsmen, who, though connected by blood, can afford no spiritual benefit. These being their respective positions, the Hindoo law, while giving a preference to those who are related, nevertheless places before all others those qualified to be Sapindas; then those who are Samanodacas; and not till it has exhausted all who can confer spiritual benefit on the deceased, does it allow the Bundhoo, or near kinsmen, to inherit. The reason, therefore, for the list of kinsmen who are to inherit after Samanodacas commencing with the sons of the Father's Sister, according to the true interpretation of the passage in the Mitacshara, Ch. II. sec. 6, par. 1, is obviously this, that the next nearer degree, namely, the Sister's son, is a Sapinda, and as such comes in before, and not after, the Samanodaca. This is confirmed, first, by the fact that Neelkunto Bhutto, in the Mayūkha, Ch. IV. sec. 19, distinctly asserts the Sister to be a Sapinda, and that her Son would be within the fourth degree inclusive, and so also a Sapinda. Secondly, that both Balambhattu and Nanda Pandita include the Sister's sons as Sapinda, and hold them entitled to inherit next after Brother's sons; and thirdly, that in the Mitacshara itself, Ch. II. sec. 5, par. 4, the paternal Grandmother, an undoubted Sapinda, is directed to inherit only on failure of the Father's descendants, among whom a Sister's son must be necessarily included.

[399] Sir R. Palmer, in reply:—It is admitted that the words in the Mitacshara are "Brothers and Brothers' sons," but the Respondent's Counsel endeavours, by some equitable construction, to avoid this plain meaning, and to say, "Sisters and Sisters' sons" ought to be included, and he relies upon a passage in the Vyavahāra-Mayūkha, Chap. IV. sec. 16 (Trans. by Borradaile), which lays it down that, in default of the Wife, the Daughters succeed. That is an authority only in force in Bombay, but is not received in the Mithila country; but he entirely ignores the fact, that there are two Sisters of their deceased Brother now living, who, even according to that authority, would succeed in preference to the Respondent. It was so decided by this Tribunal in *Venayek Anundrow v. Luxumeebaee* (9 Moore's Ind. App. Cases, 520; and see note, *ib.*, 532), and in the case of *Ichharam Shumbhoodas v. Purmanand Bhaeechund* (2 Borr. Bom. Rep., 471), Morley's Dig. tit. "Inheritance," p. 326, and note (2), *ib.* W. H. Macnaghten, Vol. I. p. 35, comments upon this case, and says it is a doctrine peculiar to Bombay, therefore, being a Sister's son, he had, even by that law, no *locus standi*, as the deceased's Sisters were their Brother's heirs. There can be no question that the law to govern the succession to this Zemindary, is the law current in Benares, by which law, in default of the Son, the Son's son, and grandson, the Widow, supposing the husband's estate is separate, as in this case, succeeds. W. H. Macnaghten's "Hindu Law," p. 32. The decree cannot be upheld, as the Court has by its latter decision, in *Mussumat Mooneea v. Dhurma* (*ante* [11 Moo. Ind. App.], p. 393) expressly overruled their judgment in this case, and [400] the latter ruling is in accordance with the Vivada Chin-tamani, *voce* "Table of Succession."

Judgment was pronounced by

The Right Hon. Sir James W. Colville.—Their Lordships have authorized me

to state that in their opinion the preliminary objection which has been taken to the maintenance of this suit must prevail. It unquestionably lay upon the Plaintiff, Mohun Lall, one of the Respondents, to show that he had a right to sue. The suit is of a peculiar nature, because it is one brought by a person who, even if his own case were true, might probably never have an interest in the property, inasmuch as he can have only a contingent estate during the lifetime of the Appellant, Thakoorain Sahiba. Such a suit is permitted simply on the ground of the necessity that the contingent reversioner may be under of protecting his contingent interest. It is, therefore, essential to see that he has such an estate as entitles him to come in in that way,—in other words, that he holds the character which he professes to hold.

Now, the admissions which have been properly and candidly made at the Bar, have reduced the question to a very narrow compass. As the suit was originally launched, and upon the face of the plaint, there was some uncertainty as to the mode in which the parties sought to establish their title. There was apparently some confusion in the mind of the Pleader whether Koor Inderjeet Sing or his father was what we call the *propositus*, and whether it was not sufficient to deduce a title to inherit from the father. Before the case reached the Sudder Court that confusion had been dispelled, and the Judges of that Court (as [401] appears by their judgment) considered the case on the assumption that Koor Inderjeet Sing was, as he no doubt was, the *propositus*, and that the Respondent, Mohun Lall, had to show that he was in the line of heirs to him.

The admission, however, which Mr. Piffard made at the Bar to day, implies that the learned Judges of that Court decided in favour of that Respondent upon a ground which is no longer tenable. They treated him as having an interest, on the ground that, being a Sister's son, he comes within the category of the cognates or Bandhoos. That view is now abandoned, and, therefore, the question is narrowed to that raised by the very ingenious argument of Mr. Piffard, namely, whether, upon the true construction of the Mitacshara, the Sister's son does not come in as one of the earlier class of heirs known as Sapindas?

We think that if this question were *res integra*, and to be determined on a construction of the Mitacshara alone, there would be considerable difficulty in coming to the conclusion to which Mr. Piffard would bring us. There is, no doubt, some foundation for the ingenious arguments which he has addressed to us. It is, perhaps, a startling anomaly, that whilst among the cognates the Aunt's sons are included, the Sister's sons should be altogether excluded from the inheritance; and there is also something plausible in the argument which he has founded upon the fourth article of the fifth section, which says that "on failure of the Father's descendants the heirs are successively the paternal Grandmother, the paternal Grandfather, the uncles and their sons." The difficulty, however, that occurs on the words "on failure of the Father's descendants" is really not insuperable, because they may well be taken to import the failure of the Father's [402] descendants, who, according to the rules expressed in that Treatise, are capable of inheriting. Indeed, unless so qualified, they would give by implication a right to inherit not only to Sister's sons, but to Sisters who, *ex concessis*, are excluded from the inheritance.

Mr. Piffard's argument had, in truth, a sort of double aspect. At first he dwelt a good deal upon the authority of the author of the Treatise called the Vyavahara-Mayucha; but afterwards he fell back upon the authority of Balambhatta and Nanda Pandita. The two authorities are not consistent. We may at once dismiss that of the Vyavahara Mayucha by saying that that Treatise, though received in the Bombay Presidency, appears to be of no authority in the Districts the law of which has now to be applied. It is further to be observed that, if received, it would not support the contention of Mr. Piffard, because it gives the right of heirship to the Sister herself, and not merely to the Sister's son, and puts the Sister after the paternal Grandmother and between the paternal Grandmother and the paternal Grandfather.

The other argument, that on which Mr. Piffard finally rested his case, is shortly this. The seventh article of the fourth section of the second chapter of the Mitacshara says: "On failure of Brothers also, their Sons share the heritage in the order of the respective Fathers." Two ancient Commentators, Balambhatta and Nanda

Pandita, held that the words "their sons share the heritage" are to be construed so as to include the Daughters as well as the sons of Brothers and the Sons and Daughters of sisters; and Mr. Piffard would have us adopt this construction. But the paragraph clearly implies that the parent, if in existence, is to take the succession. And accordingly the two Hindoo Commentators (see the [403] note on paragraph 7, sec. 4), would include Sisters in the term "Brothers," and give them a place in the line of succession. But Mr. Piffard is constrained to admit that Sisters are excluded. In fact, it would not suit his Client's case to admit them.

On the other hand, if "Brothers" are to be taken simply as "Brothers," and "their Sons" as Brother's sons, the text of the Mitaashara is perfectly clear; and the first clause of the fifth section shows that on the failure of Brother's sons, Gentiles share the estate, the paternal Grandmother being the first person of that class of heirs who take the estate. Again, were the arguments in favour of the construction which Mr. Piffard would put upon the Mitaashara far stronger than they really are, their Lordships would nevertheless have an insuperable objection, by a decision founded on a new construction of the words of that Treatise, to run counter to that which appears to them to be the current of modern authority. To alter the law of succession as established by a uniform course of decisions, or even by the *dicta* of received Treatises, by some novel interpretations of the vague and often conflicting texts of the Hindoo Commentators, would be most dangerous, inasmuch as it would unsettle existing titles.

Of what may be called the modern authorities, we have, first, the decision of the Sudder Dewanny Adawlut at Calcutta in 1801. *Rajchunder Narain Chowdry v. Goculchund Goh* (1 Ben. Sud. Dew. Adw. Rep. 43). It is impossible to read that case without seeing that the point was clearly raised before the Court, which at that time consisted of Judges who were considerable authorities on Hindoo law. That decision has received the high sanction of Sir William Macnaghten, "Hindu Law," Vol. I. p. 28; [404] it is also cited by Sir Thomas Strange, "Hindu Law," Vol. I. p. 147, and it has ever since been considered to be a correct exposition of the law. Nor can it be said, as was suggested by Mr. Piffard, that all the subsequent authorities rest upon this decision, which he attributed in part to the inability of English Judges fully to appreciate and apply the terms of the Hindoo Treatises. For at page 84 of the second volume of Macnaghten's Principles and Precedents of "Hindu Law," we have the Bywusta, or opinion of the Pundit of the Dacca Court of appeal purporting to interpret the text of Yajnyawalkya, and making no reference whatever to this decision of the Sudder Court. He there puts Sisters' sons out of the category in which Mr. Piffard would include them; although, erroneously perhaps, he puts them among the Bandhoos, or distant kindred. Again, from the MS. case cited at the Bar (*ante* [11 Moo. Ind. App.], p. 393), we find that the Agra Court, overruling its decision in this case, has recently held that the Sister's son is not in the line of heirs at all; that the same point has been decided at Madras, and was recently decided in the High Court of Bengal. It had previously been decided in the case which is set forth in the record. Against all these concurrent authorities we have nothing to set but the decision now under review, which it is admitted at the Bar cannot rest upon the ground on which the Judges put it.

Their Lordships are, therefore, of opinion that they must humbly recommend Her Majesty to reverse the decrees under appeal, and to declare that the suit ought to have been and be dismissed with costs. The Respondent, Mohun Lall, must also pay the costs of this appeal.

[405] GREEDHAREE DOSS,—*Appellant*; NUNDOKISSORE DOSS, MOHUNT,—*Respondent* * [July 17 and 19, 1867].

On appeal from the High Court of Judicature at Fort William, in Bengal.

G. D., the reigning Mohunt of the Mutt or Akra (a religious endowed institution in Burdwan), made a Will, appointing L., one of his Disciples, to succeed him as Mohunt, and to take possession of the real and personal estate belonging to the Akra, with a reservation that, when L. should find himself incapable of fulfilling the duties of the office he should appoint one G., who was specially designated by him, in L.'s place as Mohunt.

L. was installed as Mohunt, and took possession of the Guddee (or Throne) and estates attached to the Akra; and was subsequently recognized and confirmed as Superior by the Assembly of Mohunts. L., by his Will, nominated N., his successor, to the Mohuntship. In a suit by G. against N. for a declaration of G.'s reversionary right to the Mohuntship under the Will of G. D., held:—

First, that according to the true construction of the Will of G. D., there was no absolute gift to G. of the reversion upon L.'s death, or incapacity to perform the duties of the office [11 Moo. Ind. App. 428].

Secondly, that even in the event of L.'s becoming incapable to perform the duties of Mohunt, the direction of the Testator, or Grantor, amounted at most to a precatory trust, and was not imperative upon L.

Whether by usage there was any power in the Mohunt to impose such a restriction on his successor, to nominate a specified individual, *Quære?*

Held, further, that from the frame of the suit the Plaintiff could only succeed by force of his own title, and not by the infirmity or illegality of the Defendant's title.

The question in this appeal related to the claim of the Appellant to succeed to the office of Mohunt, the Superior of the Akra of an endowed religious monastic institution of professed ascetics, situate at Rajgunge in the District of Burdwan, and other [406] similar Akras, and to the real and personal property belonging to that foundation.

The Appellant founded his title to the Mohuntship and estates as hereditary heir of one Gopaul Doss, a former Mohunt, his spiritual father or guide, as his Shishya or favourite Chella (Disciple or pupil), under a verbal appointment to that office by Gopaul Doss, confirmed by the will of Gopaul Doss, hereinafter mentioned, and his alleged double Ticca or investiture with Ladlee Doss, who succeeded Gopaul Doss as Mohunt, by the assembled Mohunts, in conformity with Gopaul Doss's nomination. The Respondent, who was in possession and acting as Mohunt, on the other hand set up his right to the Mohuntship through Ladlee Doss, the late Mohunt, under an appointment and Will by him made in his favour, which appointment was confirmed by his election and investiture by the assembly of Mohunts of the above-mentioned religious establishment; and he denied the alleged double Ticca, or the Appellant's title as reversioner under Gopaul Doss's Will.

In the month of May, 1857, Gopaul Doss, the then Mohunt, being in ill-health, and shortly before his death, made his Will, which was addressed:—"To the most blessed Ladlee Doss." After referring to his state of health and the nature of his office, the Will contained the following passage:—"There is no one among my Chellas (Disciples) so fit, wise, virtuous, and loving towards religious men, that I can entrust him with the performance of these duties so as to protect the immoveable and moveable properties and perform the religious ceremonies after my death, consequently, I think it expedient and necessary to make arrangement during my own life, whereby the said wor-[407]-ship and the entertainments of the guests, etc., will continue as they now do, and whereby the properties annexed

* Present: Members of the Judicial Committee—The Right Hon. Lord Romilly, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor—The Right Hon. Sir Lawrence Peel.

thereto may be properly managed. As you are my Gooroo brother, and specially since the time of my late Gooroomohassy and my election to the Guddee, you, by your ability, wisdom, and virtue, and good conduct, have satisfactorily fulfilled the several duties relating to the Akras in your capacity as Adhicarry (head) of the Akras, and you have authority over everything. I have, therefore, a firm conviction that if you are appointed Mohunt in my place, the properties belonging to those several Akras will be properly managed, and the religious rites which are performed there will have perfect justice in your hand. Therefore, of my own free will, and in a sound state of mind, without any compulsion and coercion, I execute this my last Will, whereby I make the following promise and arrangement:—If the present sickness prove, which God forbid, fatal to me, you will succeed me in my absence in the Guddee as the next Mohunt, and have your own name entered as proprietor in the records of all those properties in substitution of mine, and take charge of all the properties both real and personal belonging to the said Akras, and keep in safe custody the gold and silver ornaments and plates, and brass utensils belonging to the idols at those Akras, and receive the outstandings due to the Akras, and pay the debts due by them, and thus representing me every way, you will perform the religious duties in the usual way. Of my Chelas Sreejoot Greedharee Doss is a little intelligent, but he is of immature age. If he studies the Dharma Shastra, religious Books, for a short time he may become a fit person, therefore you shall keep [408] him under you, and instruct him in the Dharma Shastra, and other Books studied by Mohunts. When you will find yourself incapable of fulfilling the duties aforesaid, you will appoint the said Greedharee in your place as Mohunt. You shall not be able to act otherwise. To this purport I make my Will, and after my death any demand or objection by any person against it will not be admissible: but if by the grace of God I recover from illness, then this Will shall cease to take effect, and I shall continue Mohunt as I used to do. To this effect I execute my last Will, dated 6th Joistee, 1264.”

Gopaul Doss died on the 31st of the month of Jeyt, 1264 (corresponding with June, 1857), and Ladlee Doss ascended the Guddee, or seat of honour, and took charge of the Akras left by his predecessor, and entered into possession of all the property real and personal belonging thereto. He also obtained the customary election or recognition and confirmation by an assembly of Mohunts of his nomination by the Will of Gopaul Doss; he also obtained from the Civil Judge of the Zillah of East Burdwan the usual certificate of administration, under Act, No. XX. of 1841.

On the 22nd of September, 1859, the Appellant, Greedharee Doss, filed his plaint against Ladlee Doss, in the Civil Court of the Principal Sudder Ameen of East Burdwan, claiming the cancellation of the certificate of administration and of the Will itself, and the possession of the property appertaining to the Mohuntship and of the office of Mohunt, as successor, alleging, among other things, that the above Will of Gopaul Doss, set up by Ladlee Doss, was spurious.

The nature of the suit and the proceedings which [409] were taken in it sufficiently appears from the decision pronounced by Mr. Buckland, the Judge of East Burdwan, on the 6th of August, 1860, of which the following were the material passages:—

“The Plaintiff sues to obtain investiture and possession as Mohunt of the Mutt or Akra of Rajgunge, in the town of Burdwan, with its subordinate Mutts and moveable and immoveable property and rights and privileges belonging to it, the claim being valued at Rs. 17,77,631. 0a. 1p. The Plaintiff's case is, that he is the chief Chella or Disciple of the late Mohunt Gopaul Doss, and that Gopaul Doss shortly before his decease nominated him as his successor in the Mohuntship; but as the Plaintiff was then a minor, the Defendant, Ladlee Doss, was verbally appointed by Gopaul Doss as temporary Manager of the Mohuntship until the Plaintiff should become duly qualified to take the office. The case for the Defendant is, that the late Gopaul Doss made a Will, by which he nominated the Defendant as his successor in the Mohuntship until he should become incapable of performing the duties, when the succession would devolve on the Plaintiff. Eventually the following single issue was fixed for argument, namely: ‘Admitting the Will set forth by the Defendant

to be genuine, whether the late Mohunt, Gopaul Doss, had power under the Hindoo law to make the disposition of the Mohuntship in the Will?'' The Judge then stated the most material portion of the Will (*ante* [11 Moo. Ind. App.], p. 406), and proceeded as follows:—'' The above is an accurate translation of the terms, but not of the mere details of the Will, which is admitted by the Plaintiff's Counsel to be genuine, a fact of which it may be observed that the strongest possible evidence has been [410] given by the Defendant, whilst the Plaintiff's averments are supported only by the most palpable perjury. The Counsel for the Defendant having, however, waived the advantage arising to him from the failure of the Plaintiff's case, it remains to dispose of the legal question which was proposed for argument, namely, whether the late Mohunt had power under the Hindoo law to make the disposition of the Mohuntship which is found in the Will.'' The Judge then, after referring to the following authorities and decisions on Hindoo Law,—*Daya Krama Sangraha*, pp. 28, 30, 36; the *Daya Bhaga*, ch. xi. sec. 6, par. 35; the *Vyavastha Durpuna* of *Shamachurn Sircar*, pp. 297-9; *Govind Doss v. Ramsahoy Jemadar* (Fulton's Rep., 217); *W. H. Macnaghten's "Hindu Law."* Vol. II. p. 101; *Gunes Gir v. Amrao Gir* (1 Ben. Sud. Dew. Rep., 218); *Ramrutun Doss v. Bunmalee Das* (1 Ben. Sud. Dew. Rep., 170); *Surubanund Purbut v. Deo Sing Purbut* (1 Ben. Sud. Dew. Rep., 296); *Narain Das v. Bindrabun Das* (2 Ben. Sud. Dew. Rep., 151), proceeded as follows: '' In pronouncing a decision on the legal question before the Court, it may be observed, in the first place, that the sole original text of Yajnyavalkya which is discoverable as an authority on the point, refers clearly to a state of things when ascetics had no such possession as landed estate and gold and silver vessels to bequeath to their successors, but merely a hoard of mild rice, a gourd, a clant, or perhaps a few Books and clothes; but it is equally evident that this text has been always considered as a leading authority in directing the right of succession to a Chella or pupil in preference to other parties, and to the Khas Chella, or principal Disciple of the [411] deceased, in preference to ordinary Chellas. If, therefore, the Plaintiff, Greedharee Doss, had been of age and duly qualified to undertake the duties of a Mohunt at the time of Gopaul Doss's death, then there is no doubt that Gopaul Doss would have selected him as his successor, and had him elected to the Guddee by the assembled Mohunts. The terms of Gopaul Doss's Will, in which he turns from Ladlee Doss to nominate Greedharee Doss as his successor, fully justify this conclusion. There is no precedent in the decisions of the Sudder Court exactly parallel to the present case, but it is evident from the tenor of the decisions, which are to be found under the head of 'Mohunt,' that two points have always been regarded in determining the rightful succession to a Mohuntship—first, nomination by the last incumbent; and second, acknowledgment and confirmation of this nomination by an Assembly of Mohunts. With regard to the power of nomination, it may be said that as the right of nomination is undeniable, it seems useless to dispute whether such nomination can only be verbal, or whether it may be committed to writing. The present case furnishes an illustration of the necessity of taking the most stringent precaution to obtain written contemporaneous record of the nomination. Was it, then, legally in the power of Gopaul Doss to nominate a spiritual brother, Ladlee Doss, as his successor in the absence of a duly qualified Chella? This question must be answered in the affirmative. It was argued by the Counsel for the Plaintiff that Ladlee Doss had never been duly qualified as Disciple to be capable of being elected a Mohunt; but this argument is not based on any evidence, and is contrary to the written statement of Gopaul Doss, that he had [412] been his fellow-disciple under the previous Mohunt, Poovoo-shutton Doss, and it is contradicted by the mere fact of his election by the other Mohunts, who would never have consented to the appointment of a person not duly initiated under the ruling in the case 2 at page 10 of Vol. II. of Macnaghten's 'Hindu Law;' it is declared, that a fellow-disciple or spiritual brother can succeed, and this ruling appears to be specially applicable to the present case, where there was no heir, that is, Chella, immediately available, and where Ladlee Doss, as the spiritual brother of the deceased, attended him on the point of death, and performed his exequial rites. If, therefore, it was legally open to Gopaul Doss to nominate Ladlee Doss as his successor, it is much more clear that by the usages of the particular Mohunt of Rajgunge, Gopaul Doss considered himself authorized to make the nomination, and it was deemed by the assembled Mohunts that Ladlee Doss

should have been nominated. It appears that one Poovooshutton Doss was Mohunt of Rajgunge, but this Poovooshutton Doss becoming at one time wearied of the Mohuntship, nominated one Sookram Doss as his successor, and on this nomination Sookram was elected Mohunt in the lifetime of Poovooshutton Doss. But Sookram died, and Poovooshutton again came forward and resumed the Mohuntship. He was opposed by one Gour Doss, as a Chella of Sookram Doss, but on a reference to the Civil Court of this district, Poovooshutton was maintained as Mohunt, and this order was upheld by the Sudder Court. It is, therefore, evident that in this particular Mohunt, the succession of a Chella has not been invariably observed, and, therefore, so far as usage is concerned, there was nothing irregular in the [413] nomination of Ladlee Doss as the successor of Gopaul Doss, or in his election by the assembled Mohunt—a fact which is clearly established in evidence. The decision of this Court, therefore, is that, under the Hindoo law, the late Mohunt had power to make the disposition of the Mohuntship which is found in the Will, and the suit of the Plaintiff is, therefore, dismissed, with costs.”

From this decision the Appellant appealed to the Sudder Dewanny Adawlut, which appeal was dismissed with costs on the 22nd of June, 1863, at the instance of the Appellant himself.

On the 21st Kartick, 1267, B.S. (corresponding with November, 1860), Ladlee Doss, the then Mohunt, being in ill-health, made his Will, nominating the Respondent, Nundokissore Doss, to be Mohunt, at his decease. This instrument stated, that Gopaul Doss had expressed a wish that he should elect the Appellant, Mohunt, on becoming himself incapacitated from performing the duties of the office, but alleged that, from the incapacity and bad conduct of the Appellant, he was unfit for the office of Mohunt, which he accordingly conferred on the Respondent.

Ladlee Doss died shortly afterwards, and the Respondent presented a petition to the Civil Judge of East Burdwan for the grant to him of a certificate of administration, under Act, No. XXVII. of 1860, which had been substituted for Act, No. XX. of 1841. In this petition the Respondent grounded his application solely on the Will of Ladlee Doss, the late Mohunt, whereby he was appointed successor to the Mohuntship; but an assembly of the Mohunt of the neighbouring mutts having duly elected the Respondent Mohunt in the place and according to the [414] recommendation of Ladlee Doss, he presented to the Judge a petition for leave to withdraw the former one, on the ground that Ladlee Doss had no power of disposing of the property of the Mutts, of which he was Mohunt, otherwise than by recommending the Respondent to be elected by the neighbouring Mohunts as his successor, and that the Respondent had since been elected by the Mohunts in the place and according to the recommendation of Ladlee Doss, and a new petition was accordingly presented by the Respondent as the elected successor to Ladlee Doss, for the grant to him of a certificate under Act, No. XXVII. of 1860.

The Maharajah of Burdwan filed objections to the granting of the certificate, on the ground that he was entitled to be summoned to and to take the leading part in the election of the Mohunt, and that he did not receive any notice of any intended meeting of Mohunts for the purpose of electing a successor to Ladlee Doss, and did not attend any such meeting. Certain Mohunts also objected to the grant of the certificate, on the ground that their concurrence was necessary to the validity of the election, and that they had not concurred in it.

While the Respondent's application for the grant of a certificate under Act, No. XXVII. of 1860 was pending, the Appellant presented to the Judge a petition under Act, No. XIX. of 1841, praying that he might be placed in possession of the Akras in question, with all the property thereto belonging, as Mohunt thereof, by the Will of Gopaul Doss, and for preliminary attachment thereof pending inquiry. The Appellant's petition was disposed of on the 21st of November, 1860, by Mr. Taylor, who had been [415] appointed Judge of East Burdwan, whose judgment was in the following terms:—“After taking the deposition on oath of the Petitioner, Greed-haree Doss, and perusal of my predecessor's decision in the regular suit, No. 71, between that individual and of the late Ladlee Doss, which was decided against the former, and particularly the transaction of the so-called Will of Gopaul Doss embodied therein, the Court is of opinion, that the Petitioner had no right of succession, and, therefore, no right to enter his petition under consideration, for the following

reasons: First, as the Mohuntship is by Hindoo law, and all precedents, elective, it follows that no Mohunt can legally make a Will devising it to any person after his death, though he apparently has a right to nominate a successor, whose fitness is thereafter to be taken into consideration by the Mohunts who may assemble to elect. This point was not taken into consideration by my predecessor in his decision of suit, No. 71; and the opinion thus expressed by the Court does not contravene his decision in any way. Secondly, all analogies, European and Eastern, show that no head of a Monastic or similar institution can provide in any way whatever, by recommendation or otherwise, for two successors, as Gopaul Doss evidently attempted to do in his so-called Will; and thirdly, the deposition on oath of the Petitioner shows that he had not been elected by the Mohunts since the death of Ladlee Doss." On these grounds the petition of Greedharee Doss was rejected with costs.

The Judge, however, on this occasion feeling a doubt whether the Respondent had been duly elected, and was in rightful possession of the property of the Mohunttee, eventually thought fit to order such [416] property to be attached until the day when the Respondent's application under Act, No. XXVII. of 1860 was to be disposed of. This Order for attachment was brought before the Sudder Dewanny Adawlut by summary appeal, and was reversed by that Tribunal as having been made without jurisdiction.

On the 7th of May, 1862, the Appellant instituted the suit in which the decree now appealed from was pronounced. The plaint was in the following terms: "Suit to set aside the decisions of the Judge under Acts, Nos. XXVII. of 1860, and XIX. of 1841, and according to the Will of the 6th Jeyt, 1264, and to the immemorial rules and usages of the Akra to be put to the Mohuntship for the worship of God, to get possession of the properties appertaining thereto, and to be upheld in possession of those properties of which I am in possession, the value being estimated at Rs. 17,95,533, and the cause of action dating from the death of Ladlee Doss, in the month of Kartick, 1267. The particulars are these: My Gooroodeb, or spiritual guide, the late Gopaul Doss, Mohunt, in the Guddeesheen, or the Master of the Guddee of the Akra of Rajgunge, died on the 31st Jeyt, 1264. Ladlee Doss, on producing a Will, and alleging it to have been written by my Gooroodeb, on the 6th Jeyt, 1264, opposed my getting possession; but doubts arising as to the genuineness and validity of the Will, I, in order to set aside the Will, instituted the suit No. 71, of 1859, claiming to get possession. The late Judge, considering the Will to be genuine, dismissed my claim on the 6th of August, 1860. The words of the Will clearly set forth that, according to the immemorial rules and usages of the Akra, and the [417] intent of my Gooroodeb, I am entitled to the Guddee; only on account of my youth, Gooroodeb appointed Ladlee Doss to the Mohuntship, as my Guardian, and ordered him when he should no longer be able to manage the duties to put me on the Guddee. Ladlee Doss had no authority to act contrary to that Order. Nevertheless, Ladlee Doss, at the time of his death, instead of constituting me the master of the Guddee, appointed his alleged Disciple, Nundokissore Doss, the Defendant, to the Mohuntship, and by the decisions of the Judge of the Zillah, in the suits under Acts, Nos. XIX. of 1841, and XXVII. of 1860, his claim has been admitted, and mine rejected. Accordingly, for the above-mentioned claim I file this suit against the Defendant, the appeal which I have preferred to the Sudder Court against the decision in suit No. 71 will only determine whether the Will is valid or not; but, even if the Will were valid, I, and not the Defendant, would, according to its purport, be the Master of the Guddee. Moreover, he has not been installed by the principal Mohunts; particularly he is of such a bad character that he is by no means fit to be Mohunt. On these grounds, not waiting for the decision of the appeal, and depending on the Will, I institute this suit for the Guddee vacated by my Gooroodeb Maharaj, and for possession with wassilat of the dispossessed properties, movable and immovable, belonging thereto, and for upholding possession of such properties, of which I am in possession."

The Respondent by his answer, besides objecting on the merits to the plaint, pleaded in bar, among other things, that the plaint had been filed more than a year after the date of the Orders, under Acts, [418] Nos. XIX. of 1841, and XXVII. of 1860, which was sought to set aside; and that it was consequently barred by clause 5, s. 1, of Act, No. XIV. of 1859, as the suit had not been instituted within one year from the date of those Orders. The Respondent further pleaded in bar that the suit

could not be maintained, as it was for the same subject-matter as the suit before mentioned of the Appellant against Ladlee Doss, which was still pending.

Both parties then went into evidence. Witnesses were examined as to the usage and custom of the Mohunts appointing a successor; some of whom deposed to the election by the assembled Mohunts, and installation of Ladlee Doss in pursuance of the nomination of Gopaul Doss. There was also some evidence, of an unsatisfactory character, of a double Ticca, or mark of investiture of both Ladlee Doss and the Appellant.

The case came on for hearing before Baboo Sreenauth Biddyabagish Roy, Bahadur, the Principal Sudder Ameen of East Burdwan, on the 14th of March, 1863, who decided all the issues in favour of the Appellant, and pronounced a decree allowing his claim, ordering that he should recover the office of Mohunt of the Akra of Rajgungee and its dependent Akras, as mentioned in the plaint, and possession of the estates, as well as costs, with interest, from the Respondent.

From this decision the Respondent appealed to the High Court of Judicature at Bengal, which Court, consisting of the Chief Justice, Sir Barnes Peacock, and Mr. Justice Levinge, by its decree, dated the 24th of June, 1863, ordered that the decree of the Principal Sudder Ameen should be [419] reversed, and the appeal decreed with costs and interest. The material parts of the judgment (see case reported, 1 Marshall's App. Cases, Bengal, p. 573) of the High Court were in these terms:—"The Orders of the 21st of December, 1860, and the 5th of February, 1861, were made more than a year before the commencement of the present suit, which was commenced on the 7th of May, 1862; and one question which arose was, whether the Plaintiff's claim, so far as it related to the setting aside of those two Orders, was barred by the period of limitation fixed by cl. 5, sec. 1, of Act, No. XIV. of 1859. The Principal Sudder Ameen decided that the Plaintiff's claim was not barred. We think that in that respect he made a mistake, so far as those two Orders are concerned; but this does not affect the whole case, and is not very material, as the question of title may be tried in this suit. The Principal Sudder Ameen pronounced a decree that the Plaintiff should recover the properties appertaining to the Mohunt, as mentioned in the plaint, without taking any evidence as to whether the properties mentioned in the plaint appertained or belonged to the Mohunt or not. This also was a mistake on the part of the Principal Sudder Ameen, but it is not important, as the decree must be reversed. The Will of Gopaul Doss is not disputed in this suit, although the effect of it is not certainly stated in the plaint. It was also established by the decree in the former suit, from which the Plaintiff's appeal has been dismissed at his own request. It was objected in this suit that the former and present suit were for the same cause, and, consequently, that this suit cannot, according to sec. 2, [420] Act, No. VIII. of 1859, be maintained. But the principal Sudder Ameen decided that point in favour of the Plaintiff. The Principal Sudder Ameen treats the decision on Gopaul Doss's Will as vesting the property in the Plaintiff, or giving the Plaintiff the right to this Mohuntship. The decision of the Principal Sudder Ameen is not very clear; but it says that the Plaintiff is entitled under Gopaul Doss's Will, Ladlee Doss not having appointed a successor. Then it is said that Ladlee Doss never made a Will at all. We do not think that Ladlee Doss's Will was ever in dispute. But the Principal Sudder Ameen goes on to say, that the Will is a spurious document. He says, that in the first petition Nundokissore Doss relied on Ladlee Doss's Will, and in the second petition on the allegation that he was elected by several Mohunts, and that, therefore, the Will could not be taken to be a genuine one. But the Judge established that Will as a genuine document; and if the Principal Sudder Ameen had looked at the two petitions, he would have found that Nundokissore Doss, so far from abandoning the Will, stated that his right to the Mohuntship depended on the nominating of Ladlee Doss by the Will, and the election by the Mohunts, instead of relying on the Will alone. That was no ground for the Principal Sudder Ameen's saying, that the Will ought to be considered a spurious document. The first question is whether the Plaintiff was entitled, under the Will of Gopaul Doss, to succeed to the Mohuntship upon the death of Ladlee Doss?" The Court then, after referring at length to the Will of Gopaul Doss (*ante* [11 Moo. Ind. App.], p. 406), proceeded as follows:—"We think it is clear that, even taking this as a Will, Greedharee Doss

could not derive title by virtue of [421] the Will itself. There is no evidence in the suit to show that a Mohunt who once nominates his successor, has a right to give directions to his successor when his turn to nominate comes, as to whom he should nominate, because the object of appointing a successor to the Guddee is to insure the election of a proper successor. Now, every Mohunt may be assumed to be a proper person to judge who is best qualified to succeed him and to perform the religious duties of the Mohuntee; whereas if any Mohunt were to have the power of saying who should succeed his successor, he might be allowed to go on and say who should succeed the successor of that successor, without being able to judge whether the person so nominated would be properly qualified or not when the time arrived. We think that a Mohunt has no power to give such a direction. Numerous cases have been cited to show what is the usage; but the law to be laid down by this Court must be as to what is the usage of each Mohuntee. We apprehend that if a person endows a College or Religious institution, the endower has a right to lay down the rule of succession. But when no such rule has been laid down it must be proved by evidence what is the usage, in order to carry out the intention of the original endower. Each case must be governed by the usage of the particular Mohuntee. As to the Mohuntee in question, the Plaintiff has used the evidence of several witnesses whom the Principal Sudder Ameen has considered to be respectable, and who say that the Mohunt must first appoint his principal Disciple, and, if there be no principal Disciple, a spiritual Brother; and, in the absence of such spiritual Brother, he may appoint the grandson to succeed him as Mohunt. In the suit [422] between the Plaintiff and Ladlee Doss, the predecessor of the present Defendant (who claims through him by virtue of a Will), it was distinctly ruled that, according to the Hindoo law, Gopaul Doss has the power to appoint Ladlee Doss as his successor. The Plaintiff appealed from that decision; and he might have contended that, according to the Hindoo law and the evidence in the case, Gopaul Doss had no power to appoint a successor. But the Plaintiff has abandoned that appeal, and has, consequently, admitted that the decision of the Judge upon that point was a good and valid decision. Therefore, independently of what is found in the evidence as it is now before us in this suit, we find that the Plaintiff is bound by that decision, and that by the Plaintiff's evidence in that suit (which has not been brought before us) it is proved that Gopaul Doss had a right to appoint Ladlee Doss as his successor. It appears that the Defendant applied to the Judge, Mr. Taylor, for a certificate under Act, No. XXVII. of 1860, and that Mr. Taylor, on the Defendant's second petition (not upon the first petition, because it was withdrawn because it had not been drawn up correctly) declared in favour of the Defendant's rights. It may be said that that declaration would be no evidence against the Plaintiff, inasmuch as the Plaintiff was not then one of the Objectors. But it is necessary for us to look at that Order, when we are asked by the Plaintiff in this suit to set it aside. We think that without deciding whether Mr. Taylor's decision was founded on correct facts, he has apparently treated the case as one of election. It is now contended by the learned Counsel for the Plaintiff, that this is not a case of election, but that it is the case of an hereditary [423] Mohuntee. But still, whether put upon the ground of election or not, we think that Mr. Taylor came to a right conclusion when he passed an Order in favour of the Defendant. The Judge was also right when he refused, upon the application of the Plaintiff, to appoint a Receiver under the Official Trustee's Act. If the case depended on election, the Plaintiff must establish that he was elected. Therefore, even if the Defendant's election was a bad one, that does not entitle the Plaintiff to come in and ask to be put in possession of these large estates, without first proving that he was duly elected. We do not see that it has been made out in any way that there had been an irregular election. We think that the evidence in this case shows that a Mohunt has the power to appoint his successor from among his Disciples or spiritual brethren; that in this case Gopaul Doss did appoint Ladlee Doss as his successor; that he had no power, according to the usage of this Mohuntee, to give any directions to Ladlee Doss as to whom he should appoint as his successor; that, consequently, this part of Gopaul Doss's Will is not binding on Ladlee Doss; that Ladlee was duly installed in the Guddee by the other Mohunts; that the Mohuntee became vested in him, and he became Mohunt of that Mohuntee; that he, whilst Mohunt, having fallen sick, and

wishing to appoint his successor, had the full power to appoint his own successor without reference to that instruction of Gopaul Doss; that, even if Ladlee Doss was bound to follow that instruction, he was not bound to appoint Greedharee Doss as his successor unless he considered him competent; and that Ladlee Doss did not consider Greedharee Doss competent, and, therefore, instead of appointing him, appointed the Defendant his [424] successor. Under these circumstances it appears to us that Ladlee Doss's appointment of the Defendant did vest the estate in the Defendant, and that the Plaintiff is not entitled to recover. But even if the estate was not properly vested in the Defendant, the Plaintiff had no right in this suit to divest the Defendant of the possession without establishing his own title, which he has not done. We, therefore, think that the decision of the Principal Sudder Ameen must be reversed and this appeal decreed, with costs and interest."

Against this decision of the High Court the present appeal was brought.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—First, by right of representation, as well as by the Will and the verbal appointment by Gopaul Doss, the Appellant was entitled to succeed to the office of Mohunt and the estates attached thereto. The Appellant, as Shishya, favourite Chella, having been so designated and nominated by him in his lifetime to the Mohuntship of the Akra at Rajgunge, became entitled by hereditary right to succeed as soon as he attained mature age. The Will produced and acted on by Ladlee Doss, as the Will of Gopaul Doss, affirmed the Appellant's right to the Mohuntship in succession to Gopaul Doss, notwithstanding such Will purported to appoint Ladlee Doss to act intermediately, which, if it meant anything, meant only until the Appellant should attain mature age. The office is a charitable trust descendible to a successor properly designated: The Daya-bhaga, Ch. XI. sec. 6, par 35; Daya Kram Sangraha, pp. 28, 35, 36; Vyavastha [425] Durpuna of Shamachurn Sircar, p. 297; W. H. Macnaghten's "Hindu Law," Vol. II. p. 101; and, in common with other religious establishments in Bengal, the superintendence is, by usage and custom, on the death of the Mohunt, elective by the neighbouring Mohunts: Strange's "Hindu Law," Vol. I., p. 151, [2nd Edit.]; and the appointment by the principal of a successor is good by the Hindoo law and usage: *Gunes Gir v. Amrao Gir* (1 Ben. Sud. Dew. Rep., 218); *Ramrutun Das v. Bunmalee Das* (1 Ben. Sud. Dew. Rep., 170); *Gunka Das v. Tiluk Das* (*ib.*, 309); *Narain Doss v. Bindrabun Doss* (2 Ben. Sud. Dew. Rep., 151); *Dhunsing Gir v. Mya Gir* (1 Ben. Sud. Dew. Rep., 153); *Mohunt Rama Nooj Doss v. Mohunt Debraj Doss* (6 Sud. Dew. Rep., 262); *Gorind Doss v. Ramsahoy Jemadar* (1 Fulton, 217). If the Will is to be considered and treated as a legal and binding instrument, giving a preferential right to the Mohuntship to Ladlee Doss, yet such appointment having been coupled with a special condition and imperative direction, to the effect, that when Ladlee Doss should feel himself incapable of fulfilling the duties of the Mohuntship he should appoint the Appellant. [Sir Lawrence Peel: Does it amount to more than a precatory trust?] It may be so, but Ladlee Doss was bound, on accepting such appointment, to carry out and give effect to the direction, and ought, therefore, to have appointed the Appellant to the Mohuntship, and not the Respondent. The ground alleged by Ladlee Doss for refusing to carry out the Testator's intentions was without foundation. The hereditary right of the Appellant to succeed to the [426] Mohuntship, after the intermediate temporary Mohuntship of Ladlee Doss, was admitted by the Respondent. The evidence shows that the Appellant received joint Ticca, and joint investiture and installation, and subsequent election by the assembled Mohunts; having, therefore, survived Ladlee Doss, and arrived at mature age, he ought to have been declared by the decree of the High Court the Mohunt of the Akra.

Secondly, the Appellant being the spiritual heir of Gopaul Doss and a member of the Akra, and one of the joint heirs of the whole property, had a sufficient interest to support the present suit, Ben. Reg. XIX. of 1810, sec. 15. The Mohunt, or head, is only a Trustee for the whole body of the members of the Akra. The Respondent cannot be entitled to the Mohuntship under the appointment contained in the Will of Ladlee Doss, because that appointment is at best only temporary. His subsequent election at an assembly not duly convened, and receiving Ticca from inferior Mohunts, was wholly irregular and illegal, and, therefore, void. He has failed to prove his nomination by Ladlee Doss in his lifetime as his successor, or that by the

custom and usage, or the rules of the Akra at Rajgunge, a Mohunt had the power of appointing a successor by will to take effect after his death.

Mr. James, Q.C., and Mr. Macpherson, for the Respondent, were not called on. Judgment was delivered, as follows, by

The Right Hon. Lord Romilly. Their Lordships do not think it necessary to hear Counsel on behalf of the Respondent in this case.

[427] They have come to the conclusion that the decision of the High Court of Judicature is proper to be affirmed by Her Majesty. It is an appeal from the High Court, which reversed a decree of the Principal Sudder Ameen of Zillah East Burdwan, which was in favour of the Appellant; and the only facts in the case to which their Lordships think it necessary to refer are those which I am about very shortly to state.

It appears that Gopaul Doss was the Mohunt of the Akra, a religious institution wealthy endowed, at Rajgunge, in the Zillah of Burdwan. In the year 1857, being afflicted with illness, and expecting shortly his dissolution, he made his Will. It is addressed to Ladlee Doss. In it he refers to the illness he was labouring under, and, after referring to the Akra of Rajgunge and the subordinate Akras, he says:— [His Lordship read the extract from the Will, *ante*, pp. 406-7.]

In this case two questions arise, one on the construction of this Will, and another independently of the Will itself. The question on the construction of the Will is, whether there is an absolute gift of the Mohuntship to the Appellant, Greedharee Doss, as soon as he becomes competent to perform the duties, or whether the gift of the Mohuntship is in reversion after the incapacity of Ladlee Doss. The question, independent of the Will, is whether, if there be such a gift contained in the Will, there exists such an authority within the power of a Mohunt as to enable him to make such a gift.

Their Lordships are of opinion, that the points which depend on the contents of the Will itself must be decided against the Appellant in the present [428] suit. They think, in the true construction of the Will, that it does not give the Appellant an absolute, positive, unqualified right at any time to the Mohuntship, even on the incapacity of Ladlee Doss to perform the duties of Mohunt. They think, until Ladlee Doss becomes incapable, no trust or duty is suggested, and that even when Ladlee Doss becomes incapable, it cannot be put higher than Sir Roundell Palmer himself put it, viz. as a gift in the nature of a precatory trust—that is, one requesting Ladlee Doss to perform the wishes of the Testator, and to appoint the Appellant his successor, provided he found that the incapacity which then existed in the Appellant (who was not then of sufficient age to be appointed Mohunt) should cease to exist at the time when Ladlee Doss was unable to perform those duties.

It is, therefore, clearly unnecessary for their Lordships to consider the second question, whether, in point of law, a grant of Mohuntship can be made by any holder of the Office with the superadded obligation imposing on the Grantee the necessity of following the wishes of the Grantor as to the person whom he is to appoint to be his successor in that Office.

It is to be observed that the only law as to these Mohunts and their offices, functions, and duties, is to be found in custom and practice, which is to be proved by testimony; and no evidence has been adduced before their Lordships to show that any appointment has ever been made in reversion on any former occasion.

The only question, therefore, which their Lordships have to consider on the present occasion is, whether in this state of circumstances, in the events [429] which have subsequently occurred, the Appellant has obtained any right which can entitle him to be placed in that particular situation on the decease of Ladlee Doss, in the absence of any compliance by him with the wishes of his Testator or Grantor.

The facts are these: Gopaul Doss, after executing his Will, died in June, 1857, and thereupon Ladlee Doss was installed or invested as Mohunt; and it is to be observed that the other Mohunts placed the same construction upon the Will that their Lordships have placed by electing him. Accordingly, as the Maharajah (who, as chief Benefactor and Patron,) had invested him with the full Mohuntship, they gave him the Ticca, or mark of investiture. They did not merely appoint Ladlee Doss, Adhicarary, or Agent, which, according to the contention of Sir Roundell Palmer

and Mr. Leith, was the extent of the Maharajah's authority. It is plain that the other Mohunts considered him to be entitled to have the full Mohuntship, and he was fully invested with the Ticca accordingly.

Mr. Leith has called their Lordships' attention to some evidence which was intended to show that there was a double Ticca. What the nature of that double Ticca was does not very clearly appear. This seems to be clear, from all the evidence in this case, as far as it has been brought under their Lordships' attention,—that there cannot be two existing Mohunts; that the office cannot be held jointly; and that, therefore, if there was a double Ticca at all, it must have been a Ticca of the office in reversion after the existence of the incapacity of Ladlee Doss to perform the duties. But the evidence upon that [430] point, and the law adduced upon the subject before their Lordships, fail entirely to satisfy their minds that any such species of investiture was according to the rules and customs of these Mohunts, or that any such Mohuntship can be given in reversion.

They therefore consider that Ladlee Doss was invested as the Mohunt of the Akra.

This was the view also taken in the Court in India when the suit was instituted in September, 1859, by the Appellant against Ladlee Doss, insisting that he was entitled to be appointed on the ground that he was then capable, and that his right arose as soon as he was so. He appealed from that decision, and the decision was affirmed.

Mr. Leith.—He withdrew his appeal.

The Master of the Rolls.—Yes, he withdrew the appeal, but not till after the death of Ladlee Doss.

Ladlee Doss died on the 5th of November, 1860, and upon his death Nundokissore Doss received the Ticca.

Their Lordships are of opinion, that it is not necessary for them—nay, more, that it is very undesirable for them—to go into the question of whether the Respondent was duly appointed Mohunt or not. They are of opinion, that that is not the question which they have to determine: because, for the present Appellant to succeed in this case, he must succeed by force of his own title, and not by the infirmity of the Respondent's title.

Mr. Leith suggested that the Mohunt, or any person connected with the establishment of the Akra, would have a right to contest the appointment of the Respondent as Mohunt, and he insists that it has [431] become necessary that that question should be determined. If that be so, their Lordships are of opinion, that it must be raised in a suit properly framed for that purpose. Without expressing any opinion upon the point itself, they are of opinion, that this is not a suit properly framed for that purpose.

Their Lordships observe also that the Judges of the Court of appeal, the High Court of Judicature, make use of these expressions, which are strongly confirmatory of this view of the case: "We can understand," they say, "a suit being brought to set aside the election of the Defendant, and to order the Mohunts to make a new election; but this was not a suit to set aside the election, but to put the Plaintiff in possession of the whole estate. So it was in the case cited, *Gungu Doss v. Tiluk Doss* (1 Select Report, p. 309). It was a suit to recover the office of Mohunt, together with the lands attached to it. Supposing we thought the election of the present Defendant an improper one, what authority have we to direct a new election?" (1 Marshall's App. Cases, Bengal, 588).

This is the view which their Lordships took of the case below, and their Lordships here have only had to consider whether, upon the case brought before them, the Appellant has made out his title?

It is not for them to consider whether he has shown any infirmity whatever in the title of the Respondent; but whether he has made out a satisfactory case to entitle him to recover the office and the land and property belonging to the office of Mohunt.

Upon a complete review of the case, their Lord-[432]-ships are of opinion, both on the construction of the Will and the evidence brought before them of the facts which have occurred throughout (which they think it unnecessary to detail with greater minuteness), that the Appellant has completely failed in the attempt to set up his own title, and that, consequently, the decision of the Court below, which simply asserts that he has failed to establish any title of his own, ought to be affirmed, and their

Lordships will humbly advise Her Majesty to direct that this appeal be dismissed, with costs.

[See *Rajah Vurmah Valia v. Ravi Vurmah Mutha*, 1876, L.R. 4 Ind. App. 84; *Srimati Janoki Debi v. Sri Gopal Acharjia*, 1882, L.R. 10 Ind. App. 37.]

[433] BABOO DHUNPUT SINGH,—*Appellant*; GOOMAN SINGH, MUDDUN LALL DOSS, and Others,—*Respondents* * Nov. 25, 27, 28, 1867].

On appeal from the High Court of Judicature at Bengal.

A Pottah is a generic term, embracing every kind of engagement between a Zemindar and his Tenants, or Ryots. If the Pottah does not contain the term "Mocurrery," or equivalent words of limitation, as "from generation to generation," it is not *prima facie* to be assumed to grant a Mocurrery-istimary, or perpetual tenure, but evidence of long uninterrupted enjoyment, at a fixed unvarying rent, will supply the want of words of limitation in such Pottah [11 Moo. Ind. App. 463, 464].

Where, therefore, a Pottah, dated in 1792, was granted to the predecessor in title of A. by the predecessor in title of B., addressed to him as "Moostager" or Farmer, without any words of limitation, and the property comprised in the Pottah remained in the uninterrupted possession of the Lessee and his successors at a fixed rent up to the year 1861, it was held, that such long and uninterrupted possession conferred a sufficient title to defeat the right of the then Landlord to an enhancement of rent under the provisions of Act, No. X. of 1859 [11 Moo. Ind. App. 467].

A purchaser under a decree in a civil suit takes merely the right, title, and interest, of the judgment Debtor, and is subject to the subsisting interests in the land which have been granted or created by any former Zemindar.

Section 23rd of Act, No. X. of 1859, confers on the Collector of the District where the property is situate, jurisdiction in all suits, whether they be for the determination of the rate of rent at which a Pottah or Kabooleat should be given, or for arrears of rent due on account of land.

Suit for enhancement of rent.

The suit was instituted under Act, No. X. of 1859, in the Court of the Collector of Zillah Purneah, by Baboo Purtab Singh, the Father of the Appellant, as Zemindar, against the Respondents, to recover [434] from them the sum of Rs. 26,752. 6a. 9p. for enhanced rent claimed by him from the Respondents, or those from whom they derived title, subsequent to the enhancement of the rent, according to the Pergunnah rate after admeasurement of the lands.

The principal question raised by the suit and on appeal had reference to the construction and effect to be given to an instrument of title known as a "Pottah." This instrument was dated the 19th Sawun, 1199 Fusly (23rd July, 1792), and was in the following terms:—"Pottah in the name of Aghum Singh, Chinturea Moostager [Farmer] of Mouzah Chelonnee, Bhulwahee, Billahee, and other villages, in Forests of Sukhooa trees, appertaining to Zillah Nathpooor in Pergunnah Durrumpoor, Sircar Moonghyr, within the Province of Behar. Whereas in accordance with your petition, the lands of the villages in the said Forests have been assessed at the sum of Rs. 101, Sunwah Azeemabadee, of full weight, everything being consolidated, and a Pottah granted to you. It is required that you will in all confidence locate on the lands of the said Forests 'Purbuttea' (Hillmen), and other Ryots, and annually keep paying the revenue to the Sircar [435] (Proprietor) agreeably to this Pottah:

* Present: Members of the Judicial Committee.—The Right Hon. Lord Cairns (Lord Justice), the Right Hon. Sir James W. Colville, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor,—The Right Hon. Sir Lawrence Peel.

whenever you may be summoned on account of hunting, you will attend with all the 'Purbuttas.'"

This instrument was relied upon by the Respondents as conferring on them a Mocurrery tenure, amounting to such a permanent transferable interest, as would exempt the lands from enhancement of rent within the saving clauses of sections 15 and 16 of the Act, No. X. of 1859 (a).

By the decree of the High Court on review of judgment, it was declared, that the above Pottah created a Jungleboory tenure, *i.e.* a tenure held on condition of the Lessee clearing away jungle, and bringing the land into a productive state, and settling Ryots thereon; and that under such a Pottah the Tenants were not protected from enhancement of rent, but, on the contrary, were liable to the payment of enhanced rent in respect of all lands which the Lessee might bring into cultivation as established under the provisions of Ben. Reg. VIII. of [436] 1793, sec. 8. The decree further declared, that the Pottah did not in its terms create a Mocurrery tenure, and that the Respondents were not within, and could not claim to hold under, the Pottah, nor be bound by its terms and legal operation, as the original Lessee was; but it also declared, that the Respondents were to be considered and treated as acquiring title to and getting possession of the lands in question, independently of the Pottah, and the decree found, that their title accrued subsequently to the Permanent Settlement; and that it having been proved that they had paid rent at the same rate for a period of twenty years before the commencement of the suit, it should be presumed, under the provisions of section 16 of Act, No. X. of 1859, that the lands had been held at that fixed rent from the time of the Permanent Settlement, so as to bring the Respondents within the exception of section 15 of that Act.

The facts of the case were as follows:—

Baboo Pertab Singh, the Father of the Appellant, purchased in the year Moolky 1259 Era (A.D. 1851-2), at an auction sale under a decree of the Court of the Zillah Purneah, a Zemindary, called Zillah Nathore, Pergunnah, Hurrawut, Singhea, together with half of Pergunnah, Futtehpore, situate in the district of Purneah.

It appeared that a dispute had ensued between the late Zemindar and Baboo Pertab Singh, the purchaser, which was not settled till 1266 Moolky Era (A.D. 1858), until which time the latter, it was alleged, was unable to ascertain what persons were in possession of the lands within that Zemindary.

On the 13th of March, 1860, a petition was pre-[437]-sented by Baboo Pertab Singh, to the Collector of Zillah Purneah, which stated that, a notice for the enhancement of rent, addressed to the parties in possession of the lands, had been filed therewith, in accordance with the provisions of section 13, of Act, No. X. of 1859; that the rent of 11,655 beegahs of land, the ascertained admeasurement of the estate so purchased, had been fixed at Rs. 24,842. 10a. 8p. at the rate of Rs. 2 per beegah, according to the quality and capability thereof, and praying that the notice might be issued by the Court, in pursuance of the above Act, to the parties in possession of the land, and that the rents might be allowed to be collected, in accordance therewith, from the year 1267 Moolky Era (A.D. 1858). Notice was ordered by the Collector to be issued, and it was served on the parties in possession.

It appeared that on the death of Aghum Singh, his two sons, Pertab Singh, and Neerbhan Singh, succeeded him in the possession of the lands mentioned and granted

(a) Section 15 enacts that, "No dependent Talookdar, or other person possessing a permanent transferable interest inland intermediate between the Proprietor of an estate and the Ryots, who in the Province of Bengal, Behar, Orissa, and Benares, holds his Talook or tenure (otherwise than under a terminable lease), at a fixed rent, which has not been changed from the time of the permanent Settlement, shall be liable to any enhancement of such rent, anything in section LI., Regulation VIII. 1793, or in any other law to the contrary notwithstanding."

Section 16 "Whenever, in any suit under this Act it shall be proved, that the rent at which a Talook or other tenure is held in the said Provinces, has not been changed for a period of twenty years before the commencement of suit, it shall be presumed that such Talook or tenure has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown, or it be proved that such rent was fixed at some later period."

to him in the Pottah. On their death, their respective moieties in the lands were taken possession of by their heirs-at-law, and at the time when the Appellant's Father acquired the above-mentioned Zemindary, they were in possession of the lands, with the exception of a one and a quarter anna share (the whole being nominally divided into 16 annas shares), which had been previously sold under a decree of the Court of the Principal Sudder Ameen of Zillah Purneah to the Respondent, Mudden Lall Doss, who afterwards purchased another share, being $6\frac{3}{4}$ annas share out of the other undivided moiety belonging to the sons of Neerbhan Singh, deceased; and he also bought a further share, being 17g. 3c. [438] and 1d. of the remaining portion of the undivided moiety of the sons of Pertab Singh.

At the time of the commencement of the suit, out of which the present appeal arose, Mudden Lall Doss was in the possession and enjoyment of an undivided share of 14a. 4g. 1c. 2k. and 1d. of lands; and the Respondent, Biddabutti, as Widow and heiress-at-law of Pidrut Singh, deceased, was in like possession of another 1a. 12g. share of the same; and the Respondent, Radhabutti, the wife of the Respondent, Gooman Singh, was in possession by purchase of the remaining share of 4g. 1c. and 2k. of the same.

Baboo Pertab Singh, the purchaser of the Zemindary, died after the above notice was served, and before he could institute a suit against the parties in possession to enforce the payment of the enhanced rent. He was succeeded in his Zemindary by the Appellant, his son and heir-at-law.

On the 13th of August, 1861, the Appellant brought a suit in the Court of the Collector of Zillah Purneah against Gooman Singh and the other Respondents, in which he sought to recover in respect of the lands the sum of Rs. 26,752. 6a. 9p. for arrears of rent due on the enhancement up to the end of 1268 Fusly (A.D. 1861), under the provisions of section 13 of Act, No. X. of 1859.

The plaint set forth the circumstances above stated, and the notice for the enhancement of rent.

By the statement, by way of answer, filed by the Respondent, Mudden Lall Doss, he claimed title to the lands by purchase from the heirs of Aghum Singh, the original Lessee, under the aforesaid Pottah, which he contended created a Mocurrery-istimrary tenure, [439] held at a fixed rent of Rs. 101, as therein mentioned, and he submitted, that there could not be an enhancement of the rent of such a tenure agreeably to the provisions of sections 4, 15, and 16 of Act, X. of 1859; and further, that the former Proprietors had all along continued to pay the rent to the Zemindar, year by year, and received dhakilas (receipts) for the same under the designation of Mocurrerydars, and that he and they were in possession according to boundaries set forth in a map therein referred to. That the rent of Rs. 101 had continued uniformly and more than twenty years; and at no time had there been any increase or decrease, and that it could not now be altered or increased. He also filed a supplemental statement, insisting that the notice for payment of the arrears of rent was irregular because issued for arrears of rent of the year 1267, when the suit claimed arrears for the year 1268 by virtue of such notice, and that the Ameen did not properly measure the lands.

The Respondent, Gooman Singh, also filed a written statement by way of answer to the plaint, to the effect, that he claimed title to the lands in question through his grandfather, the original Lessee, Aghum Singh; that the latter had acquired the same as a Mocurrerydar under the aforesaid Pottah at the rental of S. Rs. 101; that he and the other occupants had paid the rent year by year, and had obtained receipts as Mocurrerydars, and that, therefore, under sections 4, 15, and 16 of Act, No. X. of 1859, there could not be any enhancement of rent.

The Respondents, Biddabutti and Radhabutti, by their joint answer, also respectively claimed through the original Lessee, Aghum Singh, and under the [440] Pottah, which they also alleged was a Mocurrery at an annual rental of S. Rs. 101, and which rent had been paid yearly to the Zemindar; and they insisted that under Act, No. X. of 1859, there could not be any enhancement of a Mocurrery rent.

The issues in the suit were:—First: was the notice of enhancement duly served? Secondly, did the notice contain all that it ought to do: and was it served in the prescribed time? and, thirdly, was it a case in which enhancement could be made, or was Defendants' Pottah a Mocurrery one?

The Pottah was put in evidence, the genuineness of which was not disputed.

The hearing of the suit took place on the 31st of March, 1862, before Mr. W. L. Robinson, the Collector of Zillah Purneah, who pronounced the following judgment:—"The first issue I decide in the Plaintiff's favour; the notice seems to have been duly served, though not personally. The second issue I decide partly in the Plaintiff's favour; the notice, I think, contained sufficient information of the reason for seeking enhancement; but then the Plaintiff has neglected to bring any proof, as he ought to have done, that his enhancement is such as can be legally enforced. The third and most important issue I decide against the Plaintiff. The Defendants produce a Pottah, said to be a Mocurrery one, dated so far back as 1199 Fusly, corresponding to 1792, A.D. They also produce 'Farrigs' for various years between 1225 and 1240, and decrees for rent in other years at the rate mentioned in the Pottah. The land, moreover, was declared free of assessment in a resumption suit, instituted under Ben. Reg. II. of 1819. I consider, therefore, that possession of the land at the rate of rent [441] stated in the Pottah for very many years, has been fairly proved. In fact it is not questioned, and the Plaintiff does not say that the Defendants did not hold the land. He only asserts, that they hold more than they are entitled to. It, therefore, falls upon him to state what they are entitled to hold, and that he cannot do. I see attempts have been made in the evidence to say that he was only entitled to a few hundred beegahs under the original grant; but there is no proof whatsoever that such was the case. The Pottah produced by the Defendant does not, it is true, state the amount of the land, nor does it say that he was to hold it for ever at that rate, and, therefore, the Plaintiff objects that it is not a Mocurrery Pottah, but I cannot admit the validity of this objection; it is not, I think, necessary that a Pottah, to be a Mocurrery one, should contain those exact words. It is very fairly proved that the Defendant has held under that Pottah, at one rate, for nearly seventy years; and if he or his Ancestors got hold of more land than they were entitled to, it was the fault of those who preceded the Plaintiff. I am not quite sure that the notice for enhancement should not have stated exactly how much land the Plaintiff claimed to assess, beyond what was covered by the Pottah, but perhaps he could hardly be expected to give such detail. On the main point, however, I think there can be no doubt, namely, that the Defendants prove that they have held for over seventy years at one rate; and that the Plaintiff fails totally to prove that his enhancement was a fair one, or at a rate which could be enforced under the provisions of Act, No. X. of 1859. For these reasons I dismiss the case with costs."

The Appellant appealed to the late Sudder Dewanny [442] Adawlut of Bengal, stating the following grounds of appeal:—First, that by reason of the copy of the Pottah produced by the Respondents being apparently dated the 19th Sawun, 1199 Fusly, without setting the boundaries, and the quantity of lands, and merely stipulating for the payment of the rent thereof from year to year, it could never be deemed to be permanent and "Mocurrery." Secondly, that the copy of the Pottah contained no condition of possession and enjoyment from "generation to generation" (Nuslun-bad-Nusl). And that by reason of this also, agreeably to the precedents of the Court, after the death of the Grantor of the Pottah, such a Pottah could not be maintained. Thirdly, that the mere possession of Ryots by reason of the non-exercise of the Proprietor's power, could not be held to fix the rent. Fourthly, that by means of a Pottah, which fixes neither the boundaries nor the quantity of land, but merely mentions the yearly rent to be Rs. 101, the possession of a quantity of land in excess, being 11,000 beegahs without payment of rent, according to the Pergunnah rate, was not valid. Fifthly, that it did not appear what quantity of land the receipts produced by the Respondents were for, and hence they could not prevent the assessment of the lands in dispute; and lastly, that according to the facts disclosed by the record, the Appellant's claim ought to be decreed, and the Collector's decision reversed.

The hearing of the appeal took place on the 13th of May, 1863, before Messrs. A. Roberts and E. Jackson, two of the Judges of the High Court of Judicature at Bengal, who delivered judgment to the effect, that the fact that the Respondents' title originated anterior to the Permanent Settlement, was [443] proved from the

date of the Pottah; that the fact that the Respondents had held the lands at a fixed rate of rent from the permanent Settlement was also proved by the receipts of 1225, 1227, 1228, and 1229, and the decree obtained in 1855; that though the Pottah did not in its terms confer any Mocurrery title, and though the statement of the Appellant's father, and the receipts alluding to the Respondents as Mocurrereedars would not, in absence of all Mocurrery title in the original lease, confer any such title or form an estoppel to the Appellant's suit; yet that the law as declared by Act, No. X. of 1859, conferred a Mocurrery title on all Ryots, in the position of the Respondents, who held lands at fixed rates which had not changed from the Permanent Settlement, and prevented the enhancement on such rents, and conferred a presumptive title to a fixed rent; and that as the Respondents had proved that the rate of rent of their tenure had been fixed and unchanged for a period of seventy years, or prior to the Permanent Settlement, it could not be enhanced, and the appeal must, therefore, be dismissed with costs, and interest at 12 per cent. per annum on the costs, to the date of payment.

The Appellant presented a petition for a review of judgment to the High Court, in support of which he alleged the following grounds:—First, because it had not been proved, as required by section 15, Act, No. X. of 1859, that the Respondents had held at a fixed rent, which had not been changed from the time of the Permanent Settlement of Purneah, which was completed in 1791, whereas the Appellant's own document showed that his tenure dated from the year 1792. Secondly, because, supposing it to be ruled that the [444] Permanent Settlement dated from a period posterior to the date of the Respondent's Pottah, it was of no consequence that the Respondents had held at a rent which had not since been changed; inasmuch as, according to the provisions of section 15 of the Act, the Respondents' right must be determined by the terms of the Pottah, which conferred no Mocurrery title of any sort whatever. That the Court had proceeded, in its decision upon the provisions in sections 3 and 4 of Act, No. X. of 1859, which were specifically applicable to Ryots only, whereas the Court ought to have proceeded under the provisions of sections 15 and 16 of the Act, relating to persons possessing a transferable interest in the land intermediate between the Proprietor of an estate and the Ryots, such as the Respondents in the present case were; that between sections 15 and 16, and sections 3 and 4, there was this material distinction: that, under the former, the right may be dependent on the conditions of a lease; whereas under the latter it would be independent of the conditions of any lease. That the argument of the Court in disregarding the conditions of the Pottah would have been correct, supposing the Respondents' case rested on the provisions of sections 3 and 4: but as it did not rest on these provisions, but on the provisions of sections 15 and 16, the argument which was based on the provisions of sections 3 and 4 was entirely reversed, and the question must be considered not as one of prescriptive right, but as one dependent on the terms of the Pottah.

The hearing on review of judgment took place before Messrs. W. S. Seton Karr, and E. Jackson, two of the Judges of the High Court of Judicature, on the 5th of May, 1864, when the following judgment was given:—"The first question to be determined is, whether the tenure commenced anterior or subsequent to the Permanent Settlement. The Pottah is dated 11th Srabun, 1199, which corresponds to the English year 1792. It was on this point urged that the Permanent Settlement was identical with the Decennial Settlement; that in fact it was the Decennial Settlement subsequently made perpetual; that the Decennial Settlement of this District was completed in 1789, and though it was not made perpetual until 1793, still the Settlement which is now called the Permanent Settlement is that which was originally made, and must be held, therefore, to bear the date of the original Settlement, viz. 1789; that if this is the correct date of the Permanent Settlement the protecting clauses of Act, No. X. of 1859, will not bar the enhancement of the rent of the tenure, whatever description of Tenants the Respondents may come under, as their own Pottah is proof that the tenure originated subsequent to the Settlement. We think, that the date of the Permanent Settlement must be held to be that on which, the Decennial Settlement being declared to be perpetual, the Permanent Settlement came into force. The Proclamation which declared the Settlement to be permanent is contained in Reg. 1 of 1793; and that Regulation distinctly lays down the date from which it is to have force and effect, viz. the 22nd of March.

1793. In deciding this question, the Court cannot, as suggested, act upon the usual law of settlements and contracts, but must be guided by the distinct enactment of the Legislature, which has declared the exact date when the Permanent Settlement came into force. The tenure which is now in dispute, we hold, has been [446] proved to have commenced anterior to the Permanent Settlement, and it is not denied that the rent paid for it has remained fixed and invariable up to the present date. The next question is, whether the tenants are Ryots or Tenants intermediate between the Proprietor and the Ryots. We cannot agree with the learned Counsel for Respondents that they are Khoodkast Ryots. We think that this Court was in error in its first decision of this appeal in designating them as Ryots at all. It is very difficult to lay down any general interpretation of the word 'Ryots.' As a general rule they are the cultivating Tenants, but they may not be cultivators at all themselves; they may cultivate their lands by hired labour or by under-tenants. In this case the amount of land included in the tenure is, we think, sufficient evidence that the Tenants are not Ryots, and that view is supported by the light thrown on the facts by the original Pottah, which addresses the original Lessee as 'Moostager,' and directs him to take measures to have the land cultivated by Hill men as Ryots: the land lying on the borders of the Hill ranges in the north of the Purneah District. We think, also, that the contention that the Tenants, from their *status* as holders of a Jungleboory tenure, are protected from enhancement, can also not be sustained. It has not been shown to us that Jungleboory Tenants have any such rights, but the Regulation which is alluded to in support of this view, viz. section 8, of Reg. VIII. of 1793, contradicts those views, and states that such tenures are liable to enhancement, or, in the words of that Regulation, to all increases imposed on the Purgunnah generally. The tenants in this case being declared to be intermediate between the Proprietor and the Ryots, it remains, lastly, to be [447] considered whether they are protected from enhanced rent by sections 15 and 16, Act, No. X. of 1859. It is argued that the tenure is not permanent and is not transferable, and that the protecting clauses of those sections do not refer to any tenures except those which are both permanent and transferable, and held otherwise than under a terminable lease. On the last point we cannot say, that the present holders of the tenure hold under a terminable lease. They do not hold under the original Pottah, because that Pottah does not in any way refer to them, but only to the original Lessee. The Proprietors have allowed the present Tenants to hold the tenure without any Pottah, not for any short period of time, but for fifty years, ever since the decease of the original Lessee; and during that time they have in their receipts for rent and other documents designated them as Mocurrerydars. And so far from the tenure not being transferable, it is clear on the face of these proceedings that the tenure has been transferred without objection on the part of the Proprietors. More than 14 annas of the tenure have left the hands of the descendants of the original Lessee, and been sold by public auction to new Tenants from whom the Proprietors have received rent, and whom they now sue for enhanced rent. If, then, the Proprietors have, by their acts, admitted that the tenure is transferable, and that it is Mocurrery, *i.e.* permanent, it is not for this Court to declare that the tenure is neither permanent nor transferable in a suit for rent, in which those questions only incidentally arise. The proper Tribunal to settle those questions is a Civil Court, not a Revenue Court, under Act, No. X. of 1859. As far as the evidence before us goes, we think that [448] the Proprietors have admitted that the present tenants do hold a permanent and transferable interest in the land, and it is not shown that they hold under any lease at all, much less a terminable lease. They have not held since the Permanent Settlement. But under the law it is not necessary to show that they have held since that date. If the present tenant holds a tenure at a fixed rent which has not been changed from the time of the Permanent Settlement, that tenant is not liable to enhancement of such rent. We think that the Respondents in this case are, therefore, as far as the evidence before us goes, protected from enhancement, not as Ryots, but as intermediate tenants, under sections 15 and 16, Act, No. X. of 1859; and we accordingly dismiss this appeal, declaring all costs of this litigation, with interest at 12 per cent. per annum, payable by the Appellant."

The appeal to Her Majesty in Council was from this decree.

Before any steps were taken in the appeal, the Respondent, Muddun Lall Doss, purchased the shares of the Respondent, Radhabutty, in the lands above mentioned, consisting of 4 gundahs, 1c. 2k. 1d. sold by auction in execution of a decree of the Principal Sudder Ameen of Zillah Purneah, bearing date the 6th of October, 1863, and by deed of sale, bearing date the 5th of Maugh, 1271 Fusly, the Respondent, Biddabutty, conveyed her share in the lands, consisting of 1a. 11g. 1k. 1d., being the last remaining portion of what had been the joint and undivided family property, to the Respondent, Muddun Lall Doss, in payment of a debt found to be due by her to him by the above-mentioned decree of the Principal Sudder Ameen.

[449] By an Order of the High Court, Muddun Lall Doss was made a representative in the place of the Respondents, Biddabutty and Radhabutty.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—First, the Respondents having pleaded as the foundation of their title the Pottah of 1791-2, granted by the then Zemindar to Aughun Singh, they were bound by the terms of that instrument. That Pottah clearly created a Jungleboory tenure, mentioned in section 8 of Ben. Reg. VIII. of 1793, which is a re-enactment of the Regulation law previous to the Decennial Settlement, and, as Tenants holding under such tenure, they were liable to the enhancement of rent of the lands, at the instance of the Zemindar, under section 13 of Act, No. X. of 1859, such enhancement being an acknowledged incident to such a tenure. As there are no words of inheritance in the Pottah, such as “Nuslun-bad-nusl,” signifying from “generation to generation,” it is plainly only a lease for life, terminable at the will of the Zemindar. It is not Mocurrery or a permanent transmissible interest; but even if it was, and although held at a fixed rent, the Pottah was granted within twelve years before the Decennial Settlement, and the lands, therefore, are liable to an increase of assessment by the present proprietor: *Khaja Neekoos Marcar v. Ram Lochun Ghose* (3 Ben. Sud. Dew. Rep., 221). In the note by Macnaghten to the case of *Dyaram v. Bhobindur Naraen* (1 Ben. Sud. Dew. Rep., 140), he describes the difference between tenures of a Talook and a Mourvosy ijareh. He says: “The Pottah, or Lease, for a Mourvosy ijareh, does not specifically convey [450] more than an hereditary right of occupancy. If it be not istimrary, or entitling the Tenant to hold at a fixed rent, the amount payable to the Zemindar is variable.” The Pottah being pleaded and relied on by the Respondents, the Court below was not justified in setting up and decreeing in their favour a separate and independent title, upon a presumption from their long possession of the existence of some other grant or lease not proved, which, if it existed, must have been altogether different from the Pottah pleaded. The Court found as a fact, that the title and possession accrued subsequent to the Permanent Settlement, it was rightly decreed that they were not protected by the terms of section 15 of Act, No. X. of 1859, from enhancement of rent. The Court below was, therefore, wrong, after such finding, in giving effect to the legal presumption that rent had been paid by the Respondents from the date of the Permanent Settlement, from the simple proof of payment of such rent for twenty years before the commencement of the suit, under section 16 of that Act.

Secondly, it is admitted by the decree appealed from, that the Pottah relied on was not a Mocurrery-istimrary lease at a fixed rent within the provisions of Ben. Reg. VIII. of 1793, sec. 49. That section enacts, that holders of land at a fixed rent for more than twelve years under such a title are not liable to be assessed with increase of rent by the Zemindar. Now, the fact of the Pottah creating a Jungleboory tenure, which gives to the Zemindar a continuing right to increase the rent, as new lands are brought into cultivation by the Tenant, under sec. 8, of Ben. Reg. VIII. of 1793, excludes the operation of section 15 and 16 of Act, No. X. of 1859, those sections of the Act do not, [451] therefore, apply. The rent reserved by the terms of the Pottah had reference only to the rent then assessed on “the lands of the villages,” which imports cultivated lands alone, not lands subsequently brought into cultivation. No assessment has ever been made, nor has any rent been reserved in respect of the Forest or jungle lands which might thereafter be cleared and brought into a productive state by the Lessee under the original Pottah, and no evidence was given that a fixed rent had ever been paid for the lands which were subsequently cleared and cultivated.

Mr. W. Pearson, Q.C., and Mr. Stiffe Everett, for the Respondent, Muddun Lall Doss.—Our contention is, that the Pottah of 1791-2 in terms points out, and must

be taken to be, a Mocurrery Pottah, creating a permanent and transferable interest in the land, subject to a fixed rent. Now, such rent not having been changed from the time of the Permanent Settlement, the Respondents cannot be held liable to an enhancement under section 13 of Act, No. X. of 1859, having regard to the provisions of section 51 of Ben. Reg. VIII. of 1793, and sections 15 and 16 of the Act, No. X. of 1859. If the Pottah did not in terms mention a Mocurrery-istimrari tenure, yet the lands having been enjoyed as such at an invariable fixed rent for seventy years from the date of the Permanent Settlement, the rent cannot now be enhanced. A Pottah, which is defined in sec. 8 of Ben. Reg. VIII. of 1793, as specifying the boundaries of the land granted, conveys a freehold of inheritance, and the Court will take notice of this without evidence, because it is the common conveyance in India: *Doe* [452] *dem Nemoo Sircar v. Watson* (1 Morton's Rep., 255). *Freeman v. Fairlie* (1 Moore's Ind. App. Cases, 305). *Gardiner v. Fell* (1 Jac. and Wal., 22). In *Joba Singh v. Meer Nujeb Oollah* (4 Ben. Sud. Dew. Ad. Rep., 271), the Sudder Court decided that lands held at an invariable quit rent under a Mocurrery Pottah, for a period of upwards of twelve years, was not liable to any enhanced assessment, though the grants did not specify that the tenure was hereditary. To the same effect is *Baboo Gopal Lal Thakoor v. Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 183, 191); *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* (*ib.*, 123); *Sheikh Emaun Buksh v. Sheikh Enayut Ali* (7 Ben. Sud. Dew. Ad. Rep., 278); *Dharpurain Raee v. Sreemunt Raee* (12 Ben. Sud. Dew. Ad. Rep., 189); *Mussamut Brojyugyona Dassee v. Mussamut Debrancee Dassee* (1 Marshall's App. Cases, Ben., 424). It is clearly collected from the nature of the tenure and construction of the Pottah that it is not Jungleboory, as mentioned in sec. 8 of Ben. Reg. VIII. of 1793, as contended by the Appellant; and if it were so, these proceedings were altogether irregular, for the notice to enhance does not treat the lands as a Jungleboory tenure. The Appellant cannot set up two inconsistent titles.

By the operation of the above Regulation and Act, a permanent and transferable interest has been created, and was in full force at the time the notice of enhancement was given, and by the Appellant's father. The permanency of the interest which the Respondents had in the lands was not questioned by the Appellant, nor by any of his predecessors in title. Though their acts and proceedings recognized the tenure as Mocurrery, and throughout the suit, [453] which was in fact only for enhanced rent, the Appellant never asserted or pretended any claim to recover possession of the lands. We submit, that the Appellant is estopped from denying the effects of such permanency by the acts of his predecessors in title: first, as a suit for rent admits that the possession of the tenant is rightful as Mocurrery; secondly, the giving receipts for rent to the tenants for the time being under the designation of Mocurrerydars; and thirdly, the permitting sales by public auction, as of such tenure, the Appellant himself even bidding against the Respondent, who purchased the same. It is established by the evidence, that the rent of Rs. 101 has never been advanced since the date of the Pottah of 1791-2, and it would be a great hardship upon the Respondent if the Appellant were allowed now to disturb the tenure. This Respondent having purchased the various shares of the descendants upon the faith of the land being held at a fixed rent of the original Lessee, which have been publicly dealt with, and sold as transferable interests, and that with the privity of the Zemindars for the time being, including the Appellant and his father.

Another objection is, that the Court of the Collector, a mere revenue Court under Act, No. X. of 1859, was not the proper Tribunal to determine the questions at issue in this suit, having regard to the rights and title of this Respondent, as well under Ben. Reg. VIII. of 1793, as under the Act, No. X. of 1859. Moreover, the notice of enhancement was not a sufficient notice, nor was it duly served; and in any event the Appellant has failed to prove that the enhancement of rent was a fair one, or such as could be enforced under the provisions of Act, No. X. of 1859.

[454] Sir R. Palmer, Q.C., in reply.—Section 51 of Ben. Reg. VIII. of 1793, which enacts that, no Zemindar or other Proprietor is to increase the rent of Talookdars dependent on him, only applies to Talookdars: *Birjkishwor v. Sumbhoochund Rai* (1 Ben. Sud. Dew. Ad. Rep., 141, and see note *ib.*, 142); *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* (10 Moore's Ind. App. Cases,

123). As this is a proceeding for enhancement of rent of a Jungleboory tenure, described in sec. 8 of Ben. Reg. VIII. of 1793, it is within the provisions of Act, No. X. of 1859, sections 15 and 16. *Baboo Gopal Lall Thakoor v. Teluk Chunder Rai* (*ib.* 183), was a suit for enhancement of rent of a Talook under Ben. Reg. V. of 1812, and this Tribunal decided that the *onus* of proving that the Talook was held at a fixed invariable rent under a Mocurrery or fixed tenure twelve years before the Permanent Settlement on the party in possession. To constitute that tenure there must be words of inheritance, such as from "generation to generation" (*Nuslun-had-nusl*), contained in the deed (*ib.*, 191). There is nothing of the kind to be found in this Pottah; there is an entire absence of the slightest indication that it was to be perpetual. It is simply a lease for life, or terminable at the will of the Landlord, as in the *Amaran*, or service tenure; *Unide Rajaha Raje Bommarauze v. Pemmasamy Vencatadry Naidoo* (7 Moore's Ind. App. Cases, 128). The cases of *Freeman v. Fairlie* (1 Moore's Ind. App. Cases, 305); *Gardiner v. Fell* (*ib.*, 299); and *Doe dem Nemoo Sircar v. Watson* (1 Morton's Rep., 255), are distinguishable, as [455] the Pottahs in those cases were granted by the Government Collector.

Their Lordships' judgment was reserved, and now delivered by

The Right Hon. Sir Richard T. Kindersley (Dec. 20, 1867).—This is an appeal against a decree dismissing the suit brought by the Appellant under Act, No. X. of 1859, for the enhancement of the rent of lands within his Zemindary. The argument before their Lordships raised various questions of some perplexity, and of great public importance: but the facts of the case are, for those of an Indian cause, unusually free from doubt.

A claim to enhance rent assumes the existence of some right of occupation in the Defendants (the actual Tenants), and of a right to raise the rent previously paid in the Plaintiff (the Zemindar). The Appellant's title is thus derived:—He is the son and representative of Baboo Pertab Singh, who, in 1851, purchased the Zemindary in which the lands in question are situate at an execution sale. The execution, though at the suit of Government, was one in a mere civil suit for moneys, and, accordingly, the purchaser acquired none of the extraordinary rights of a purchaser at a sale for arrears of Government revenue. He took merely the right, title, and interest of the judgment debtor, and, therefore, subject to whatever subsisting interests in the lands had been effectually granted or created by any former Zemindar.

The following is the history of the Respondents' occupation:—

[456] In 1792, shortly after the Decennial Settlement of this Zemindary had been completed, but before that Settlement had been declared perpetual, the then Zemindar granted the lands in question to one Aghum Singh, at an annual rent of S. Rs. 101, under a Pottah, of which the terms and effect will hereafter be considered. Aghum Singh continued to pay that rent, without variation, up to the time of his death, which took place in 1820: and in some of the latest of the Zemindar's receipts or acquittances, which have been produced in evidence, he is described as Mokurrereedar. After his death his sons, Pertab Singh and Neerbhan Singh, continued to hold the lands on the same terms; and some of the Zemindar's receipts, accepting the same rent of S. Rs. 101 from Pertab Singh, and describing him as Mokurrereedar, are also in evidence. Pertab Singh died in or before 1838, for in a proceeding before the Deputy Collector of Zillah Purneah, dated the 24th of January, 1842, his son, Gooman Singh, one of the present Respondents, and Neerbhan Singh, are described as the then occupants of the lands.

That proceeding was in a suit brought by Government for the resumption and assignment of these lands which failed on proof that they were included in the Zemindary, of which the revenue had been permanently settled in 1793, and were, therefore, not subject to any claim on the part of Government. The Zemindar being no party to this proceeding, it is material only as showing that the title on which the Respondents now rely was openly asserted as early as 1838. Some of the other receipts that are in evidence show that rent for the years 1835, 1836, and 1837, at the old rate of S. Rs. 101, was received [457] from Gooman Singh; and in these also he is described as Mokurrereedar. It is not, however, clear that these last-mentioned receipts were granted by the then Zemindar or his Officers. It seems more probable that they were granted by a Receiver, who, under the Court of

Wards, during the minority or incapacity of the Zemindar, or under some other unexplained circumstances, was at that time in possession of the Zemindary. It also appears that although the rent was often taken from one member of the Singh family, as shown by the receipts, there were many persons of that family beneficially interested in the lands, Pertab Singh having left five sons besides Gooman Singh, and Neerbhan Singh having on his death left two sons, Dabee Singh and Akbur Singh. And from one of the documents in evidence in the cause it appears that fees were paid by the two last-named persons to, and accepted by, the Receiver in 1845, on a mutation of names, as upon the devolution of a Mocurrery tenure.

The Father also of the Appellant is shown to have brought, in 1855, a summary suit for the recovery of one year's rent, at the rate of S. Rs. 101, alleging that the lands were held as a Mocurrery at that rent by the Defendants there named.

So far the tenure, whatever was its nature, remained in the Singh family, but it afterwards became the subject of transfer by sale. By various transactions, partly of voluntary sale and purchase, partly of purchase at judicial sales, of which the earliest is in 1858, the Respondent, Muddun Lall Doss, had, before the commencement of the present suit, acquired the whole interest in the tenure, except the shares (at most one-twelfth each) of Gooman Singh and of [458] one of his brothers; and it is stated in the Respondents' case that he has since acquired the last-mentioned shares also, and is now the only person interested in supporting the decree under appeal. The result, therefore, of what has been stated is, that at the commencement of this suit the lands had been held as against the Zemindar at one unvarying rent since 1792, under a tenure originating in the Pottah of that year, but treated *de facto* as an hereditary tenure, and, from time to time, described by both the Zemindar and the tenants as a Mocurrery tenure; and that, as such, it has been made the subject of sale and transfer, to the knowledge and with the assent of the Zemindar, who on one occasion bid, through his manager, for a portion of it.

The first proceeding in the suit was necessarily the notice which the 13th section of the Act directs to be served on the under-tenant or Ryot whose rent is sought to be enhanced. That document stated that the taidad, meaning probably the rent-roll, of the lands was extremely small; that the Respondents had produced "no reliable document," showing on what special grounds they occupied them; that with a view to settle the rent, the lands had been measured, and were found to consist of 11,645 beegahs; and that the rent of them, according to the rate paid by other Ryots cultivating the same kind of land, would amount to Rs. 24,842 10a. 8p. And the plaint founded on this notice accordingly claimed that sum with interest, amounting in all to Rs. 26,752 6a. 9p. as due from the Respondents to the Appellant.

The learned Counsel for the Appellant have argued, that the defence set up by the Respondents [459] must be taken to be that they are the holders of a Mocurrery-istimrary tenure, *i.e.* an hereditary tenure, at a fixed rent under the Pottah of 1792; and that they must stand or fall, according as the terms of that instrument establish, or fail to establish, such a title. Their Lordships cannot accede to that argument. It is to be observed, that Act, No. X. of 1859, sec. 59, does not require the Defendants to put in any written pleading. And, in their Lordships' opinion, the fair construction of the written statement which, under the option given to him, the Respondent, Muddun Lall Doss, did put in is, that under all the circumstances stated above, he and those from whom he derives title must be taken to have held as hereditary Mocurrereedars, which of itself would be an answer to the suit; and that if that contention could not be supported to its full extent, they were protected against an enhancement of rent by the provisions of Act, No. X. of 1859.

The Respondents have been successful in every stage of the suit in the Courts below; but the several decisions in their favour have proceeded on different grounds. The Collector (the Judge in the first instance), in his judgment of the 31st of March, 1862, seems to have held, that though the Pottah neither stated the amount of the land, nor said that it was to be held for ever at the rate fixed, the Defendants had proved that they had held for upwards of seventy years at one rate, and that

the Plaintiff had totally failed to prove that his proposed enhancement was a fair one, or at a rate which could be enforced under the Act. From this there was an appeal to the High Court. The petition of appeal treats the Respondents as Ryots, and on the first argument in [460] that Court their Counsel argued their case on the assumption that they were properly described as Ryots. On that occasion the Judges held that the Pottah did not in its terms confer any Mocurrery title; and that the statement of the Appellant's father, and the receipts describing the tenants as Mocurrereedars, would not, in the absence of all Mocurrery title in the original lease, confer such a title, or form an estoppel to the Appellant's suit. But they also held that the law, as declared by the 3rd and 4th sections of Act, No. X. of 1859, conferred in fact a Mocurrery title on all Ryots in the position of the Defendants, who held lands at fixed rents, which had not been changed since the date of the Permanent Settlement. The Appellant petitioned for a review of this decision, partly on the ground afterwards decided against him, and now abandoned, as to what in legal contemplation is the date of the Permanent Settlement; and partly on the ground that the Court had proceeded upon the provisions of the 3rd and 4th sections of the Act, No. X. of 1859, which were specifically applicable to Ryots only, whereas it ought to have proceeded under the 15th and 16th sections, relating to persons possessing a transferable interest in the land intermediate between the Proprietor of the estate and the Ryots, such as the Defendants were; that between these last-mentioned sections, on the one hand, and the 3rd and 4th sections on the other, the right may be dependent on the conditions of a lease, whereas under the latter it would be independent of the conditions of any lease; and finally, that the question was to be treated not as one of prescriptive right, but as one dependent on the terms of the Pottah. The High [461] Court, on this final hearing, held that the Defendants were not Ryots, but Tenants intermediate between the Proprietors and the Ryots; that they did not hold under a terminable lease, nor under the Pottah, which did not in any way refer to them, but only to the original Lessee; but that inasmuch as they had been allowed by the Proprietors to hold the tenure without any Pottah for fifty years, and ever since the death of the first Lessee, and the Proprietors had by their acts admitted the tenure to be transferable and Mocurrery, *i.e.* permanent, it was not for the Court, sitting as a Revenue Court under Act, No. X. of 1859, and in a suit for rent, to declare the tenure neither permanent nor transferable; and that the Respondents, holding a tenure at a fixed rent, which had not been changed from the time of the Perpetual Settlement, were protected by the 15th and 16th sections of the Act from enhancement.

It is now assumed on both sides that whatever was the interest of the Respondents in these lands, they were not Ryots, but Tenants intermediate between the Proprietor and the Ryots. And one of the points taken for the first time here was, that that being so, they were not subject to the jurisdiction of the Collector under Act, No. X. of 1859; that this tenure, if it could be made the subject of enhancement of rent at all, could be made so only by suit in the Civil Court; and for examples of this we were referred to the cases of *Ranee Surnomoyee v. Maharajah Suttees-chunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123); and that of *Baboo Gopal Lall Thakoor v. Teluk Chunder Roi* (10 Moore's Ind. App. Cases, 183).

Their Lordships cannot entertain any doubt of the [462] jurisdiction of the Courts below. Both the cases cited were tried before Act, No. X. of 1859, was passed. That Act throughout contemplates under-tenants as distinct from Ryots, and contains provisions relating to both classes. And their Lordships think that the 23rd section of the Act, by which exclusive jurisdiction is given to the Collector over the suits therein mentioned, embraces such a suit as this, whether it be treated as what it substantially is, *viz.* "a suit for the determination of the rate of rent at which a Pottah and Kaboolyat should be given," or as what it is in form, a suit for "arrears of rent due on account of land."

This being so, the first question is, what is the nature of the Respondents' sub-tenure? If it can be shown to be Mocurrery-istimrari, there is an end of the case. If this cannot be established, the question whether the Respondents are not protected by the 15th and 16th sections of the Act will arise.

The Pottah is addressed to Aghum Singh as "Moostager," which is translated

"Farmer" of Mouzah Cheloone, and other villages in Forests of Sukhooa trees in the Zillah named; and the operative part of it, according to one version of it, is in these words: "Inasmuch as, in accordance with your application, the lands of the villages in the said Forests have been assessed with a rental of 101 rupees, everything being consolidated, and a Pottah granted to you, it is required that you will in all confidence have the lands of the said Forests occupied by Purbuttea and other Ryots, and keep paying to the Sircar the rent year by year, according to this Pottah; and whenever you may be summoned [463] for the purpose of hunting, you will attend accompanied by all the Purbutteas."

In the course of the arguments for the Appellant, a question was raised whether this Pottah was more than a lease of the village lands then in cultivation; and whether the greater part of the land now in the occupation of the Respondents had not been acquired by subsequent and gradual encroachment. Their Lordships, however, are of opinion, that the Pottah covered, not only the lands then in cultivation, but also the Forest lands which the grantee was to settle and reclaim by bringing Purbutteas and other Ryots upon them; and upon the pleadings and evidence in this cause, they must assume that it included all the lands which the Appellant now seeks to re-assess. The nature and extent of the interest in these lands which it conferred on Aghum Singh have now to be considered.

Upon these points their Lordships are not prepared to dissent from the judgment of the High Court, in so far as it found that the Pottah, taken by itself, cannot be held to have granted a Mocurrery-istimrari tenure. It does not contain the term "Mocurrery," or any equivalent words from which an obligation on the part of the Grantor never to raise the rent is fairly to be inferred; nor does it contain the expression "from generation to generation," or other like words importing that tenure, whether the rent was to be fixed or variable, was to be hereditary. Their Lordships cannot accede to the argument for the Respondents, that a Pottah must *prima facie* be assumed to give an hereditary interest, though it contains no words of inheritance. They do not think that the case cited from Morton's decisions, still less that [464] that of *Freeman v. Fairlie* [1 Moo. Ind. App. 305] is any authority for such a proposition. "Pottah," as may be seen by referring only to Act, No. X. of 1859, is a generic term which embraces every kind of engagement between a Zemindar and his under-tenants, or Ryots. Nor can it be disputed that the expressions here wanting are ordinarily used in the grant of a perpetual tenure.

Again, neither the date nor the nature of the transaction is, on the whole, in favour of the hypothesis that the intention of the Grantor was to create a perpetual tenure at a fixed rent. It may be conceded to the Respondents that the Zemindar in 1791 may have deemed himself capable of granting such a tenure. For, though according to the preamble of Ben. Reg. XLIV., of 1791, Zemindars, before the Perpetual Settlement, had no power to enter into engagements for a period exceeding that of their own engagement with Government, and in 1792 the Decennial Settlement, which had just been completed, had not been declared perpetual, yet at that time there was every reason to believe that the settlement would be declared perpetual; and the second section of the Regulation last referred to, which restricts the Zemindar's power of disposition, had not been enacted. The whole policy, however, of the Decennial Settlement, as appears by Regulation VIII. of 1793, was adverse to Mocurrery tenures. It made them all subject to re-assessment, unless they fell within the protection of the 49th section of that Regulation. It is, therefore, not probable that the Zemindar would, immediately after the completion of the settlement, grant such a tenure, except upon special grounds and adequate consideration; and of these there is no proof. Though the Pottah contains [465] some reference to future services, as incidental to the tenure, the transaction on the face of it is a grant of lands partly cultivated but chiefly waste, with the object, on the part of the Grantee, of bringing the latter into cultivation.

If, on the one hand, it is improbable that the Grantee should undertake such an obligation without some fixity of tenure, and some assured and permanent interest in the lands; it is, on the other hand, equally improbable that the Grantor should part for ever with all his interest in the improvable value of his lands,

But passing from the Pottah, taken by itself, it is necessary to consider the character of the occupation of the land, as shown by the uncontested facts of the case.

The Appellant, as we have already remarked, is not, as was the Plaintiff in the case of *Bahoo Gopal Lall Thakoor v. Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 183), which was cited in the argument, an auction Purchaser, who, under the Revenue laws, can throw upon the Tenant the burden of showing that his tenure would have been valid against a Zemindar, unfettered by any personal engagement, at the time of the Perpetual Settlement. He is bound by the engagements and acts of his predecessors in the Zemindary; and we must consider the evidence of these as it bears first upon the duration of the tenure, and next upon the question of fixed or variable rent. And, in doing this, we must recollect that, after the passing of Regulation V. of 1812, there was no restriction upon the disposing power of the Zemindar.

The facts already stated, afford incontestable proof that ever since the death of Aghum Singh, the here-[466]-ditary character of this sub-tenure has been recognized by the successive Zemindars. There is also evidence, which is not contradicted, that some of them have recognized its transferable nature. This evidence affords ample grounds for inferring either that the tenure was always intended to be hereditary, although not so expressed in the Pottah, or that, if the original grant were limited, as was suggested, to the life of Aghum Singh, his tenure has by some subsequent grant become hereditary and transferable. And, upon the proof here given of long and uninterrupted enjoyment, accompanied by the recognition of its hereditary and transferable character, it is almost impossible to suppose that a suit by the Zemindar in the Civil Court to disturb the possession of the Respondent, could not be successfully resisted. The case of *Joba Singh v. Meer Nujeer Oollah* (4 Ben. Sud. Dew. Ad. Rep. 271) is an authority for the proposition, that evidence of this kind will supply the want of the words "from generation to generation" in the Pottah, which is the foundation of such a title.

Upon this second point, the evidence of the subsequent acts and conduct of the Zemindars is material only in so far as the receipts and proceedings above referred to show that both Aghum Singh and his successors were described as Mocurrereedars. Their Lordships are not prepared to say that, from this evidence, a Court or jury might not legitimately infer, as against the first Zemindar and his successors, either that the rent had been always fixed, or that by subsequent contract, that, which had been originally variable had been made invariable. It is not, however, necessary for the determination of this appeal that they should so decide; and they are unwilling, [467] without necessity, to draw from the facts proved conclusions which were not drawn by the Court below.

It is sufficient to say, that if the tenure was or has become hereditary and transferable, as stated above, and if, as is abundantly shown, the rent has not been changed from the time of the Perpetual Settlement, the case, as ruled by the High Court, falls within the protection of the 15th section of Act, No. X. of 1859. Whatever be the interpretation to be given to the somewhat loose and ambiguous expression, "a terminable lease," it is clear that a tenure under which the Tenant can no longer be dispossessed by his superior cannot be brought within that exception.

There is another ground upon which, though it does not seem to have occurred to the Court below, their Lordships cannot but think that the present suit ought to have been dismissed. It has been seen that the Respondents were sued as occupying Ryots, liable for the rent assessed upon them in that character; that the High Court held that, considered as Ryots, they were protected by the 3rd and 4th sections of the Act, No. X. of 1859, and that thereupon the Appellant, shifting his ground and treating the Respondents not as Ryots, but as Tenants intermediate between him and the Ryots, obtained an Order for review.

But if the Respondents were Tenants intermediate between the Proprietor and the Ryot, that fact seems to raise objections both of form and of substance fatal to the maintenance of the present suit. The notice on which it was founded did not in that case accurately specify "the ground on which enhancement of rent was desired"; and the assessment on which the sum sued for was calculated, was improperly made: [468] the case of *Dyaram v. Bhubindur Naraen* (1 Ben. Sud. Dew.

Ad. Rep., 139), and the note of Sir William Macnaghten at the foot of it, p. 140, show that, where the suit is against an intermediate Tenant, the enhancement ought to be made according to the Pergunnah rate of the rents payable, not by Ryots, but by the holders of similar tenures. To assess such an intermediate Tenant according to the rents paid by Ryots, must necessarily deprive him of all beneficial interest in his tenure.

Their Lordships, however, do not decide this case on this last ground. For the reasons above stated, they think that the decision of the High Court was substantially right, and they will humbly recommend Her Majesty to dismiss this appeal with costs.

MOHUMMUD ZAHOOB ALI KHAN,—*Appellant*: MUSSUMAT THAKOORANEE RUTTA KOER, and Others,—*Respondents* * [Dec. 2, 1867].

On Appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

To entitle a female disqualified landholder, whose estate is in charge of the Court of Wards, to take advantage, by way of defence to an action brought against her, of the provisions of Ben. Reg., LII. of 1803, in respect of her non-liability for Bond debts contracted by her, the course pointed out in that Regulation must be strictly followed [11 Moo. Ind. App. 477].

The provisions of Ben. Reg., LII. of 1803 (extending Ben. Reg., X. of 1793, to the North-Western Provinces), are identical with the former Regulation.

Circumstances in which it was held, that a female whose estate was under the control of the Court of Wards was not to be considered a disqualified female, and that she had power to contract Bond debts.

Where a Plaintiff sued the Obligor and other Defendants on a Bond, not affecting land, and there was an allegation in the plaint, that the Obligor had transferred the land to those Defendants to avoid judgments attaching on the land, it was held, that there was no right of action against those Defendants, and they were improperly made parties.

The case of *Jan Khatoon v. Khwaja Ali Mullah* (5 Ben. Sud. Dew. Ad. Rep., 240), founded upon Ben. Reg., X. of 1793, followed [11 Moo. Ind. App. 482, 483].

Although the Judicial Committee is disposed to give a liberal construction to pleadings in Indian Courts, so as to allow every question to be raised and discussed in the suit, yet a Plaintiff cannot be entitled to relief upon facts and documents neither stated nor referred to in the pleadings.

The suits in which this appeal arose, was brought by the Appellant against the Respondents in the Civil Court of the Principal Sudder Ameen of [469] Zillah Meerut, to recover the sum of Rs. 21,280, principal and interest, due on a Bond alleged to have been executed by the first Respondent. The other Respondents were made Defendants on the allegation that they had combined with the Obligor and colorably procured her estate to be transferred to them in order to deprive the Appellant of his remedy against it.

The Sudder Ameen (Mohammed Abdool Azeez Khan) dismissed the suit, with costs, on the ground that Talooka Chukathul, in the Collectorate of Allygurh, the estate of the first Respondent, Rutta Koer, was, at the date of the execution of the Bond in question, in charge of the Court of Wards, under Ben. Reg., LII. of 1803, and that it was, therefore, essential that the Government's Collector's sanction should have been obtained to the execution of the Bond, and he held that such omission nullified the Bond; and, further, that in consequence, it became unnecessary to record any opinion as to the genuineness of the Bond, or to enter into any of the other points stated in the recorded issues. By the [470] decree of the late

* Present: Members of the Judicial Committee,—The Right Hon. Sir James W. Colville, the Right Hon. Sir Edward Vaughan Williams, the Right Hon. Sir Richard Torin Kindersley, and the Right Hon. the Lord Justice Rolt. Assessor. —The Right Hon. Sir Lawrence Peel.

Sudder Dewanny Court at Agra, consisting of Messrs. J. H. Batten and C. R. Lindsay, the decision of the lower Court was affirmed, as the appellate Court was of opinion, that the superintendence of the Court of Wards over the estate existed at the time of the execution of the Bond, and as a conclusion of law, the first Respondent was not competent to incur any debt, and, therefore, decreed that, in the circumstances, there was no necessity for inquiring into the second issue, namely, whether the Bond was executed by her and was a *bona fide* instrument.

The present appeal was from this decree of affirmance. As the Respondents did not appear, the case was heard *ex parte*.

The judgment of their Lordships being confined to the operation of Ben. Reg., LII. of 1803, and not touching the merits, it is not necessary to detail the facts.

The questions taken on appeal were; first, whether the estate and property of the first Respondent, Rutta Koer, was in charge of the Court of Wards when the Bond sued upon was alleged to have been executed by her; and secondly, whether such custody or charge was not of a character as, under the above Regulation, incapacitated her from contracting debts in any way, without the consent of the Court of Wards, and deprived the Appellant of his rights under the Bond.

Mr. Leith (Sir R. Palmer, Q.C., with him), for the Appellant, submitted, that the Respondents failed to prove that at and previously to the date of the execution of [471] the Bond sued on by the Appellant, the Respondent, Rutta Koer, had been by the Revenue authorities formally found to be a disqualified landowner and incompetent to the management of her estate, and that by reason thereof her estate had been taken possession of and placed under a Manager by the Court of Wards, under Ben. Reg., LII. of 1803, and urged that, on the contrary, it was established by the Appellant's evidence, that the Sudder Board of Revenue, who afterwards acted in the capacity of the Court of Wards, did in fact consider the first Respondent as exempted from the operation of the above Regulation, and invested her with the management of her estates. That being competent to charge the estate, she executed by their order, the same directions for the payment of the Government revenue as other qualified proprietors, under the provisions of Ben. Reg., VIII. of 1805, sec. 29, and he further urged that, assuming that she could have been considered as a disqualified landholder, and her estate under the charge and management of the Court of Wards, at the date of the execution of the Bond; yet as such disqualification did not arise from minority, idiocy, or mental imbecility, the first Respondent was not thereby legally incapacitated from contracting debts for her necessary expenses, or executing a Bond for securing repayment thereof.

Their Lordships reserved judgment, which was now pronounced, as follows, by

The Right Hon. Sir James W. Colville (Feb. 10, 1868).—This is an appeal from a decree of the late Sudder Dewanny Adawlut, of the North-Western Provinces of Agra, bearing date the 11th of July, 1864, which [472] affirmed a decree of the Principal Sudder Ameen of Meerut, bearing date the 25th of February, 1863.

The plaint was filed in the Court of the Principal Sudder Ameen of Allygurh on the 3rd of May, 1861, and is entitled, the petition of plaint of the Plaintiff against Rutta Koer and nine other persons, there named, and against Zemindary rights in certain Mouzahs, there named, the property of Rutta Koer; and claimed to recover Rs. 21,280, the amount due on a Bond, dated the 19th of August, 1856, and stated that, Rutta Koer borrowed from the Plaintiff Rs. 10,000, and executed a Bond engaging to pay the amount on demand with interest at 2 per cent per mensem; and that the Plaintiff had repeatedly demanded the amount due, but that Rutta Koer evaded payment, and had not discharged the debt. It further stated, that in order that the money might be lost to the Plaintiff the other Defendants had combined, and got the above estates belonging to Rutta Koer illegally transferred to them, though they had not been put in possession; and, therefore, as a precautionary measure, the Plaintiff filed the petition of plaint, with the Bond on which his suit was based, against Rutta Koer, the principal Defendant, and the other Defendants who claimed her property; and it concluded by praying, that the amount sued for might be decreed against the Defendants, and the property aforesaid, with interest to the date of realization.

The Bond of the 19th of August, 1856, filed with the plaint, and on which, as

stated in the plaint, the suit is based, is a simple money Bond, purporting to have been executed by Rutta Koer for Rs. 10,000, and interest. None of the other Defendants are in any way parties to it, nor does it purport to be a [473] mortgage or charge upon, or in any way to refer to the property mentioned in the plaint.

The Plaintiff has also tendered in evidence another Bond, dated the 28th of November, 1857, by which Rutta Koer purports to secure a further advance, and to pledge her Zemindary estates to the Plaintiff until she should pay off the whole debt to him. But his suit is in no way based upon this second Bond.

Now, as to all the Defendants, except Rutta Koer, it is obvious on the face of the plaint that no relevant case is made against them. The allegation that they have combined with the Plaintiff's alleged Debtor to get her estates illegally transferred to them, is no ground of suit against them, if, as is the case here, the Plaintiff sues upon an instrument which creates no charge upon or estate or interest of any kind in the lands. If he can obtain judgment on his Bond, and is not satisfied, he may possibly be entitled hereafter to raise such a case, as that suggested in the plaint, against the land and against these Defendants; but any such proceedings before execution on the judgment are premature. It follows, therefore, that as against these Defendants, at all events, the appeal must be dismissed, and it is wholly unnecessary to consider as to them the other defences set up in their several written statements.

Nor as to Rutta Koer was it open to the Plaintiff on this plaint, to ask for any decree other than a personal decree for payment of the amount due on the Bond. The Plaintiff is not entitled to rely on his second Bond. Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised [474] and discussed in the suit, yet this liberality of construction must have some limit. A Plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings, and the only thing that can be rightly insisted on by the Plaintiff here is a decree for payment against Rutta Koer. To a decree so limited, he would be entitled in a suit properly framed, if he proved his case; and the only defences that could usefully be raised by Rutta Koer are—that she was incompetent to contract debt—or that she did not in fact contract debt—or that she had satisfied it.

Two of these defences she has in fact pleaded; namely, first (in substance and effect), that no such money was ever lent her, and that the Bond was fabricated; and, secondly, that her property was under the Court of Wards, and that the Government Officials had not been made cognizant of or accorded their sanction to the institution of the suit, and that, even supposing the Bond to be genuine, the claim of the Plaintiff could not lie against the person and property of the Defendant.

Amongst the issues fixed for trial by the Principal Sudder Ameen (besides those relating to the validity of the Bond and the existence of the debt) was one in the following terms:—"Thirdly, had the Defendant the power to contract debts, her estates being under charge of the Court of Wards; and is the fact of no notice having been given of the execution of the Bond and the contracting of the debts at the Collectorate a sufficient argument for the falsity of the Bond or not?"

The form of the issue apparently assumes that Rutta Koer's estates were under charge of the [475] Court of Wards, and that the only question was the effect of this circumstance on her power of contracting debts; but it will be observed that the question is, "Had the Defendant the power to contract debts?" and not the more limited question, whether she had power by contract to charge her land with debts.

It is further to be observed that, though the third issue appears to assume that the Defendant's estates were under the charge of the Court of Wards, yet the fact of their being, or of their having been under charge, was the only fact or point treated as open to dispute or question in the Courts below. It was assumed by both the Courts that, if her estates were in charge the case was at an end—the Plaintiff could have no relief of any kind; and both Courts being of opinion, that there was sufficient proof of the estates having been in the custody of the Court of Wards, from a time anterior to the date of the Bond to a time subsequent to the institution of the suit, the Plaintiff's suit was dismissed with costs, and there was no examination

of, or observations upon the evidence, which the Plaintiff had tendered of the loan of the money to Rutta Koer, and the execution by her of the Bond.

Under these circumstances, the principal questions to be considered on this appeal are, whether the estate and property of Rutta Koer were in fact under the charge of the Court of Wards when the Bond is alleged to have been executed, and if so, whether such custody or charge was of a character which made her what is called, under the Regulation to be presently referred to, a disqualified female, and incapacitated her to contract debt in any way.

[476] These questions turn mainly on Regulation LII. of 1803. That Regulation, after reciting that it is essential to the interest and happiness of Minors, and of such Females as shall not be deemed competent to the management of their own estates, and of Idiots, Lunatics, and other proprietors of land paying revenue to Government, who are or may be rendered incapable of managing their lands by natural defects or infirmities, of whatever nature, that the lands of persons coming within the above descriptions, should be managed for the benefit of the Proprietors, by persons appointed to the trust by Government, and that a Court of Wards should be instituted, with powers to superintend the conduct and inspect the accounts of the Managers of the estates of such persons, it was enacted by section 5, that the superintendence of the Court of Wards should extend to the persons and estates of (amongst other persons) all proprietors of entire estates paying revenue immediately to Government, who were or might be Females not deemed by the Governor-General in Council competent to the management of their own estates. Section 6 enacts, that the lands of disqualified landholders should not be liable to be sold for arrears of public revenue on account of the periods during which such lands might be under the charge of the Court of Wards. Section 8, that the Collectors of the revenue should ascertain and report to the Board of Revenue what proprietors were disqualified. Section 9, that if a proprietor of lands were disqualified solely from being a Female, the Court was to take charge of the estate and to report to the Governor-General, with power to the Governor-General to declare her exempt from the Regulation. Section 10, that Managers [477] and Guardians were to be distinct, and Managers to have care of estates, real and personal; and by sections 22 and 23 provision was made for the application of moneys received of Managers, in which there was a provision that any just debts then outstanding against, or thereafter adjudged against the estates of disqualified landholders, must necessarily be satisfied; but that the circumstances of all such debts were to be reported to the Collector, and by him to the Court of Wards, previous to payment by the Manager; and by section 26, Females, though disqualified, were not to be subjected to Guardians, but might themselves receive and disburse their own maintenance.

There is no pretence for saying that, but for the application of this Regulation to her, Rutta Koer was incapable of contracting the debt in question. The Regulation itself does not in terms declare the incapacity, or define the circumstances in which it is to arise. The provisions of such a law should be strictly pursued, in order to effect the disqualification of any particular person; and no one should lose her natural liberty of contracting debts unless the relation of Ward and Guardian between her and the Court of Wards be regularly and completely constituted.

The examination, however, of the evidence in the Court below appears to have been addressed solely to the object of discerning whether the Talook was, in fact, under charge; and it seems to have been assumed, that if in charge, Rutta Koer was a disqualified person. But their Lordships are of opinion, that this does not necessarily follow; the Court of Wards may have obtained the custody originally under circumstances not affecting her personally, and may have continued in charge after the estate [478] devolved upon her under circumstances which do not necessarily make her a disqualified Female under Regulation LII. of 1803. It becomes, therefore, material to ascertain, not merely, whether the estate was under charge, but also what were the circumstances under which it was first brought under charge, and afterwards so continued.

The material facts are these. The landed property in question of Rutta Koer (usually called throughout these proceedings the Talooka Chukkathul, in the Collectorate of Allygurh) had previously belonged to her Sister, Maha Koer. She was

declared a disqualified Female, under Regulation LII. of 1803, as far back as the year 1811, and the Talook was then placed under the Court of Wards, and a Manager was appointed under that Regulation; but in 1838, in lieu of continuing it in the hands of a Manager, the Talook was let to Farmers, who paid their rents to the Collector, who exercises the powers of the Court of Wards, and throughout the whole period from 1811 until Maha Koer's death (with the exception of a few years arising from circumstances not material to the question) the Malikana, or maintenance, was paid by the Collector to Maha Koer.

Maha Koer died in 1853. On her death adverse claims were set up to the property; one by Aram Singh, claiming as heir of her deceased husband; another by one Ali Buksh, claiming under a Deed from her; and the third by Rutta Koer claiming as her Sister and heir. The claim of Ali Buksh appears to have been first disposed of, and was found to be groundless. As between Aram Singh and Rutta Koer the Government, through the Sudder Board of Revenue, appears to have decided in favour of [479] Rutta Koer, whose name was recorded as Proprietor of the Talook in place of the deceased Maha Koer; but she was not put into possession. About this time, and apparently in consequence of the decision of the Sudder Board, and certainly in or before the year 1855, a civil suit was instituted by Aram Singh in the Court of the Principal Sudder Ameen of Allygurh, to enforce his claim against Rutta Koer, and to this suit he made the Government a party, on the ground of the estate being under the control of the Court of Wards. Thereupon the official correspondence of the Collector took place. This mentions that in August, 1855, a petition was filed by Rutta Koer in the Court of the Allygurh Collector, stating "that she was not subject to the Court of Wards; that Government had been wrongly made Defendant; also that she had succeeded by inheritance to the property of her deceased Sister, Mussumat Maha Koer, who was subject to the Court of Wards; that the functions of the Court had ceased with the Ward's demise; and that the Board, in paragraph 16 of their Orders, No. 83, dated the 6th of February, 1855, had ruled that, in the absence of any other rightful Claimant, the Malguzary management must depend upon her discretion;" and from this correspondence it appears, that the final determination of the Government was to put in an answer to the effect, that Government was not interested in the suit, that the question of right should be settled between the contending parties themselves, and that Government should be exempted from all costs. This was done, the litigation went on between Aram Singh and Rutta Koer; a decree was made in favour of the latter by the Principal Sudder Ameen, the date whereof does not appear in the proceedings; there was an appeal [480] from that to the Sudder Court, where the suit finally ended in a compromise some time in or before the year 1862. If the evidence stopped here, it would be impossible to hold that the continued possession of the Court of Wards was more than that of a Stake-holder; since if it really held the Talook as a Court of Wards on behalf of Rutta Koer, treating her as a disqualified Proprietor, it was clearly the duty of the Collector representing the Court of Wards actively to defend her title to the estate. It appears, however, that the Revenue authorities have not acted consistently on their then view of the case; for in February, 1856, Ratta Koer being recorded as Proprietor, a mutation of names as to several villages in the Talook was applied for on behalf of certain persons, including the present Appellant, who claimed under assignments from her; and this application having been disallowed by the Collector, because a civil suit was pending, and it was difficult to say who was in possession, the Sudder Board confirming, on appeal, the Collector's decision, declared that Chukkathul never had been emancipated from the control of the Court of Wards, and had never been given into the possession of Rutta Koer.

In 1856 the Farmers set up claims to a settlement adverse to the proprietary title of Rutta Koer in Chukkathul. Their claim was disallowed, and thereupon a correspondence between the Government authorities took place, in the course of which the Secretary to Government, in a Letter, dated the 21st of August, 1856, stated that the Lieutenant-Governor agreed in opinion with the Sudder Board that no claim adverse to the proprietary title of Thakooranee Rutta Koer existed, nor had any sprung up during the [481] administration of the Court of Wards, and that he authorized the acceptance of proprietary engagements from the Thakooranee,

with certain terms of settlement in favour of the Theekadars, or Farmers. And, it appears from the judgment of the Sudder Dewanny Adawlut, though the document itself is not set forth in the Record, that a Proclamation, dated the 1st of October, 1856, issued from the Collector's Office, in conformity to the orders of Government and the Board, giving full proprietary possession to Rutta Koer, who had filed the usual Durkhast, or petition, asking to engage for the payment of revenue, and that the Putwarry of the Talook acknowledged receipt of the Proclamation and the possession of Rutta Koer on the 13th of October, 1856. This arrangement, however, was not finally carried out. It appears from the Letter of the Collector of the 18th of September, 1858, that before the contemplated settlement was completed the Mutiny broke out. He says: "Then happened the Mutiny, with the Farmers still in possession of the Villages, and the Government orders for giving possession to Rutta Koer not carried out." From the same document it appears that, in October, 1857, when order was restored to the District, he, as Collector, resumed charge of the Talook, of which, on the 2nd of March, 1858, he appointed a Manager; and, there is further proof that, between the last-mentioned date and April, 1862, the Talook was under the management of the Court of Wards. But in or before the month of August, 1862, the Court of Wards, for some unexplained reason, gave up the possession and management of the property, as appears from the Perwannah of the Collector filed in this suit, which is referred [482] to by the Principal Sudder Ameen, in his proceeding fixing the issues.

Their Lordships are of opinion, that the Courts below were warranted in concluding from this evidence that, with the exception perhaps of the period during which all order and government may have been suspended in this District by the Mutiny, the Court of Wards was continuously in the actual possession of this Talook from the year 1811 to August, 1862. They do not, however, think that by reason of that possession, which began in the time of the Maha Koer, Rutta Koer was, when this Bond is alleged to have been executed, incapable of binding herself by contract. They have already observed that, in order to effect such a disqualification, the Regulations must be strictly pursued. Under this Regulation the Collector is to report a female Proprietor as disqualified to the Board of Revenue, and the Board of Revenue, in their capacity of a Court of Wards, are to report that they have taken the estate under their charge, to the Governor-General in Council, so as to enable him to exercise his discretion of exempting her from the operation of the Regulation. Nor are these mere forms; they are necessary preliminaries to the disqualification of a female, so as to invalidate an alienation even of the property under charge of the Court of Wards by her. This was expressly decided in the case of *Jan Khatoon v. Khwaja Ali Mullah* [5 Ben. Sud. Dew. Ad. Rep., 240]. That case arose in Lower Bengal, and under Regulation X. of 1793. But Regulation LII. of 1803 is little, if anything, more than an extension of the earlier Regulation to the North-Western Provinces. The provisions of the two Regulations upon the point in question are absolutely identical. [483] Again, the present case is far stronger than that of *Jan Khatoon v. Khwaja Ali Mullah* [5 Ben. Sud. Dew. Ad. Rep. 240]. The Bond here impeached does not, like that which was then in question, affect the land. It is a simple money obligation. And the evidence in this case not only fails to show that the necessary reports of the Collector and of the Board of Revenue were made; it also, though not uniformly consistent, goes far to negative any intention on the part of the Revenue authorities to treat Rutta Koer as a disqualified Proprietor, or a person incompetent to manage her affairs. It shows, that when her title was attacked in 1855, they declined to act as a Court of Wards in its defence, but left her to sue or be sued, as a person *sui juris*, on her own responsibility, and at her own costs. It further shows that in 1856, and in the very month in which she is alleged to have executed the Bond, they had taken all the necessary steps towards putting her into the full possession and enjoyment of the Talook, as a Proprietor competent to its management, on her entering into proper engagements for payment of the Government revenue; and that the completion of that arrangement was only prevented by the accident of the Mutiny. The fact, if fact it be, that for some time in and after the year 1858, the property was regularly managed by the Court of Wards, can have no bearing on the question of her capacity to bind herself by contract in 1856.

The decisions of the Principal Sudder Ameen of Meerut, and of the Sudder Court of Agra, nevertheless rested exclusively on the ground, that Rutta Koer had no capacity to contract debts, because the Talook was in the custody of the Court of Wards. The Sudder Court expressed itself thus: "Holding [484] the opinion, that the superintendence of the Court of Wards did not cease until the year 1862, and hence that Rutta Koer was not competent to incur any debt, or make any alienation of her property, or that she is in any way answerable for the claims, there is no necessity for our inquiring into the second issue."

The question, whether any formal report was ever made of Rutta Koer being a disqualified female was left wholly unnoticed.

The attention of the Sudder Court was called to the unsatisfactory nature of the decision in this respect on an application by the present Appellant for a review of the judgment, when he stated, as one of the grounds of his application, that "no formal Order was passed placing Rutta Koer under the charge of the Court of Wards. Hence, though the property to which she succeeded may have been under the charge of the Court of Wards, yet Rutta Koer in person was a free agent, and should be held responsible for her acts." And the Sudder Court, in refusing leave to review, gave the following, among other reasons, for so doing:—"Even allowing, for the sake of argument, that no formal Order was given during the years 1855, 1856, and 1857, placing the person of Mussumat Rutta Koer under the charge of the Court of Wards, yet, as it is admitted by the Counsel for the Plaintiff, that the property to which she succeeded was under the Court of Wards during 1855, and a part of 1856, we cannot allow that such omission, if omission there be, in any way affects the case, for to all intents and purposes Mussumat Rutta Koer was under the charge of the Court of Wards. We are unable to dissociate the person of Mussumat Rutta Koer from the property [485] to which she succeeded. We think that she, in person, and her property were under the charge of the Court of Wards, and that she was not free to contract debts, and to hypothecate her property for the liquidation of such debts. Regulation LII. of 1803 certainly does provide for the liquidation of the just debts of disqualified Landholders,—'just debts now outstanding against, or hereafter adjudged against the estates of disqualified landholders;' but it does not permit a Ward to contract debts without the sanction of the Court of Wards. It would be strange indeed if the law allowed the Ward to contract debts, to alienate and hypothecate property under charge of the Court of Wards, when it distinctly declares that the Manager in charge shall not dispose of any portion of the property confided to his care without the consent of the Court of Wards."

For the reasons already given, their Lordships cannot agree with this conclusion. They are of opinion, that the finding of the Courts below, on the only issue which they have really tried, is wrong.

They have, however, felt some doubt as to the Order which it will be their duty to recommend Her Majesty to make on this appeal. They have already intimated that the appeal must be dismissed against all the Respondents except Rutta Koer; and they have felt some doubt whether, inasmuch as the suit was wholly misconceived, the proper course was not to dismiss this appeal altogether, without prejudice to the right of the Appellant to bring a new suit against Rutta Koer upon this Bond, treating it as a mere money Bond. Considering, however, that such a suit would probably be met by a plea of the Act of Limitations; that in the circumstances of this case [486] such a defence would be inequitable; and that, the Respondent not having appeared, their Lordships are not in a condition to put her on terms as to her defence to a fresh suit; they have come to the conclusion that the fairer course is to do what the Judge of the Court of First Instance might, under the Code of Procedure, have done at an earlier stage of the course,—namely, allow the Appellant to amend his plaint so as to make it a plaint against Rutta Koer alone for the recovery of money due on a Bond. Her liability on the Bond may thus be tried on the issues already settled. Upon those issues, and the evidence taken on them, their Lordships will intimate no opinion. The nature of the transactions, and the status of the Obligor, make it peculiarly desirable that the appellate Court should have the benefit of the judgment of the Courts below on those issues.

The Order, therefore, which their Lordships will humbly recommend to her Majesty is, that the appeal be dismissed against all the Respondents except Rutta

Koer : that the decrees of the Courts below be reversed, except so far as they dismiss the suit against those Respondents with costs ; that it be declared that Rutta Koer was not, at the date of the alleged Bond, incapable of binding herself by contract by reason of the Talook Chukkathul being still in the custody of, or under the charge of the Court of Wards ; that the cause be remanded to the High Court of Judicature for the North-Western Provinces, with directions to allow the Appellant to amend his plaint so as to make it a plaint against Rutta Koer alone for the recovery of the money alleged to be due to him on the Bond, and to take all necessary steps for the trial of the said suit upon the issues already [487] settled, or to be hereafter settled ; with liberty to the Respondent, Rutta Koer, to make any defence to the suit which is not inconsistent with the declaration aforesaid. Their Lordships will give no costs on this appeal.

[Distinguished, *Rai Balkrishna v. Mussumat Masuma Bibi*, 1882, L.R. 9 Ind. App. 182.]

BHUGWANDEEN DOOBEY,—Appellant : MYNA BAE.—Respondent * [Dec. 2, 3, and 6, 1867].

On appeal from the Sudder Dewanny Adaulut, North-Western Provinces, Agra.

By the Hindoo law prevailing in Benares (the Western School) no part of the Husband's estate, moveable, or immoveable, forms portion of his Widow's Stridhun, and she has no power to alienate the estate inherited from her Husband, to the prejudice of his heirs, which, at her death, devolves on them. The estate which two Hindoo Widows take in their Husband's property is a joint estate.

Where a childless Hindoo dies, leaving two Widows surviving, they succeed by inheritance to their Husband's property as one estate in coparcenary, with a right of survivorship : and there can be no alienation or testamentary gift by one Widow without the concurrence of the other.

One of two Widows died, having made a testamentary disposition whereby she gave the moiety of her Husband's estate, which she had been put in possession of, to her Father and Brother. In a suit brought by the surviving Widow to recover the moiety—Held, that the surviving Widow was entitled to the share of the deceased Widow.

A summary Order made by a Judge under Act, No. XIX. of 1841, not in a suit, but on an application for immediate possession, in consequence of differences having arisen in the family, giving possession in equal moieties to two Widows, although acquiesced in by the Widows, by each taking possession of a moiety, does not amount to a partition of the estate.

Upon an application for review of judgment before the Sudder Court, the written grounds for review impugned the correctness of the decision of the Court below, on grounds that related solely to the immovable estate, and not to the movable estate, also in question in the suit—Held, that notwithstanding the terms of the 378th section of the Code of Procedure (Act, No. VIII. of 1859) it was competent to the Judges, by whom the Order allowing the application for review was made, to enlarge those grounds on an oral application, by including moveables, if satisfied that there was a proper case on the merits for so doing.

Semle :—If the Court below was wrong in its procedure, such miscarriage

* Present : Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, the Right Hon. Sir Richard Torin Kindersley, and the Lord Justice Rolt. Assessor.—The Right Hon. Sir Lawrence Peel.

will not prevent the Judicial Committee from deciding the question, with respect to the power of disposition of the moveables.

In this appeal, the suit was brought in the Court of the Principal Sudder Ameen of Benares, by the Respondent, as the sole surviving Widow and heiress-at-law of Rae Deenanath, a Hindoo inhabitant of Benares, [488] who had died childless, against the Appellant personally, and as guardian of his Son, Kaloo Ram, a Minor, to recover possession of a moiety of the self-acquired moveable and immoveable estate of Rae Deenanath, which had been in possession of Doola Bae, then deceased, the other Widow and co-heiress of Rae Deenanath; and to set aside a testamentary disposition of Doola Bae, whereby she gave the moiety of the estate she was in possession of to the Appellant, Bhugwandeem Doobey, her Father, and Kaloo Ram, her Brother; and also to render inoperative an Order made in a Miscellaneous suit, under Act, No. XIX. of 1841, which upheld the possession of the Appellant in the moiety given by the Will of Doola Bae.

The question raised by the suit was, whether by the Western School of Hindoo Law, prevalent in Benares, where the estate was situate, where there were two Widows, co-heiresses-at-law and representatives of a deceased Hindoo resident of Benares, each of whom had on his death succeeded separately [489] and severally under an Order made by a Judge in a summary suit, pursuant to the Act, No. XIX. of 1841, to moieties of his whole moveable and immoveable estate, either of them could in her lifetime alienate or give by way of testamentary disposition her moiety, or any portion of the moveable or immoveable property included therein, to her blood relations, to the exclusion of the surviving Widow, or the heirs of their deceased Husband who might be alive at the time of surviving Widow's decease.

The decree of the Principal Sudder Ameen (Mr. Robert H. Smith) determined this point in favour of the Appellant, on the ground, that there had been a division declared and effected by a competent Court, namely, the Judge of Benares, by his summary Order for possession, under Act, No. XIX. of 1841, and that such division having been acquiesced in by the Respondent, the estate of Rae Deenanath thereby became a divided and separate estate, to a moiety of which Doola Bae succeeded exclusively as her own inheritance, and which she was competent to leave to whomsoever she pleased; and that the disposition so made by her to her Father and Brother was valid.

The Sudder Dewanny Adawlut at Agra, consisting of Messrs. Ross, Edwards, and Roberts, also held, that the estate was so divided, but as the Hindoo Law prevailing in Benares did not in this respect differ from that prevalent in the Province of Bengal, that Doola Bae was incompetent to make any testamentary disposition of the property which had been allotted to her under the summary Order to the prejudice of the Respondent, who was her copartner in respect thereof until such copartnership had been dissolved. Hence this appeal.

[490] The facts and issues raised by the suit are fully stated in the judgment.

The appeal was argued by Mr. Kay, Q.C., and Mr. J. Bell, for the Appellant; and Sir R. Palmer, Q.C., and Mr. Leith, for the Respondent.

The following authorities were cited:—

Upon the question, whether by the Western School of Hindoo Law, current in Benares, a Hindoo Widow was competent to dispose of her husband's self-acquired estate, moveable or immoveable, which she, as a Hindoo Widow, had inherited from her husband, by testamentary disposition, or deed of gift, to the prejudice of his heirs, *Mussumat Thakoor Deyhee v. Rai Baluk Ram* (ante [11 Moo. Ind. App.], 139); *Keerut Sing v. Koolooohul Sing* (2 Moore's Ind. App. Cases, 331); *Katama Natchier v. The Rajah of Shiragumgah* (9 Moore's Ind. App. Cases, 543); *Cossinant Bysack v. Hurroosondry Doss* (2 Morley's Dig. 204-5, 214); Morley's Dig., N.S., tit. "Hindu Widow," p. 180, Note. Colb. Dig., Vol. III. pp. 458, 464-8, 575; The Vivada Chintamani, pp. 256, 266 (Trans. by Prossorno Coomarr Tagore); W. H. Macnaghten's "Hindu Law," Vol. I. pp. 19, 48, 50; *Ib.*, Vol. II. p. 46; The Madras Jurist, 31st of March, 1866, p. 128; 1 Strange's "Hindu Law," pp. 247, 268 [2nd Edit.]; The Mitacshara, ch. II. sec. xi. cl. 2, and cls. 11 to 25, were cited.

As to the estate two Widows take, whether as tenants in common or in coparcenary, W. H. Macnaghten's "Hindu Law," Vol. I. p. 38, was cited.

And, whether the summary Order of the Judge, under Act, No. XIX. of 1841, and the acquiescence [491] of the Widows and possession by them of the moieties operated as an estoppel and a bar to the Plaintiff's claim, *Meer Nujeeb Ullah v. Mussumat Kuseema* (1 Ben. Sud. Dew. Ad. Rep., 10); *Raulins v. Powell* (1 P. Will., 297); Goodeve "On Evidence," p. 325, were cited.

Upon the construction of the 378th section of the Act, No. VIII. of 1859, and the power of Court on an oral application to amend the written grounds of appeal, Broughton's Practice of the High Court, Calcutta, p. 28, was cited; and that the Court would not make a decree upon a variance of plea and proof, *Narainee Dossee v. Nurroohury Mohonto* (1 Marshal's App. Cases, Ben., 70); Morley's Dig., N.S., tit. "Practice," p. 312, were relied on.

At the conclusion of the arguments the case stood over for consideration.

Judgment was now delivered by

The Right Hon. Sir James W. Colville (March 14, 1868).—The following are the undisputed facts upon which this appeal arises:—

Rae Deenanath, a Hindoo Banker, of great wealth, carrying on business at Benares, Hyderabad, and other places, died at Benares on the 7th of June, 1855, childless. He was separate in estate from his brethren, if he had any; his wealth is said to have been self-acquired; and consequently his co-heiresses, according to the Hindoo law of the Benares school, were his two Widows, viz. the Respondent and Doola Bae, since deceased. Immediately after his death, however, a document, purporting to be a Will executed by him in favour of one Hunwunt Pershad, to whom, jointly with a person named Birhul Pershad, it gave the [492] management of the property, was propounded. The title of Hunwunt Pershad, claiming under this alleged Will, or as the adopted son of Rae Deenanath, has since been litigated in the Indian Courts, which have uniformly pronounced against it. An appeal to Her Majesty in Council against their decision is pending (*Mussumat Lutchmee v. Bhugwandeem and Others*), but it has not yet been set down for argument, in consequence of the death of one of the parties; and for the purposes of this appeal it must be assumed that Rae Deenanath died childless and intestate, and that the claim of Hunwunt Pershad was unfounded. Nor would it be necessary to refer to that claim but for the arguments which the Appellant's Counsel have founded on the partition between the Widows, which was in some measure caused by it, and upon the alleged collusion of the Respondent with the Claimant.

The first consequence of the claim was that a summary suit, under Act, No. XIX. of 1841, to determine the right to the immediate possession of the property, was instituted in the name of Doola Bae, who was then a Minor, by her Uncle and Guardian, in which a Curator was appointed under that Act. When this suit came to a hearing the Judge pronounced against the Will, and directed that the whole estate of Rae Deenanath should be equally divided between the Widows, and that the Curator should carry out that order without delay. The property was thereupon divided; each Widow was put in possession of her share; and Doola Bae continued in the separate possession and enjoyment of her share up to the time of her death.

She died on the 10th of November, 1857, having on the 21st of August, 1857, made a Will, which was [493] registered on the same day, whereby she disposed of her share of the property inherited from her Husband in favour of her Father (the Appellant), and her infant Brother, Kaloo Ram, who is also represented by the Appellant on this appeal.

Some steps seem to have been taken by the Respondent, and also by Hunwunt Pershad, to resist the registration of this Will in the lifetime of Doola Bae; and upon her death the Respondent applied for the attachment of the property in dispute, being that taken by Doola Bae under the partition, as specified in the list before referred to; and for the appointment of a Curator under Act, No. XIX. of 1841. Her application having been dismissed by the Judge, who on that summary proceeding upheld Doola Bae's Will, she commenced the regular suit out of which this appeal has arisen, on the 21st of December, 1857, in the Court of the Principal Sudder Ameen of Benares.

The issues settled in the suit were:—

First, whether there was any informality in the institution of the suit.

Second, whether the Plaintiff (the Respondent) was legally competent to institute it.

Third, whether Doola Bae was a Minor or not at the date of the alleged execution of the Will.

Fourth, whether the Will was fraudulent or a *bona fide* instrument.

Fifth, if a person die leaving two Widows, and one of the Widows subsequently dies leaving a Will, who is entitled to succeed according to the Shasters, the surviving Widow or the Legatee of the Will (supposing the Husband's estate to have been divided between the Widows, and also supposing no such division to have been made)? And is a Widow [494] competent to make a Will in favour of her Brother and Father under the Shasters?

The third and fourth issues may be dismissed from consideration. Both have been found by the Courts below in favour of the Appellant, and the correctness of this finding is not now impeached.

Upon the other issues the Principal Sudder Ameen found—first, that the Respondent could not maintain her suit, because it was brought on grounds wholly inconsistent and irreconcilable with the averments made by her in the suit, under Act, No. XIX. of 1841, wherein she had supported the claim of Hunwunt Pershad; secondly, that by reason of the partition, Doola Bae was fully competent to leave her property to whomsoever she pleased; and accordingly he dismissed the suit with costs.

There was an appeal to the Sudder Court at Agra. The first judgment of that Court was adverse to the finding of the Principal Sudder Ameen on the first and second issues, and decided that the Respondent, notwithstanding her former acts and averments, was competent to maintain the suit. But holding, that Doola Bae was competent to dispose of the inheritance derived from her Husband, when it had been distinct and divided, and had effectually done so, it dismissed the appeal. It treated her power to dispose of the moveable property as certain; her power to dispose of the immoveable property as more open to question.

The Respondent applied for a review of this judgment. The nature of her application and the proceedings upon it will have to be more particularly considered hereafter. The result of it was, that the case was re-heard before a full Bench, when the Court decided that, according to the law of the Benares [495] school, Doola Bae was incompetent to dispose of either the moveable or immoveable property which she had inherited from her Husband, and made a decree in favour of the Respondent. The present appeal is against that decree.

From the foregoing statement it is obvious, that the principal question between the parties is the broad and general one, whether, according to the law of the Benares school, a Hindoo Widow is competent to dispose, by Will or deed of gift, of either moveable or immoveable property inherited from her Husband, to the prejudice of his next heirs.

The learned Counsel for the Appellant have, however, contested the right of the Respondent to have the present case decided on this issue upon various grounds. They contend, first, that, if not precluded from maintaining the suit by reason of her acts and averments in former proceedings, as ruled by the Principal Sudder Ameen, she has so shaped her case on the pleadings, that she cannot in this suit insist on her rights, whatever they may be, as next heir of her Husband in succession to Doola Bae; secondly, that it was not competent to the Sudder Court, having regard to the application for review and the proceedings thereon, to review its first decision, except as to the immoveable property.

Two other points were taken at the Bar, which it will be convenient to consider after, rather than before the determination of the principal and general question of Hindoo Law. One was raised by Mr. Leith on behalf of the Respondent, and was to the effect that, as one of two Hindoo Widows taking as coheirs to their Husband, she is in a more favourable position than that of a person claiming as next heir [496] of the Husband in succession to a single Widow deceased.

The other, which was taken by the other side, is what was the effect of the partition, either by way of enlarging the power of Doola Bae to dispose of the property, or affecting the right of the Respondent to question her disposition. Their Lordships will consider all these questions in their order.

At the close of the argument for the Appellant they intimated, that in their judgment the Respondent was not precluded, either by her acts or averments, or by her form of pleading in this suit, from insisting on her rights as heir of her Husband against the claims of Doola Bae. Their Lordships agree generally in that part of the first judgment of the Sudder Court, which ruled that the Respondent, because she originally acquiesced in the title set up by Hunwunt Pershad, had not lost any rights which accrued to her as one of the coheirs of her Husband, when that claim was decided to be untenable. Nor do they think, that her alleged alienation of her share can be urged against her by the Appellant as a bar to the present suit. It may have been an improper act; it may be one which Doola Bae, had she been the survivor of the two Widows, could have questioned, or which the next heirs of Rae Deenanath may yet question; but the improper alienation of part of her Husband's estate cannot affect the Respondent's right to recover other parts of it from those who, if her view of the law is correct, have no title to it.

And upon the argument founded on the pleadings their Lordships have to observe, that the plaint does not inaccurately state the Respondent's claim to the right to succeed, on the death of Doola Bae, [497] to that property which the latter took by inheritance from her Husband. The replication and the petition of appeal from the decree of the Court of First Instance are no doubt more open to the objection taken. In order to meet the case of quasi-estoppel set up, they attempt to draw a distinction between the claim to the original share which the Respondent took on her Husband's death, and her claim to that to which she became entitled on Doola Bae's death; and make some confusion as to the character of her heirship. But this mispleading has in no degree prevented the settlement of proper issues, or prejudiced the fair trial of the real question of right between the parties; and that being the case, it would be contrary to the practice of their Lordships to give effect to nice and critical objections founded on the inaccuracy of an Indian pleading.

The next question is, whether the decree now under appeal ought to be reversed, so far as it affects the moveable property, merely on the ground that it was not competent to the Sudder Court to review its prior decree, with respect to that portion of the property in question in the suit.

Their Lordships are not satisfied, that the proceedings on review were not within the powers of the Sudder Court. Two objections have been taken to them—first, that the Respondent never petitioned for a review of judgment, except as to the immoveable property; next, that whatever was the scope of her petition, the Order of Mr. Gubbins upon it, must be taken to have conclusively confined the review to the immoveable property.

Upon the first point their Lordships think, that the application for review must, on a fair construction of [498] it, be taken to embrace the question as to the moveable as well as that relating to the immoveable property. The first plea seems to be confined to the latter; but the second plea is more general. It insists that the opinion of the Calcutta Pundit ought to be accepted as correct. That opinion made (as he himself stated in his second opinion) no distinction between moveable and immoveable property, but denied the right of the Widow to dispose of either, to the prejudice of her Husband's heirs.

Again, as regards the acts of the Court: the article of the Code of Procedure which is supposed to have tied the hands of the Judges is the 378th. It is clear, however, that the final Order contemplated by that section was the Order which, in the ordinary course, would have been made by Messrs. Ross and Pearson on the 15th of January, 1863. The proceedings of Mr. Gubbins was merely his fiat for the issue of that notice to the opposite party, which is required by the proviso of that section.

It may be admitted, that Mr. Gubbins understood the application to be limited to the immoveable property; that he so limited the notice: and that when the parties were together in presence before Messrs. Ross and Pearson, the written grounds for review impugned the correctness of the decision, so far as it related to the real property only. But the question still remains, whether it was not competent to the Judges, by whom the Order allowing or rejecting the application for review was to be made, to enlarge those grounds on the oral application of the party, if satisfied that there was a proper case on the merits for so doing. There

seems to be nothing in the Code of Procedure which expressly prohibits them from so [499] doing. And their Lordships are of opinion, that Messrs. Ross and Pearson, though they might have made a final Order, granting or rejecting the application *in toto*, or in part, were not incompetent to make the qualified Order which they did make, leaving in the Court which was to review the decision, a discretion as to the extent to which the review should be carried.

They are also of opinion that, even if the Court below had been wrong in its procedure, its miscarriage ought not to prevent this Committee from deciding the question touching the disposition of the moveable estate on its merits. There has been no surprise. The question was fully argued before the full Bench of the Sudder Court on ample notice to both parties. It has been fully argued here. The objection, therefore, is purely technical, and the result of yielding to it might be to place the Respondent at a very unfair disadvantage. She had a right to appeal to Her Majesty against the whole or any part of the first decree of the Sudder Court. She would not have lost that right of appeal even if she had limited her application for a review to the immoveable property. She was relieved from the necessity of appealing by obtaining a final decree in her favour as to the whole of the property, whether moveable or immoveable. If this objection were to prevail, there could be no final determination of the question as to the former or its merits; unless, indeed, for the sake of doing substantial justice between the parties, their Lordships were now to allow her to appeal against that portion of the first decree of the Sudder Court. They are of opinion, that no such formality is necessary; and [500] that it is competent to the Respondent, who has been brought here on appeal, to maintain, if she can, the decree which is under appeal, by showing that it is right upon the merits.

Their Lordships being, therefore, of opinion, that there is no obstacle to the determination on this appeal, and between these parties, of the general question involved in the judgment under appeal, will now address themselves to the consideration of that question.

The parties have brought together a large amount of conflicting authority concerning it, consisting partly of the Bywustas, or opinions of Pundits, partly of decided cases, and partly of passages from ancient or modern authorities, which are accepted as authoritative in the Courts of India.

It is impossible to reconcile the various opinions of the Pundits which are to be found in the Record. They are divisible into three classes—namely, first, that of opinions taken in other suits; secondly, that of opinions taken by the parties themselves for the purposes of this suit; and thirdly, that of opinions given in answer to the questions put by the Sudder Court in this suit.

Of the first class are No. 10 of the Record—probably No. 11 of the Record—No. 33 and No. 28 of the Record. Three of these are not very material. As far as they go, the first two support the contention of the Respondent; the third seems to be good law, but it has really no bearing on the question now under consideration. The point was, whether on the death of the Widow, the Daughter or a Nephew should succeed to property derived from the Husband; and inasmuch as the Widow could not have taken [501] the property if it had not been divided, it followed that it must continue to descend in the course of succession to separate estate; and, therefore, to a Daughter before a Nephew. The fourth is strong against the right of a Widow to alienate immoveable property inherited from her Husband; and the case in which the opinion was taken was decided in accordance with it. But the opinion being apparently that of the same Calcutta Pundit who was consulted in this case, it is material only as showing that he has in other cases rejected the doctrine that a Widow has power to dispose of land inherited from her Husband.

The second class consists of No. 12 of the Record, being the opinion of thirty-seven Benares Pundits filed by the Respondent; and of No. 14 of the Record, being the opinion of twenty-one Pundits of the same place, filed by the Appellant. The first ruled that the surviving Widow was entitled to succeed to the share of the deceased Widow; and that that right could not be defeated by the disposition of the deceased Widow. The other goes the length of contesting the right of one Widow to succeed to another Widow of her deceased Husband in any case; it affirms the proposition that the property being once vested in the Widows, each had an absolute

interest in her share, and might dispose of it as she pleased. It held also, that in the case of intestacy, the Father and Brother of the deceased Widow would have been the persons entitled to inherit her share.

The third class consists of No. 4 of the Record, being the opinion of Ram Nath, one of the Pundits at the Sudder Court of Agra; of No. 7 of the [502] Record, being the opinion of four Benares Pundits, taken by the Judge of that place, under Orders from the Sudder Court at Agra; No. 5 of the Record, and No. 3 of the Record being the two opinions of Heerna Nund, the other Pundit at the Sudder Court of Agra; and No. 6 of the Record, and No. 2 of the Record, being the two opinions of the Calcutta Pundit. All these, except the later opinions of Heerna Nund and of the Calcutta Pundit, which were taken on the proceedings in review, were given in answer to the questions put by the Sudder Court before its first judgment.

The questions were prefaced by the following preamble, or statement:—

A dies, leaving two Wives, B and C, who inherit his property, real and personal. B and C make a complete partition of the property, and live separately from each other. C dies, having as blood relations a Brother and an Uncle; and the questions were—

First. Does the property left by C descend by inheritance to the other Widow, B, or to the Brother or Uncle of C?

Second. Would C be competent to bequeath by Will to her blood relatives the share of the property which she inherited from A (so divided), to the prejudice of B, who is still living?

It will be observed that this statement assumes a complete partition by the act or contract of the two Widows, and it substitutes an Uncle for the Father of the deceased Widow. The only variation in the references to the different Pundits was that, from accident or design, that to Heerna Nund was confined to real property.

To these questions the four Benares Pundits [503] answered:—First, that the Brother of C was her foremost heir, and after him her Uncle, and that while these two existed B could not succeed. Second, that any Testamentary disposition by the Widow of the property which she had inherited from her Husband should be held valid, the property having been exclusively her own, and that she was, therefore, at liberty to dispose of it in any way she thought proper.

Three out of the four consulted Pundits, appear to be included amongst the twenty-one, who had previously given the opinion above referred to at the instance of the Appellant, and accordingly the two opinions are, as might be expected, to the same effect; except, perhaps, that the second does not deny so strongly as the first the right of the surviving Widow to succeed to the share of the deceased Widow in any case.

The answer of Ram Nath to the first question was, that C's share would descend by inheritance to B, because C could not be succeeded by her Brother or Uncle during the existence of her Husband's sapinda; and although, in his answer to the second question, he admits the power of C to defeat this right of B by her Will, he rests that power of disposition solely on the partition assumed by the statement. He says expressly, "She could not have done so had the property been jointly held." He makes no distinction between real and personal estate.

The answers of Heerna Nund and the Calcutta Pundit, upon which the ultimate judgment was in great measure grounded, was, of course, in favour of the Respondents on both points. They, too, make no distinction between real and personal property. The first opinion of Heerna Nund was confined to real [504] property; but this, as he explained in his second opinion, was because the reference to him was so confined.

The following, then, is the result of the Bywustas of the Pundits:—If the partition, the effect of which will be afterwards more fully considered, were out of the question, all the Court Pundits would agree in holding, that the Respondent, as the next heir of her Husband, is entitled to take by succession the share of Doola Bae; and that that right cannot be defeated, either as to moveable or immoveable property, by the Will of Doola Bae. Ram Nath, however, holds that, by reason of the partition, Doola Bae acquired the right of disposition. Again, the twenty-one or twenty-two Benares Pundits who are in favour of the Appellant's title are opposed by the twenty-seven Pundits of the same place, who have given their opinion in

favour of the Respondent. And the Bywustas given in other cases are more favourable to the Respondent than they are to the Appellant.

The Benares Pundits who are in favour of the Appellant refer only generally to the Mitakshara, but the particular passages on which they rely are probably the 1st and 11th sections of the second chapter, and especially the second article of the 11th section. Those passages, and the arguments in favour of the Widow's right of disposition which were deduced from them, were lately under the consideration of this Committee in the case of *Mussumat Thakoor Deyhee v. Rai Baluk Ram* (ante [11 Moo. Ind. App.], p. 175). The following is the conclusion to which their Lordships then came:—"The result of the authorities seems to be that, although, according to the law of the Western schools, the Widow may have a power of [505] disposing of moveable property inherited from her Husband, which she has not under the law of Bengal, she is, by the one law, as by the other, restricted from alienating any immoveable property which she has so inherited; and that on her death the immoveable property, and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her Husband." To the authorities then cited and reviewed by their Lordships may be added Sir W. Macnaghten's observations in his work on "*Hindoo Law*," Vol. I. pp. 19 to 21; Cases XIV. and XV. in the second Volume of the same work, pp. 32 and 37; and also some of the cases which will hereafter be mentioned, which, whilst they support the doctrine of the Widow's power to dispose of moveable property, admit that she cannot dispose of immoveable property inherited from her Husband.

It must, then, be taken upon the authorities to be settled law that under the law of Benares a Hindoo Widow has not the power to dispose of immoveable property inherited from her Husband to the prejudice of his next heirs; and the only question open to doubt is, whether she has any such power over moveable property.

It must be admitted that, in favour of this supposed distinction, there appears at first sight to be a considerable body of positive authority. In the case of *Cossinanth Bysack v. Huroosondry Dabee* [2 Morley's Dig. 204, 214], the leading case upon the rights and disabilities of a Hindoo Widow in Bengal, it was at first supposed that the distinction was recognized even by that School. The first decree in that case declared the Widow entitled to an interest for life in the immoveable, and to an absolute interest in the moveable [506] estate of her late Husband. That was altered by the decree made on a Bill of review, which declared her entitled to the real and personal estate of her Husband, to be possessed, used, and enjoyed by her as a Widow of a Hindoo Husband, dying without issue, in the manner prescribed by the Hindoo law. On an appeal from that decree the whole subject was reviewed by Lord Gifford. His judgment (which is reported in the Appendix to Mr. Longueville Clark's Rules and Orders), whilst it establishes that, according to the law of Bengal, there is no distinction between moveable and immoveable property in respect to the Widow's power of disposition over it, seems to proceed on the ground that the Treatises known as the Vivada Chintamani and the Ratnacara are overruled and qualified in this respect by the Daya-Bhaga and Dayatutwa, which give the law to Lower Bengal, and that where the two former Treatises prevail the distinction may exist. This judgment, therefore, affords some ground for the argument that the law of Bengal, which does not recognize the distinction, is an exception from the general Hindoo law. Again, in *Rajunder Narain Rae v. Bijai Gobind Sing* (2 Moore's Ind. App. Cases, 181), decided here in 1839, the right of the Widow to dispose of moveable property inherited from her Husband, and its devolution on her dying intestate, are treated as open questions under the law of the Mithila school.

Of decided cases affirming the distinction, we have that in the High Court of Bengal, which was cited at the Bar from the Indian Jurist of the 31st of March, 1866, p. 128; and which appears to be a case governed by the law of the Mithila school. [507] We have further the four cases cited in the judgment in that case, of which two show that the distinction has been recognized by the Sudder Court of Madras as prevailing in the Presidency of Madras; and two show that it has also been recognized by the High Court of Bombay as prevailing in that Presidency. And, lastly, we have Case VII., at p. 46 of the Second Volume of Sir W. Macnaghten's "*Hindoo Law*," in which the law which ought to have been applied was that of the Benares school.

If it were clear that the law upon the point in question was necessarily the same for all parts of India except those Provinces of Lower Bengal which are governed by the Daya-Bhaga, these cases might afford ground for saying that the doctrine under consideration, however questionable originally, must be taken to be now established by a course of decisions.

Is, however, this uniformity of the law to be presumed?

The Judges, indeed, of the High Court of Calcutta say, in the judgment just referred to, "This case comes from Tirhoot, one of the Districts forming the ancient Province of Mithila, but the law is admittedly the same in this particular both for Mithila and for the Provinces governed by the Mitacshara." Their Lordships, however, are not satisfied that this statement is correct.

The Mitacshara is no doubt accepted as a high authority by all the Schools, even by that of Bengal, when it is not controlled by the Daya-Bhaga, and other Treatises peculiar to that School. But the other four Schools have, like that of Bengal, though in a less marked degree, their particular Treatises [508] and Commentaries which control certain passages of the Mitacshara, and give rise to the differences between those Schools. In proof of this, it is only necessary to refer to the preliminary remarks of Sir William Macnaghten, pp. 21 to 23. From these it would appear that, whilst the Mithila Schools follows implicitly the Vivada Chintamani and the Ratnacara; the South of India the Smriti Chandrika and the Madhavya; and the Presidency of Bombay the Vyavahara Mayukha; these works are by no means held in equal estimation at Benares.

Now, it appears from the judgment of Lord Gifford, that the works which were supposed to go furthest towards establishing the distinction between moveable and immoveable property, which is now under consideration, were the Vivada Chintamani and the Ratnacara. These may well be taken to establish such a distinction, according to the law of Mithila, and yet fail to do so according to the law of Benares. Again, the Mayukha is cited as an authority for the decision of the case, at p. 43 of the second volume of Macnaghten's Hindoo Law. And, in the judgment under appeal, it is expressly stated that that Treatise is not accepted as an authority by the Benares school; and, consequently, that the case in question was not binding on the Court. In like manner the law established by the two decisions at Madras, if it be so established, may depend on Treatises and authorities peculiar to the South of India, and not accepted at Benares. From the reports of these, at p. 117 of the Sudder Decisions for 1849, and at p. 77 of the Sudder Decisions for 1850, it appears that both were decided on the Bywustas of Pundits. In the former [509] case the authorities relied on by the Pundits are not given; but in the latter, mention is made of the Books called Madhaveyen and Suraswativilasa, as well as of the Mitacshara (there called Vijnyaneswara); and it appears, from Sir William Macnaghten's remarks, that the two latter works are of paramount authority in the Territories dependent on the Government of Madras, whilst they are not enumerated amongst the works accepted at Benares.

If this be so, it follows that, even if the above-mentioned cases were correctly decided, they are by no means conclusive on the present question. The decision of the High Court of Calcutta, in so far as it confirmed the title of the Purchaser of the Government promissory notes, might have been rested on the general law relating to the transfer of negotiable paper, and that case, so far as it involved the question now under consideration, and the case in the second volume of Moore's Indian Appeal Cases, were determinable by the law of Mithila; the two cases in the High Court of Bombay, and the cases, No. VII., at p. 46 of the Second Volume of Macnaghten's "Hindoo Law," were decided according to the peculiar law of the Bombay Presidency, including the Mayukha; and those at Madras according to the law of that Presidency. None of them necessarily govern a case to be decided according to the law of Benares.

How, then, does the law stand independently of these decisions?

The startling differences of opinion amongst the Pundits show that the question cannot be taken to be clearly settled by the authorities accepted at Benares.

The text of the Mitacshara, on which, as has already been shown, the Appellant must mainly rely, [510] is the second paragraph of section XI. of Chapter II., which includes "property which she may have acquired by inheritance" in the enumera-

tion of women's peculiar property. These words make no distinction between moveable and immoveable property; yet it is settled, beyond all question, as we have already stated, that the immoveable property which a woman inherits from her Husband cannot be disposed of by her, and does not pass as her stridhun. The legitimate inference from this seems to be, that neither moveable or immoveable property inherited from her Husband forms part of a woman's peculium or stridhun. Sir William H. Macnaghten, indeed, ("Hindoo Law," Vol. I., p. 38), excludes from stridhun all the different kinds of property enumerated in the last clause of the paragraph in question.

On the other hand it may be argued that the text is explicit; that it includes under the head of stridhun all property inherited from the Husband; that from the fact of its inclusion the power of disposition over it is *prima facie* to be inferred; but that the right to alienate immoveable property, whether inherited from the Husband or given by him in his lifetime, having been taken away by positive texts, the distinction in this respect between moveable and immoveable property has arisen.

This argument, however, would fail to show why immoveable property, inherited from a Husband, should not (and all the decided cases show it does not) descend as stridhun; but passes, on the Widow's death, to the next kin of the Husband. The truth seems to be, that the texts which restrict a woman's power of disposition over immoveable property given to her by her Husband in his lifetime, are different [511] from those which both restrict her power over immoveable property inherited from her Husband, and regulate the course of its devolution.

To the former class belong the text of Nareda: "Property given to her by her Husband through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land or houses;" and the text of Katyayana: "What a woman has received as a gift from her Husband she may dispose of at pleasure after his death, if it be moveable; but as long as he lives, let her preserve it with frugality." To the second class belongs the text of Katyayana, on which the judgment under appeal so much proceeds, viz.: "The childless Widow preserving inviolate the bed of her Lord, and strictly obedient to her spiritual Parents, may frugally enjoy the estate or property until she die; after her the legal heirs shall take it." We take these Texts as rendered by Colebrooke, Dig., Vol. III. p. 575 and p. 576.

It is impossible to deny, as will be seen on reference to the Digest, that there has been a considerable conflict of opinion amongst the Commentators concerning the text. The better opinion, however, seems to be, that they relate to different subjects.

Again, the latter text certainly includes both moveable and immoveable property; and it seems to be only by reason of confounding the law as to property given by, with that relating to property inherited from the Husband, that the words "after her the legal heirs shall take it" can be restricted to the immoveable portions of the Husband's estate. The preponderance of authority is certainly in favour of the proposition that, whether the Widow has or has [512] not the power to dispose of inherited moveables, they, as well as the immoveable property, if not disposed of, pass on her death to the next heirs of the Husband.

It is also worth remarking, that the doctrine that property inherited from her Husband forms part of a woman's stridhun receives no countenance from two of the Treatises current in other Schools which are supposed to recognize the Widow's power to dispose of moveables so inherited. Both the Vivada Chintamani and the Mayukha confine stridhun within the definitions of Menu and Katyayana. They exclude property inherited, and the other acquisitions which are comprehended in the last clause of the paragraph in the Mitacshara, but are excluded by Sir W. Macnaghten.

They have distinct chapters for "the separate property of women," and "her right of succession to a husband who leaves no son." The Vivada Chintamani expressly says (p. 262), that the text of Katyayana does not refer to the peculiar property of a woman; and although it cites from Katyayana, "Let a woman on the death of her Husband enjoy her Husband's property at her discretion," and explains "that this refers to property other than immoveable," it also, at page 292, quotes from the Mahabharata, "For women the heritage of their Husbands is pronounced applicable to use. Let not women on any account make waste of their Husband's wealth:" to which it adds, by way of explanation, "Here waste means sale and gift

at their own choice." (See Vivada Chintamani, pp. 256 and 266, and Mayukha, pp. 84 and 78).

Another argument against including the wealth inherited from her Husband in a woman's stridhū, [513] as defined by the 2nd clause of the 11th section of the 2nd chapter of the Mitāshara, may be derived from the clauses 11 to 25 (both inclusive) of the same section. These declare the Husband to be, in default of the issue, the heir to "the whole property as before described, cl. 11." This is intelligible, if the words "property which she may have acquired by inheritance," in the second clause, are considered to be property inherited in her Husband's lifetime, or from some persons other than him.

The reasons for the restrictions which the Hindoo law imposes on the Widow's dominion over her inheritance from her Husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. The more ancient Texts importing the restriction are general. It lies on those who assert that moveable property is not subject to the restriction to establish that exception to the generality of the rule. The diversity of opinion amongst the Benares Pundits is sufficient to show, that the supposed distinction between moveable and immoveable property is anything but well established in that School. And the unanimous judgment of the five Judges of the Sudder Court, supported by the opinion of the Court Pundits has, in this case, ruled that the distinction does not exist. Such a judgment ought not to be lightly overruled.

Their Lordships, therefore, have come to the conclusion that, according to the Law of the Benares School, notwithstanding the ambiguous passage in the Mitāshara, no part of her Husband's estate, [514] whether moveable or immoveable, to which a Hindoo woman succeeds by inheritance, forms part of her stridhū, or particular property; and that the Text of Katyayana, which is general in its terms and of which the authority is undoubted, must be taken to determine—first, that her power of disposition over both is limited to certain purposes; and, secondly, that on her death both pass to the next heir of her Husband. They have already stated the grounds on which they think that the cases decided in India are not necessarily in conflict with those conclusions. It is unnecessary for them to express any opinion touching the correctness of those decisions; except that, in so far as they proceed—as that in the High Court of Calcutta unquestionably does in part proceed—on a different construction of the passage in the Mitāshara, they cannot be supported on that particular ground.

Their Lordships have now to consider, whether the effect of the so-called partition was to give Doola Bae any power of disposition over her share which she would not otherwise have had.

The case is wholly distinguishable from those in which a Widow, having a right to an ascertained share upon a partition with coparceners, who have an absolute interest in their shares, is put by them into possession of that share. In such case it may be a question, whether her interest does not become absolute; though in a case coming from Lower Bengal the contrary was decided by this Committee on an appeal from the Supreme Court of Calcutta. But here the so-called partition was between two Widows, each having the limited interest of a Hindoo Widow in her Husband's estate. It does not appear, [515] that it was made at the suit or on the application of either. It was made by Order of a Judge who, in the particular proceeding (one under Act, No. XIX. of 1841), had no jurisdiction to determine questions of title; and who could only deal with the right to possession. It is difficult to see how such a partition could enlarge either Widow's estate, so as to give her a disposition which she would not otherwise have had against the next heirs of her Husband.

It may be said, that the question here is only, whether the Respondent has not, by her partition, lost her right by survivorship. There is, however, no proof of any contract to make a partition, and, as part of that contract, to release the rights of survivorship, supposing it to have been competent to the Widows to enter into such a contract. There was, as has already been shown, no jurisdiction in the Court to make a complete partition *in invitam*. The transaction seems to have been merely an arrangement for separate possession and enjoyment, leaving the title to each share

unaffected. The acquiescence of the Widows in the Judge's proceedings cannot have done more than bind each not to disturb the other's possession.

If this be so, it follows that the opinions of those Pundits which were given in favour of the Appellant, on the assumption of a complete and regular partition, lose much of their power. It follows also, that the case of the Respondent is stronger than it would have been had she claimed merely as next heir to her Husband in succession to Doola Bae. For the estate of two Widows, who take their Husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes [516] the whole property, to the exclusion even of Daughters of the deceased Widow (2 W. H. Macnaghten's "Hindu Law," p. 38, note 1). They are, therefore, in the strictest sense, coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other. And, accordingly, this case might have been decided in favour of the Respondent on this ground alone.

Upon the whole, then, their Lordships are of opinion, that the decree under appeal is substantially right, and ought to be affirmed. Considering, however, that what has here been decided in respect to Doola Bae's interest is equally applicable to that of the Respondent, and that the latter is said to have assumed a power of disposing of her own share, they think it may be well to insert in the decree a declaration, that the property recovered by the Respondent is to be possessed and enjoyed by her as a Widow of a Hindoo Husband dying without issue, in the manner prescribed by the Hindoo law. Their Lordships will humbly recommend Her Majesty, with that variation, to confirm the final decree of the Sudder Court of Agra. The Appellant must pay the costs of this appeal.

[See *Aumirtolall Bose v. Rajoneekant Mitter*, 1875. L.R. 2 Ind. App. 126.]

[517] NAWAB UMJAD ALLY KHAN.—Appellant; MUSSUMAT MOHUMDEE BEGUM and MUSSUMAT NAWAB BEGUM, AFZUL MUHUL and Others.—Respondents * [Nov. 29, 30, 1867].

On appeal from the Court of the Judicial Commissioner of Oude.

A gift *inter vivos* of Government promissory Notes, negotiable securities, by a Father to his only Son (Mahomedans of the Sheah sect), accompanied by delivery of possession, and a transfer into the Son's name, without any reservation of the dominion over the *corpus* by the Donor, except a stipulation for the right to the accruing interest on the Notes during the Donor's life, to be applied by him to certain religious and charitable purposes, is a valid gift by the Mahomedan law of the Sheah school, and creates a trust on the Donee to pay the interest to the Donor during his life.

Whether the non-assent of the heirs vitiates a Will of a Mahomedan made in favour of one heir to the prejudice of the other heirs. *Quære?*

The law of succession, *ab intestato*, applies only to the assets which constitute the succession.

Special leave to appeal was granted *ex parte*. The Appellant made only two of the parties to the suit Respondents. On application by another party to the suit, whose interest was affected by the appeal, the original petition for leave to appeal was ordered to be amended, and the party applying made a co-Respondent.

This was an administration suit.

The suit was brought in the Court of the Civil Judge at Lucknow, and involved the right to the inheritance and division of the property of Nawab Moonuwurood Dowlah, a Mahomedan of the Sheah sect, who died at Lucknow. The two first

* Present: Members of the Judicial Committee,—The Right Hon. Sir James W. Colville, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. the Lord Justice Rolt. Assessor,—The Right Hon. Sir Lawrence Peel.

Respondents were the Plaintiffs and the Appellant the [518] principal Defendant. The object of the suit was for an account and division of the assets of the deceased, according to the Shiah school of Mahomedan law. A separate claim was set up by Afzur Muhul, his Widow, in respect of her dower.

The facts of the case were as follow :—

Nawab Moonuwurood Dowlah was for many years Prime Minister of Oude under the native Royal dynasty, and who was reputed to have been possessed of immense wealth, of which a great portion was invested in Promissory notes of the British Government, commonly called Company's paper, which form the securities of the public Creditors in respect of portions of the public funded debt in India.

These Promissory notes were negotiable instruments payable to order, and the right therein is transferable and passes by endorsement to the person to whom the same are made payable, or in whose name they happen to stand.

It appeared that about the year 1848, the Nawab made a gift, which was the principal question in the appeal, transferring and endorsing some of the Government Promissory notes, then belonging to him and standing in his name, into the name of the Appellant, his only Son. These transferred notes represented the aggregate amount of S.Rs. 6,74,000. In the year 1853, notice was given by the Government that the Government notes belonging to the public loan, of which the last-mentioned notes formed a part, were about to be paid off, and such notes were accordingly called in by the Government. An option was given by the Government to the holders of such notes to transfer the amount thereof into another public loan, kept in Company's Rupees, the then [519] currency, and bearing interest on the equivalent amount in Company's rupees at the reduced rate of four per cent per annum. At this juncture, the Appellant exercised his right, as owner of the Government notes for S.Rs. 6,74,000 by giving the necessary orders to the Government Officer at Calcutta to transfer the amount standing at his credit with the Government to the other public loan bearing interest at four per cent, and effected the transfer, and of other Promissory notes in lieu of the Sicca rupee notes, equivalent to a sum of C.Rs. 7,35,300, in the name of the Appellant. It further appeared, that the Appellant had written to Calcutta, directing that the interest on the Government notes should be remitted to his father, the Nawab at Lucknow, and that the interest was appropriated by his order, on account of pay of Sayudut ool mominim (poor Pensioners), on account of the establishment of the Emambarah and of the Cemetery, etc., and also for expenses at the annual Festival called the Mohurruum; and that, when the accruing interest did not suffice, the Nawab used to advance out of his own funds, and sometimes ordered, but rarely, a portion of that money to be expended for his personal purposes. The interest used to be sent to the Nawab with a Letter from the Government Officer, stating it to be "to account of Umjud Ally's notes."

The Nawab also, in his lifetime, transferred to and endorsed in the name of the Respondent, Iftikharounissa Begum, his Wife, other Government notes to the amount of Rs. 2,41,600.

In the Hijree year 1262, corresponding with the year 1846, C.E., the Nawab executed two several deeds of gift, called Hibbanamahs, in favour of the [520] Appellant, and by which he gave certain houses, situate in Lucknow and elsewhere, to him absolutely, at the same time delivering over the possession of the same to the Appellant; and on the 1st of November, 1856, C.E., he also executed an instrument, called a Soolenamah, or Deed of conditional grant, for the consideration therein mentioned, in favour of the Appellant, by which he granted to him (reserving to himself only the use of the same during his life) certain Malguzary Villages or lands in the Furruckabad District, in respect of which mutation of names was effected at the time, together with houses and personal property therein described; but especially excepting from such personal property, jewels and other properties which were therein stated to have been left by the Nawab to his four daughters, the Respondents. And it was therein mentioned, that the Appellant had accepted the grant of the property aforesaid. Two other similar Deeds, and also called Soolnamahs, were executed by him, on the 1st of June, 1857, in favour of Mahomed Baker Ally Khan and Mahomed Jafer Ally Khan, two of the sons of the Appellant, and by which the Nawab granted to them respectively other real or immoveable estates in Zillah Khyrabad and Zillah Lucknow, and reserving to himself the usufruct thereof during his lifetime.

In the year 1857 the Mutiny broke out over the North-western Provinces of British India, and on the 30th of June in that year the Battle of Chinut was fought; and on the following day, the Nawab being alarmed for his personal safety, fled from his House, which was looted by the Rebels, and only some property in secreted recesses escaped pillage. He took [521] refuge at his son-in-law's House, the Respondent, Aboo Toorab Khan, from whence, on the 23rd July, he returned to his own House. Again he attempted to fly, but was taken Prisoner and carried into the camp of the Rebels. It was alleged, that while in custody he made a Will and supplement, called Bund, hereafter mentioned, the validity of which was contested in the suit.

The British power having been re-established; on the 15th of March, 1858, a Proclamation was made by the Government of India, stating, that the British Army was in possession of Lucknow, and that the City was at the mercy of the British Government, after having been rebelliously defied and resisted for nine months by a mutinous soldiery, supported by the inhabitants of the City and Province of Oude at large. The Governor-General then proclaimed to the people of Oude that, with certain exceptions (therein specified), the proprietary right in the soil of the Province was confiscated to the British Government, which would dispose of that right in such manner as it may seem fitting, and directing that the Talookdars and Land-owners should throw themselves upon the justice and mercy of the British Government.

The Nawab died on the 4th of October, 1858, leaving him surviving one Son, the Appellant, and the four Daughters and a Widow, the Respondents, his heirs-at-law, according to the Imamyah Code of Mahomedan Law.

It appeared that the late Nawab, by a Letter, dated the 8th of May, 1858, addressed to the Deputy Commissioner of Lucknow, submitting that, as the British Government were supposed to be just and [522] equitable, they would not wish to confiscate "Houses or Gardens," and referring to certain Houses and mango gardens stated to belong to him, and to be in his possession. The only garden, however, that was mentioned was that of Wuzer Bagh; but no claim for exemption or restoration of any other landed property appeared to have been made by the Nawab in such Letter, or otherwise, in his lifetime.

On the 5th of May, 1860, the British Government granted to the Appellant and his heirs the proprietary rights and interests of the estates or villages, situate in the Districts of Lucknow, Seetapore, and Roy Bareilly, in the Province of Oude, by a Firman of that date. The Appellant was accordingly put into the possession of the last-mentioned estates, paying the Malguzary reserved by the grant to the British Government.

It appeared that, as long ago as the 25th of April, 1844, the name of the Appellant had been, on the death of the Nawab, substituted for the name of the latter as proprietor of certain Malguzary situate in the District of Furruckabad, in the Books of the Collector of that District.

The Appellant obtained a certificate of administration of his Father's estate under Act, No. XXVII. of 1860, subject to the obligation to render accounts.

The Respondents, Mussumat Mohumdee Begum and Mussumat Nawab Begum, two of the Appellant's Sisters, claimed to be associated with him in the administration of the estate; and in a summary proceeding before the Civil Judge on the 28th of April, 1860, the Appellant admitted their rights as co-heirs with others, but submitted, that they should be post-[523]-poned to the payment of debts and dower to the Widow, and satisfaction of dower under the alleged Will, which was, however, contested by these last-mentioned Respondents.

The certificate of administration was withdrawn on account of some irregularity in its issue, and another was subsequently issued to the Appellant, under the above Act, on the expressed condition of his rendering a full account or inventory of the entire property, including not only the property of the Nawab admitted by him to be divisible, but also that which had been especially given to himself, as before stated; also on condition that he would distribute the assets regarding the divisibility of which there was no dispute among the parties. The Respondents objected to this certificate being granted without taking security from the Appellant, which objection was overruled by the Judicial Commissioner, who left the Objectors to a regular suit to recover such portion of the estate of the Nawab as they claimed.

Accordingly, on the 18th of December, 1860, the suit in which the present appeal

has arisen was commenced by the two first-mentioned Respondents, the daughters of the late Nawab, filing a plaint in the Civil Court of Lucknow against the Appellant and other persons. The claim set up by the plaint was founded on their hereditary right and title, which they sought to establish, as joint heirs, to a two annas and two pice share each (the whole into sixteen annas being nominally divided) in the whole of the moveable and immoveable estate and property left by the Nawab, taken possession of by the Appellant and the Respondent, Aboo Toorab Khan; the late Nawab [524] having, as it was alleged, died without executing any Will, Soolenamah, or other document affecting their title. The plaint further claimed proprietary possession of the villages situate in the Districts of Seetapore, Roy, Bareilly, Lucknow, and other places in the Province of Oude, as also of the villages in the Furruckabad District, of the Houses lying in Lucknow, Furruckabad, and Cawnpore, and of other immoveable property lying in the British Territory; also interest on the Government Promissory notes, and the latter themselves, and the interest of the Government notes invested for the maintenance of the Hoosainabad Emanbarah, and all in proportion to their shares. The plaint concluded, by alleging the falsity of the several documents and the Will, which latter the Plaintiffs alleged was a forgery; and also averred that the late Nawab was the real owner of the Government Promissory notes for Rs. 7,35,300 standing in the Appellant's name, and of those to the value of Rs. 2,41,600 standing in the name of the Respondent, Afzul Muhul, the Widow; and that she and the Appellant were merely ism furzee (nominal) holders; that Hukeem Meer Ally, another of the Respondents, was a mere nominal holder of the landed estate; and that the Respondent, Afzul Muhul, the Widow, possessed no right to the dower claimed by her to the amount of Rs. 4,50,000.

On the 10th of June, 1861, a written statement, purporting to embody what had been urged verbally in support of the Plaintiff's claim, was filed by them in the Civil Court. In that document a claim was for the first time set up to the immoveable estate confiscated and afterwards granted by the Government to the Appellant, under the before-mentioned Firman, [525] submitting that, as there was no new conveyance by his Father to him after the confiscation, the title under the Soolenamah failed; and as he could only be regarded as taking the grant from Government as the sole male representative of the late Nawab, he was bound to make a suitable provision for his co-heirs, as was customary under the law of primogeniture in the Province. They admitted, that they had received the sum of Rs. 2,68,404. 4a. 4p., but claimed to receive more from the estate of the deceased Nawab, and they alleged that the following constituted part of his estate:—

	RS.	A.
1. Ism furzee notes held in name of Defendant	7,35,300	0
2. Ism furzee notes held in name of the Widow of deceased	2,41,600	0
3. Sum paid to Ifhtikharoonissa Begum, <i>alias</i> Ufzul Muhul, the Widow, being over and above of what is acknowledged by the Defendant to be her one-eighth of the divisible estate	4,50,000	0
4. Talooks held ism furzee, in possession of Umjud Ally, under false deed of gift under the name of deceased (deed being in favour of Umjud) the genuineness of which deed is denied. Total malguzary of the real estate (approximately):—		
In Oudh, 1 per an.,	55,000	
In Futtehghurh, about	5,000	
	60,000	0
[526] N.B. Besides Houses and godowns in both Provinces.		
5. Rud muzalim (for the benefit of deceased's soul), amount kept under this head by Nawab Umjud Ally, as provided for by the alleged Will	5,43,303	10
6. Waseeka, a portion of the Hosanebad trust, paid monthly to the deceased, and claimed to be heritable.		
7. Household property belonging to the estate, and jewellery to an immense amount, alleged to have been lost in the loot.		

An account of the division of Government notes was filed by the Appellant, by which it appeared that he had delivered, according to the alleged Will, to the Re-

spondent, Afzul Muhul, the Widow, in payment and satisfaction of her dower, Government notes to the amount of Rs. 4,50,000; that he had set apart and allotted to the trust Rud Muzalim other Government notes to the amount of Rs. 5,43,333; and had paid out of the residuary estate to the Widow her one-eighth share, Rs. 1,12,500, as one of the co-heirs; to the two Plaintiffs and their two Sisters, the Respondents above named, their one-eighth share each; and to himself (the Appellant), being a Son, his double share.

Issues were recorded and witnesses examined as to the validity of the alleged Will and supplement, before Mr. C. G. Fraser, the Civil Judge of Lucknow, and on the 31st of October, 1861, he decreed that the Will and supplement were proved, and together constituted the Will and Testament of the [527] deceased Nawab; that the gift of Government notes of Rs. 7,35,000 to the Appellant was a good and valid gift, and that they were his property; that the gift of Government notes for Rs. 2,41,600 to the Widow was also valid, and given to her as part of her dower claim; and that the other notes for Rs. 4,50,000, not transferred to her in the Nawab's lifetime, were rightly endorsed, and given to her since his death, by the Appellant, as Administrator, in discharge of and full payment of her claim for dower under her deed of dower, which he upheld; that the sum of Rs. 5,43,300, was properly settled as a trust fund (Rud Muzalim), by the Will, and that by the creation of this fund the Appellant was the greatest loser, as it reduced the divisible estate. Then, as to the immoveable property referred to in the deeds called Hibbeenamah and Soolenamah, the decree declared, that they also were proved; and that the Malguzary property in Zillah Lucknow was, moreover, covered by the Government grant in favour of the Appellant, as well as the villages held by his son under deed, and situate in Khyrabad, Zillah Seetapore, which were also conferred on the Appellant by the Government grant; and that the titles conferred by the previous Deeds were in fact wholly set aside, and a new title conferred; and the decree further declared, that the garden, Wuzeer Bagh, was divisible property, subject to deduction for any sums paid by the Appellant for its restoration; that the sum still divisible among the heirs was Rs. 28,448. 0a. 2p.; and lastly, as to the jewellery, it was declared, that there was nothing to recover except a lot in Court secured by the Respondent, Aboo Toorab Khan, by purchase.

[528] The Plaintiffs, being dissatisfied with this decree, appealed against the same to the Judicial Commissioner of Oude.

The Respondent, Afzul Muhul, also presented a petition of appeal to the Judicial Commissioner, on the ground that the decree dismissed her claim on account of dower.

The hearing of these appeals took place before Mr. G. Campbell, the Judicial Commissioner, and on the 19th of April, 1862, he delivered one judgment and decree in both appeals. In that judgment he held, that he entirely concurred with the Civil Judge in rejecting the Widow's claim to dower in addition to what she had received, and accordingly dismissed her appeal. In respect of the other appeal, the decree affirmed the decree of the Civil Judge, so far as related to the payment by the Appellant, as Administrator, according to the Will, to the Respondent, as Widow, of the Government notes for Rs. 450,000, in satisfaction of her dower. The judgment, in considering and treating of the contest on the genuineness of the Will and supplement, and on the trust fund called Rud Muzalim, therein mentioned, proceeded as follows:—"I now come to the distribution of the Government paper, which is in fact the main subject in suit, and regarding which there has been the contest of the genuineness or otherwise of what is called the Will, or rather the Supplement to the Will. I should be very sorry if the disposal of this great property turned upon the validity of this unsigned paper. Although as between the present parties the internal evidence would, I think, be quite in its favour, it must no doubt be remembered that it was originally produced in opposition to the claims [529] of Kaim Ally, by whom the present Defendants were then sufficiently pressed, and whose case it was very much calculated to rebut. Still, as a mere question of weighing opposing probabilities and improbabilities, I might respect the finding of the Judge who so fully tried the issue; but while I am sure that I could have no better decision of the facts than Mr. Fraser's, I must correct his law on some very important points; and the first of these is this, that in putting the alleged Will in issue he seems to have altogether forgotten one of the plainest rules of Mahomedan Law, viz., that no legacy can be left to one of the heirs without the consent of the

other heirs; that is a rule found in every Text-book. The only doubt might be that as these Books are principally taken from Soonee law, there might be some difference in Sheah law. I have, however, plainly put the point to the parties, and there has been no attempt to dispute this view of the law. It may, therefore, be considered settled; and I have, therefore, all along intimated that I thought that as between the heirs nothing could turn upon the Will. In fact, the document itself does not, as between them, profess to be a Will at all. It merely recites certain distributions said to have been already made, and assigns a third of the remainder to the religious and charitable fund called the 'Rud Muzalim.' The Plaintiffs admit that there was an assignment to this of at least as large amount and of older date. They would only fix the assignment on another part of the property which is claimed by Nawab Umjud Ally, but that the fund is to come out of the estate is admitted on all hands, and that need not be put in issue. I, therefore, declare, that, so much as has been admitted by [530] the Administrator, not exceeding one-third of the whole net estate (as eventually settled), belongs to the Rud Muzalim fund; and I strike out of the case the issue respecting the Will, because nothing really turns upon that alone. I will only allow the paper to stand, as found to be more probably true than false, so far as it may to some extent come in as incidental evidence on the other issues. With respect to the Rud Muzalim fund, I think it must be understood that Nawab Umjud Ally cannot take any beneficial interest in it to the exclusion of the other heirs. It must be managed by an individual or individuals strictly as Trustees. The eldest male descendant of the Founder is clearly a proper person to hold the office of Trustee. I, therefore, declare that Nawab Umjud Ally, and after him the eldest of the line of the descendants on the male line from Nawab Moonowurood Dowlah, if sane, fit, and of age, shall be a Trustee, and that conjoined with him in that office shall be Syud Mahomed Mujtahid-ul-Asur, and after him some other fit person of a religious character to be nominated by the Court; and that if the Trustees accept the office, they shall within a month submit for the approval of the Court a scheme for the governance of the fund." The judgment then proceeded to deal with the question and issue involving the Appellant's right to the Government notes for Rs. 7,35,500, under gift from the late Nawab, as follows:—"Nawab Umjud Ally, the Defendant, contends, that the property was fully and legally transferred to him, and that the enjoyment of the proceeds by his Father was by his leave and consent, and that such enjoyment does not affect the legal possession nor invalidate the gift. In a case of such importance it is im-[531] possible to place any faith in any Mahomedan legal opinion. The Mujtahid, the principal authority here, has from the first, by improperly attesting the Will after the death of Nawab Moonowurood Dowlah, placed himself in the position of a partisan, and I have not thought that we could with any advantage accept anything from him. Lucknow abounding in Mahomedan Lawyers, I have thought it better to give the parties full opportunity of producing their authorities. The result has been very unsatisfactory. The Texts produced on both sides from notable and acknowledged Text-books are obscure in the extreme, and none of them can be said fully to meet the case: other quotations subsequently produced are from Books of a local character and little authority. In fact, the Mahomedan Law did not contemplate Government securities held by public registry, and Government Agents holding securities in the name of one man, and remitting the interest to another. They seem to assume that possession must be simple possession, and they constantly require possession as a condition of gift. For the rest, it has been said that the native Lawyers can produce authority for any opinion. I believe that it is equally unsafe to accept the *dicta* of particular Lawyers, and difficult to settle a complicated case by comparison of authorities. The proper course then in such cases seems to me to be, to accept the broad and acknowledged principles of native law, and apply them by our own reason to the case. That is the course which I must follow in this case. In this light the question seems to me to be whether, in transferring this property to the Son while the Father retained the enjoyment of the proceeds during his life, the parties did or did [532] not act up to the principles and spirit of the Mahomedan Law. To my mind it is perfectly clear, that they did not. They altogether evaded the law, which requires real possession as the condition of a gift, and prevents a man from enjoying property while he lived, and then

dividing it unequally among his heirs at his death. Such an unequal division the Mahomedan Law thinks fit to forbid, and in that prohibition it is not singular; the laws of other Countries have done the same thing. There is, therefore, nothing in the Law itself which would prevent our giving effect to it. We are bound to do so, and if the Law is so, it is much better that it should be made clear, and honestly acted upon, and that it should be left to the Legislature to alter it, if it be deemed fitting to do so, than that we should allow it to be evaded by subterfuges. I, therefore, think that the first principles of Mahomedan Law are involved in this case. It is evident that if the disposition hold good, the effect is that, in practice, Nawab Moonowurood Dowlah, having enjoyed his fortune to the day of his death, has left a large share of it to one child, and a much smaller share to the other children, contrary to the main principles of the Mahomedan Law. Upon the party claiming under abnormal disposition lies the *onus* of proving a case to justify the evasion. I do not think he has done so: I do not find any clear legal authorities to justify the proceeding; nor can I find any precedents for it among the decisions of British Courts. The nearest case is one between Husband and Wife; but then the Donee seems unquestionably for a time to have exercised dominion, and the case between Husband and Wife is acknowledged in the Text-books to be peculiar. I cannot then find any-[533]-thing to justify the evasion of the Law which is attempted. There is another consideration which may have some weight if the Law is to be evaded. I think it very much against public policy that any encouragement should be given to evading it by the demoralizing practice of what is called 'ism furzee,' or 'false name' holding—that is, the nominal holding by one person for the real benefit of another. I am sorry to say that this practice is well known in Lucknow; and there is clear evidence in this case that in other instances Nawab Moonowurood Dowlah adopted it, having held estates in the name of his creatures. If my view of it is correct, the transaction which is the subject of the present case is of this nature. In order to evade the Law, Father and Son agreed that there should be a transfer to the name of the Son, but that the Father should continue to enjoy the benefits. I would not sanction any evasion of the Law, unsupported by undoubted authority, and least of all would I sanction an evasion by what I consider to be an 'ism furzee' transaction. I had then formed a strong opinion that this transfer could not be maintained. Just when I was near the conclusion of the case I received an answer of the Calcutta Law Officer to a supposititious case which I had put to him, to see if he, among others, could throw any light on the matter (*a*). His opinion seems to go contrary to [534] mine, and I have given it due consideration. But after all he quotes no precedents or authorities: it is a bare nude opinion, and I do not concur in his argument, which is, that the usufruct being paid to the Donor by the leave and order of the Donee, the condition of possession is not vitiated. He doubtless places the case in the light in which it can be best argued on that side. Setting aside the point made by the Plaintiffs, that there was no gift, but only a trust (for the Rud Muzalim), it might be possible that the argument might avail, if the Donee, after for some time exercising real dominion and active possession, had ordered the proceeds to be paid to the Donor, or if, instead of the whole proceeds going to the Donor, and an allowance being made by him to the Donee, the Donee had retained as much as was required for his own expenses, and paid the rest to the Donor. But in this case the gist of the matter seems to lie in this, that there is every reason to suppose that the transfer of the property to the name of the Donee, and the arrangement that the Donor should continue to receive the whole of the proceeds, were coincident in point of time, and being so that the two transactions were correlative, and were in fact but parts of one bargain. In fact, it seems to me indisputable, that the Father transferred the property to the Son on the express condition and understanding that the Father should receive the usufruct during

(*u*) The Futwa of the Calcutta Law Officer referred to in the above judgment was as follows:—"There can be no doubt as to the gift being good and valid. The making over the property by the Donor is proved both by the gift and the registration of the name of the Donee as proprietor; and the Donee directing the Agent to send the net proceeds to his Father, shows that he had obtained possession. The receipt of the proceeds by the Father cannot, therefore, invalidate the gift."

his life. That was, I think, *ab initio*, a condition of the transfer; and I have a clear and strong opinion, that such a condition violates the Mahomedan Law of gifts, and renders the transfer inoperative as a gift to the transferee, and invalid as against the heirs claiming under the law of inheritance and bequest. [535] On these grounds, then, I declare that the disputed notes for Rs. 7,35,300 is part of the divisible estate of Nawab Moonowurood Dowlah, and that Nawab Unjud Ally must account for them to the heirs, with interest. Considering that there was reasonable and almost necessary ground for litigation in the manner of the disposition made by the Father, I think it proper that, after being carefully taxed, the costs of both parties in the case in which Mohundee Begum and Nawab Begum are Plaintiffs should be paid out of the estate. I have reserved the decision regarding the landed property, because Government has intimated its intention to bring before the Legislature an Act for altering the jurisdiction of the Courts in respect to landed property in Oude; and I think it desirable to see, whether it will retrospectively affect any decision passed in this case; but in postponing so much of the case, I do so without prejudice to the interest of the parties who have carried it through the Civil Courts; and if on the publication of the Act it appears that it will not have retrospective effect, I will decide the remaining issues."

The Appellant applied to the Judicial Committee for leave to appeal from this decree. He made only the first two Respondents parties to the petition. By an Order in Council, dated the 9th of January, 1863, special leave to appeal against the decree of the Judicial Commissioner of Oude was granted.

Before the hearing of the appeal took place, Afzul Mahul, the Widow, applied to have the appeal dismissed for irregularity, or that it might stand over to amend the petition of appeal, and that she might be admitted as a co-Respondent, to appear and be heard, also for liberty to appeal from so much of the [536] decree of the Judicial Commissioner as affected her rights as the Nawab's Widow. Leave was granted for her to appear and be heard, so far as her rights were concerned, and if necessary to appeal from the Judicial Commissioner's decree.

(Nov. 26, 1867 *).—The appeal now came on for hearing.

Sir R. Panner, Q.C., and Mr. Leith, for the Appellant.—By the Mahomedan Law of the Sheah school, a gift to an heir followed by possession is valid: Shurayool Islam, pp. 242, 252-3; Baillie's "Dig. of Moohummudan Law," pp. 507, 522; the Hedaya, Vol. III. B. XXX. ch. 1, title "Gifts," p. 294. A gift is constituted by declaration and acceptance; the Hedaya, Vol. III. p. 673. Therefore, the gift of the Government promissory notes for Rs. 7,35,300 by the Appellant's Father to him was valid. Such notes were negotiable securities transferred into the Appellant's own name, and such transfer having been accompanied by the delivery of possession to him, all control and power over the same was given up by the Donor. The directions by the Appellant to his Agent to pay the interest to his Father, to be appropriated by him to certain religious and charitable purposes, as well as his act of converting the moneys secured by the first notes into other notes belonging to a distinct Government loan, were obvious acts of ownership, and could not affect or invalidate the gift. Even if the gift was invalid, the decree of the Judicial Commissioner was wrong. First, the [537] Will and supplement was established by evidence; secondly, the Judge was not justified in appointing a Stranger to act as a Trustee under the Will and the supplement of the Appellant's Father, in conjunction with the Appellant in his office of Trustee of the family religious and charitable fund, called "Rud Muzalim;" thirdly, the Judicial Commissioner ought to have declared that the Government promissory notes, the subject of the gift, passed by the Will and supplement as a specific bequest to the Appellant, inasmuch as he held, that one-third of the estate of the Testator remained unappropriated or undisposed of at the time of his death; lastly, he was not justified in refusing, on the hearing of the appeal, to adjudicate upon the right of the Appellant and the other persons claiming in respect of the

* Present: —Members of the Judicial Committee—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor:—The Right Hon. Sir Lawrence Peel.

landed property in question in the suit, on the ground stated by him, and, on the contrary, ought to have established the right of the Appellant.

Mr. J. Bell, for the two first Respondents:—

First, upon the evidence as to the *factum* of the alleged Will and schedule of Nawab Moonooowurood Dowlah, the Court could not hold that it constituted a valid Will. Even if the evidence of the *factum* of these papers was in favour of their having been duly executed, still the provisions relied upon by the Appellant could not, according to the principles of Mahomedan Law, be carried out, inasmuch as no legacy can be left to one heir without the consent of all others, which requirement of law in this case was wanting.

Secondly, as to the Rud Muzalim fund, it was clearly a trust fund only, out of which the Appellant could take no beneficial interest to the exclusion of [538] the other heirs: *Varden Seth Sam v. Luckpathy Royjee Lallah* (9 Moore's Ind. App. Cases, 308); and the decision of the Judicial Commissioner, in appointing the Appellant and Syud Mahomed Mujtuhid-ul Asur as Trustees for the administration of the trust, was in accordance with the principles of the Mahomedan Law, as administered in Courts in India. As to the transfer of the Government notes, I submit, that there was no such transfer as was sufficient by the Mahomedan Law to vest the same absolutely in the Appellant, it being found as a fact by the Court of first instance, which finding was confirmed by the Judicial Commissioner, that Nawab Moonooowurood Dowlah retained the possessory right and usufruct of those securities until his death. Now, according to the Mahomedan Law, any beneficial interest reserved in the thing given, to continue during the lifetime of the Donor, is an invalid gift, and against the policy of the Mahomedan Law of the Shea school: Bailie's "Dig. of Moohummudan Law," p. 531. Relinquishment of possession by the Donor and immediate seizure by the Donee of the entire subject of the gift is absolutely necessary: *Jeswunt Sing-jee Ubbay Sing-jee v. Jet Sing-jee Ubbay Sing-jee* (3 Moore's Ind. App. Cases, 245-7); *Jafer Khan v. Hubshee Behee* (1 Ben. Sud. Dew. Rep. 12); Macnaghten "On Moohummudan Law," Ch. V. p. 50; *ib.* Prec. of Gifts, Case, XVIII. p. 222. If the statement in the schedule attached to the alleged Will is to be relied upon as a direction in a valid testamentary paper, it can only be regarded as the completion of an imperfect gift by a testamentary direction, and would, therefore, require the consent of the other heirs to make it valid. The decision of the Judicial Commissioner is in accordance with the justice of the case, save so far as it deprived these Respon-[539]dents of a share in the specific articles of personality to which they are entitled, for although the Mahomedan Law, according to the Sheah doctrines, recognizes a Son's right to receive his Father's sword, Koran, wearing apparel, and ring, yet there is no authority to be found that he shall retain possession of Elephants or Guns, or implements of warfare or the chase, which articles, on the death of the Appellant's Father, should have been valued, and the value distributed in the same proportion as other property.

Thirdly, it is submitted that the discretion exercised by the Judicial Commissioner in refusing to adjudicate, and reserving his decision with respect to the real estate of the deceased Nawab, cannot now be questioned, as the Appellant is restricted to the extent of the relief he asked for, and which was granted by the special leave given him by this Tribunal to appeal which is confined to the case of the first two Respondents, whom he alone made Respondents, and does not affect the Widow or other Respondents interested in the residue of the general estate.

Lastly, it is submitted, that there was no valid forfeiture by the Governor-General's proclamation, of the estate of Nawab Moonooowurood Dowlah, arising out of the rebellion in Oude, and the Sunnud or Firman by the British Government, recognizing the Appellant's right, does not affect the case; but as that is an act of State, a Municipal Court probably cannot go into the question of its validity.

Mr. Ince, for the Widow, Afzul Muhul, contended, that by Mahomedan Law, this Respondent, as Widow of Nawab Moonooowurood Dowlah, was entitled to one-eighth of the Government secu-[540]rities as dower, according to the settlement made on her, as the gift to the Appellant was void, the Donor continuing to have an interest, it being essential by that Law that the gift should be actual and potential to the Donee, without any reservation of interest in the Donor, which was not the case in the gift to her by the Nawab. He referred to Baillie's "Dig. of

Moohummadan Law," p. 508; Macnaghten "On Moohummadan Law," Ch. V. p. 50; and "Prec. of Inheritance," Cases XLII. pp. 114, 129.

Judgment, having been reserved, was delivered by

The Right Hon. Sir Edward V. Williams [Dec. 20, 1867].—This is an appeal, under an Order made on a special application to Her Majesty, for leave to appeal against so much of the decree of Mr. Campbell, made by him when Judicial Commissioner of Oude, as reverses or varies a decree of Mr. Fraser, the Civil Judge of Lucknow, in favour of the Appellant. The suit in which Mr. Fraser's decree was made was brought by the Respondents, Mohumdee Begum and Nawab Begum, as Daughters and co-heirs of the deceased Nawab, against the Appellant as the Son and the Administrator of his Father's estate, under Act, No. XXVII. of 1860, against the Widow of their Father and two Sisters of the Plaintiff, also co-heirs; and, lastly, against certain other persons described as nominal Defendants whom it is unnecessary here to name or further to describe.

The suit was in the nature of an administration suit; it sought a discovery of a portion of the assets alleged to be withheld, and an account, and a division of the assets amongst the heirs according to the Mahomedan Law. The deceased and his family were [541] Mahomedans, and followers of the Sheah school. The Widow of the deceased instituted also a distinct and separate suit against the heirs, claiming her dower according to a settlement of it upon her by her Husband, and claiming, in addition to it, a large sum of money by gift from her Husband during his lifetime. Her claim to one-eighth of the clear assets seems not to have been disputed. The Appellant claimed a large portion of the property, consisting of Promissory notes of the Government, commonly called Company's paper, amounting to Rs. 7,35,300, as his property by gift from his Father in the lifetime of the latter, the validity of which gift was disputed by the Respondents, the Plaintiffs in the suit, as well as by the Widow, a co-Defendant.

Mr. Fraser's decree established this gift in favour of the Appellant. The decree of Mr. Campbell reversed that portion of Mr. Fraser's decree, and declared the gift invalid according to Mahomedan Law. The Appellant claimed also against the co-heirs, the immoveable property described in the suit. Of this a large proportion was situate in Oude, and was claimed by him under a Firmā from the Government of India, granting it to him exclusively as property which had been declared forfeited, and to be the property of the State, by Lord Canning's Proclamation on the suppression of the rebellion in Oude; and a smaller portion, being land situate in Furruckabad, was claimed by him under a certain instrument of conveyance from his Father, termed a soolehnameh. This property was adjudged to him by Mr. Fraser's decree. Mr. Campbell did not adjudicate upon that part of Mr. Fraser's decree relating to the above-mentioned immoveable property, otherwise [542] than by declaring his intention to reserve the consideration of those issues to a further time, for the reason assigned in the concluding paragraph of his judgment. The Appellant treats this reservation of judgment, as a variation by Mr. Campbell of Mr. Fraser's decree, and makes the propriety of it a ground of appeal. The Respondents, on the other hand, contend that, as a mere reservation of a judgment, on appeal, by the appellate Court, is neither a reversal nor a variation of a decree appealed against, the Appellant is not entitled to insist on this part of Mr. Campbell's judgment as a grievance against which he has been permitted to appeal. The appeal is brought not as of right, but by special leave, and in the petition on which leave to appeal was granted, the Appellant named only the two Respondents, who were Plaintiffs in the suit; but the Appellant has, nevertheless, now named all the parties interested in the general estate, including the Widow, as Respondents.

Application was made, on the part of the Widow, to their Lordships, on the first day of their sittings, to dismiss or suspend the hearing of the appeal, on the ground of irregularity; her Counsel stated that the Widow had not appealed against the decrees affecting her claims to the sum disallowed as a gift, being, on the whole, content to take her portion of the seven lacs which, by Mr. Campbell's decree, fell into the residuary estate; but that, if this appeal succeeded, she would be prejudiced thereby to so large an extent that she should then desire to appeal against

the disallowance of a part of her claim by the decrees of the two Courts. Leave was given to her to appeal against that portion of the decrees, and she has been heard by her Counsel as a party [543] Respondent on the present appeal. The decision of their Lordships on the present appeal, will be without prejudice to her rights in her own appeal, if preferred, as respects the claims disallowed her by those decrees: in other respects it will conclude her rights, in the ordinary way, as a party Respondent to this appeal.

The matters to be determined on this appeal are three in number, and are:— First, the validity of the gift to the Appellant of the Company's Paper, amounting to Rs. 7,35,300: secondly, the appointment of a Stranger to be and act as co-Trustee with the Appellant in the trust as to the family, religious, or charitable fund called Rud Muzalim, and the direction to settle a scheme for the administration of that fund: and, thirdly, the reservation of his judgment, indefinitely, by the Judicial Commissioner, on the right of the Appellant, as declared by Mr. Fraser in his decree, in respect of the landed property adjudged to the Appellant by that last-mentioned decision.

The first in order of these matters involves an important point of Mahomedan Law relating to gifts, *inter vivos*.

If the gift be sustained as a valid gift, *inter vivos*, it will be unnecessary to review the evidence as to the genuineness of certain documents propounded by the Appellant, and said to constitute a valid testament by the Mahomedan Law, or to consider in any way the validity or effect of those documents.

The effect of the non-assent of co-heirs to a bequest to an heir by a Mahomedan of the Sheah sect becomes also immaterial as a subject of inquiry here, if the gift be valid as a gift *inter vivos*.

Before the validity of this gift, as one *inter vivos*, is determined, it must first be considered by their [544] Lordships what the real nature of the transfer was. The legal title in the Promissory notes was undoubtedly in the Appellant, in his Father's lifetime, by virtue of an act of the Father.

But though the transfer of a legal title will satisfy that provision of the Mahomedan Law which relates to the point of seizen, in its legal and technical sense, yet that alone will not suffice where no intention exists to transfer the beneficial ownership, either present or future. The facts relating to the gift have been most carefully investigated by Mr. Fraser, the Civil Judge. The Judicial Commissioner, paying a just tribute of commendation to Mr. Fraser on his accurate investigation of the facts, expresses no dissent from his conclusion as to them, but reverses his decision as to this gift as erroneous in point of law. Mr. Fraser's observations as to the mode of dealing amongst Natives living amongst themselves as a family, in a state of family union, and dealing in this state with the proceeds of property standing in the names of separate members of the family, to whom it has been transferred by the parent and head of the family, and on the deference to his wishes and arrangements, and acquiescence in them commonly exhibited, are forcible as arguments to exclude the notion of fraudulent concealment or design in a transfer circumstanced as the present. They strengthen the probability of an intended transfer of property in the lifetime of the Donor, with a reservation of the use or proceeds of the money transferred during the lifetime of the Donor only.

In consequence of the tendency amongst natives to disguise their ownership under Benamiee transfers of property, a natural suspicion arises often that such is [545] the design when the transaction is really fair and open, and the apparent and real title are entirely consistent. The transaction questioned in this case, though between Natives, differs in no respect as to the manner of dealing with the property in question (Company's paper in the hands of the Government Agent at Calcutta at the time of and after the gift), from the mode in which an European Father and Son, designing to make between themselves a similar disposition of the like property, giving the paper to the Son with a reservation of the interest to the Father for life, might have dealt with it so as completely to effectuate their intention. There is no evidence of any attempt or design to conceal from the Government Agent, or from others, the origin of the property, its source, transfer, or continuing state of enjoyment. Mr. Fraser accordingly, and very reasonably

negatives any fraud in the transaction as to these notes, and Mr. Campbell, though he treats the case as one undeserving of support in a Court of Justice, proceeds not on actual fraud, but on his views of the policy of the law, and treats the transaction as fraudulent in contemplation of law, and done in evasion of its provisions, which limit the testamentary power of a Mahomedan, and aim in some degree at equality of a division amongst the descendants *ab intestato*.

Everything which took place in respect of these notes at the Government Agent's Office was perfectly consistent with the Appellant's real title in them. It is true his case is stated higher in his pleadings than the real title warrants; but the case, as stated, includes the real title, and is only the common error which is so frequently observed in [546] the cases of Natives in India, where their legal advisers, from ignorance or foolish craft, misstate a good case, and place it on false grounds. This was not an absolute transfer of the whole property, including all future interest, beneficial as well as legal; nor was it a Benamsee transaction. A mere Benamsee, or ism furzee title, is simply a nominal title without interest. It may, or may not, be fraudulent in design. Such a disposition by a Donor, where the transfer of the property, from its very nature, effected a legal transfer of it, would be simply the creation of a trust in his favour, and would, of course, leave the disposition *ab intestato* undisturbed. But such was not the intention here, and such is not the nature of the disposition. The object of the disposition is correctly stated by Mr. Fraser to have been to give the Son a larger share of the Father's property than would come to him by succession *ab intestato*. Mr. Campbell, the Judicial Commissioner, treats that intention and act as evasive of the testamentary law of Mahomedans, and as inconsistent with their law of gifts. Upon the first ground of decision it is to be observed, that in the absence of immoral or illegal purposes accompanying and promoting an act of disposition of property, a disposition which the law admits, cannot be evasive of the law. The law of succession *ab intestato* applies only to the assets which constitute the succession. If the law allow alienation so as to defeat a succession, the question, whether a subject of property is part of the assets, or not, raises simply the question, whether the transfer of it is legally complete. The design to alter, and so in one sense to defeat, the disposition of property, is simply a design to conform to the law, whilst working out an unfor-[547]-bidden design. The other view of the subject, that this is an incomplete gift by the Mahomedan Law, is one which presents more difficulty, and will be presently considered. On moral grounds the transaction cannot be impeached. It seems to have proceeded simply from the cause assigned for it in Mr. Fraser's judgment, viz., a desire to maintain the dignity of the eldest branch of the family; neither can the policy of the law be invoked, for the reason above assigned, that the policy of the law is to be collected from its whole body, and not from a detached portion of it; so that if the law suffers a Father by an act, *inter vivos*, to alter his succession, his exercise of that power cannot be deemed a fraud upon the law.

It remains to be considered whether a real transfer of property by a Donor in his lifetime under the Mahomedan Law, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during his lifetime, is an incomplete gift by the Mahomedan Law. The text of the Hedaya seems to include the very proposition and to negative it. The thing to be returned is not identical, but something different. See Hedaya, tit. "Gifts," Vol. III. Book XXX. p. 294, whether the objection being raised that a participation of property in the thing given invalidates a gift, the answer is, "The Donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use [of the whole indivisible article] for his gift related to the substance of the article, not to the use of it." Again, if the agreement for the reservation of the interest to the father for his life be treated as a [548] repugnant condition, repugnant to the whole enjoyment by the donee, here the Mahomedan Law defeats not the grant, but the condition. Hedaya, tit. "Gifts," Vol. III. Book XXX. p. 307. But as this arrangement between the Father and the Son is founded on a valid consideration, the Son's undertaking is valid, and could be enforced against him in the Courts of India as an agreement raising a trust, and constituting a valid obligation to make a

return of the proceeds during the time stipulated. The intention of the parties, therefore, is not found to violate any provision of the Hedaya, and the transfer is complete. The Mahomedan Law authority whom Mr. Campbell consulted, supported it. His opinion is treated somewhat lightly as a nude opinion, unsupported by authority; but it is to be observed, that unless some authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties.

The second matter of complaint is the appointment of a co-trustee. The ground taken on the argument of the incompatibility of such an association with the *status* and dignity of the Appellant, and with family usage, seems to their Lordships to be displaced by one of the documents which the Appellant propounded and used before the Court, which does associate a co-trustee with him. As against the Appellant the appointment of a co-trustee will justly give effect to what he alleges to have been the intention of the founder of the trust. The discretion of the Judicial Commissioner as to the person appointed is a matter with which their Lordships are indisposed to interfere, and no sufficient reasons are advanced to control it in this instance. His [549] direction as to a scheme for the administration of this trust seems to their Lordships reasonable.

The third point requires a more detailed statement of the grounds on which their Lordships think, that the decision of Mr. Fraser may be affirmed here, rather than by the Judicial Commissioner acting under their Lordships' expression of opinion. As it is clear, that the Appellant meant to include this part of the judgment in his appeal, any merely verbal insufficiency in his grounds of complaint, or of the Order made thereon, might be removed by leave given to renew and extend the application to appeal, so as to cover and remove a mere technical defect. But as the intention is manifest, and the decree of Mr. Fraser, though untouched in terms, is in effect suspended by Mr. Campbell's judgment, upon a liberal construction of the language of the petition to appeal, this part of the judgment of Mr. Campbell may be considered as included within the term "varied." When the appellate Court in India on appeal has omitted to decide a question raised by the appeal, their Lordships have remitted the case for decision to that Tribunal, in all cases where they did not find clearly on the Record before them materials for a final judgment doing complete justice between the parties. This case is not of that nature. Mr. Fraser forbore to question the Appellant's title under the Firman, because that Firman could not be questioned in that Court. That Court itself existed under an exercise of powers of a similar character, and it did not think itself invested with a jurisdiction to question an act of State, under which the Firman had its origin. The Proclamation was necessarily impeached by impeaching the Firman, and it was [550] undoubtedly an act of State. Even if this act could be directly or indirectly questioned in a Municipal Court (on which we express no opinion), the contention must be raised on a suit duly constituted to which the Government must be made a party. The forfeited estates were not assets at the time of the Nawab's death, and could only be treated as such when the Government title was displaced. To remand the case for hearing to the Judicial Commissioner would be simply to involve the parties in unnecessary expense, and subject them to unnecessary delay, since it must be accompanied with a declaration that in the suit, between those parties, and on those pleadings, the legality of the title of the Grantors of the Firman could not be questioned.

The objection raised to the Solehnameh by Mr. Bell (which it is necessary to notice only as respects the lands in Furruckabad) does not arise on the facts. The consideration, two rings, may be small and inadequate in the sense of purchase money; but it cannot be treated as of no pecuniary value: and the Record furnishes no grounds to justify a remand to the Judicial Commissioner on this comparatively trifling point.

Their Lordships think, that a valid gift, *inter vivos*, as to the Company's paper, was effected by the Nawab in his lifetime in favour of his Son, the Appellant, and, therefore, they deem it unnecessary to consider the question as to the genuineness of the documents set forth as constituting his Will, or to consider, whether the non-assent of the heirs does or does not vitiate the Will of a Mahomedan of the Sheah school in favour of an heir.

On the whole case, they will humbly advise Her [551] Majesty to reverse the decision of the Judicial Commissioner of Oude, except as to the appointment of a co-trustee, and to affirm the decision of the Civil Judge, Mr. Fraser, with that variation.

As the contention in this appeal arises from the acts of the last owner, who has subjected his property, by his mode of dealing with it, to questions fairly raised, their Lordships think that the costs of the appeal of both parties should come out of the residuary estate.

[See *Ameeroonissa Khatoon v. Abedoonissa Khatoon*, 1874-5, L.R. 2 Ind. App. 98.]

MOONSHEE BUZLOOR RUHEEM.—*Appellant*; SHUMSOONNISSA BEGUM.—*Respondent* (three Appeals); and JODONATH BOSE.—*Appellant*; SHUMSOONNISSA BEGUM.—*Respondent* * [Feb. 12, 13, 14, 15, 16, 1867].

On Appeal from the High Court of Judicature at Calcutta.

In a suit by a Wife (a Mahomedan woman) against her Husband to recover the value of Company's paper and real and personal estate, the plaintiff alleged, that such paper being her separate property, had been, as she lived in seclusion, indorsed and handed over by her to her Husband for the purpose of receiving the interest thereon. The defence of the Husband was, that he had purchased such paper from his Wife, and on the indorsement and delivery had paid the full value to his Wife, who had appropriated the proceeds to her own use. Held, upon a review of the evidence, that although the Wife failed to prove affirmatively the precise case alleged by her in the plaintiff, the Husband was bound to show something more than the mere indorsement and delivery of the Company's paper, and that from the relations subsisting between the parties, the *onus probandi* was upon him to establish; first, that the transaction which he set up was a *bona fide* sale; and second, that he gave full value for the Company's paper so received from his Wife.

Held, further, that in the absence of proof of the Husband having the means of purchasing the Company's paper, he being at the time in embarrassed circumstances, and the condition of the Wife, a secluded woman, that no purchase had taken place, and that the transaction was fraudulent as against her.

Although the habit of holding land Benamsee is prevalent in India, such fact does not justify the Court in making every presumption of such holding against apparent ownership.

A suit for restitution of conjugal rights will lie in a Civil Court by a Mahomedan Husband to enforce his marital rights.

By the Mahomedan Law such a suit is in the nature of a suit for specific performance, being founded on a contract of marriage, the Mahomedan Law regarding it as a civil contract, and the Court will enforce all the obligations which flow from such a contract.

If, however, there be cruelty to a degree rendering it unsafe for the Wife to return to her Husband's dominion, the Court will refuse to send her back to his House: so also if there be a gross failure by the Husband of the performance of obligations which the marriage contract imposes on him for the benefit of the Wife, it affords sufficient ground for refusing him relief in such a suit.

From the frame of the pleadings and issues, the question of cruelty was not properly entered into, but in the circumstances of the conduct of the Husband towards his Wife, the Judicial Committee declined to direct the Wife to be

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor.—The Right Hon. Sir Lawrence Peel.

sent back to her Husband, and remitted the cause back to the Court below for a new trial, with liberty to frame issues and take evidence as to the specific acts of cruelty.

Sec. 7 of Act, No. VIII. of 1859, provides, that if a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained. Held, on a construction of this section, first, that the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit; and secondly, that it included accidental error and involuntary omission of the subject of the new suit.

A suit cannot be maintained to recover a specific Company's Note when the cause of action in a former suit was the misappropriation by the same Defendant of similar Company's Notes, as such claim for the individual note might have been included in the former suit.

These appeals were brought from decrees of the High Court, and, as regarded the first three, were from decree made in suits between the same parties, [552] and as regarded the fourth, which related to property, the title to which involved the same rights of the Respondent, were all heard together. The first suit was brought by the Respondent, Shumsoonnissa Begum, the wife of the Appellant, Moonshee Buzloor Ruheem, to recover possession of certain real and personal property stated by her to have been entrusted to the Appellant, the right and title to which she contended she had never parted with. The personal property sought to be recovered from the Appellant consisted of Government securities, known as Company's paper, to a very large amount, together with money, jewels, and other personalty, also of very considerable value. The real estate which she [553] sought to recover from the Appellant in the suit comprised certain shares in two gardens, named Dum-Dum and Narain Mundul, which were in the possession of the Appellant, Jodonath Bose, and one Mirtunjoy Bose, a Defendant in the Court below, but who had not appealed, having been, as the Respondent alleged, acquired by them by means of a fictitious sale, and not *bona fide*, and held by them Benamee, or in trust for the Appellant. The second suit, which constituted the third of these appeals, was instituted by the Appellant against the Respondent, who had withdrawn from his House and protection; and was in the nature of a suit for restitution of conjugal rights. The third suit was brought by the Respondent against the Appellant to recover a single Company's paper.

The general facts were as follows:—In the month of Bysack, 1254, B.E., corresponding with the months of April and May, 1847, C.E., the Appellant intermarried with the Respondent, then a Widow, according to the laws and usages of the Mahomedans, and by the form or ceremony called "Nikah." The Respondent was the Mother of five children (two Sons and [554] three Daughters) by her first Husband, who had died about six months previous to her second marriage. Soon after the marriage, the Respondent, with her children, took up their residence at the House of the Appellant, at Sealdah, in the suburbs of Calcutta. At the time of her marriage with the Appellant, the Respondent was in possession of considerable property, both real and personal, which she had inherited from her Father, Moonshee Hossain Ally, who died in 1837, leaving the Respondent, his Daughter, her Mother, and two other Widows, and a Nephew, who were, by Mahomedan Law, his heirs. Litigation had taken place between the Respondent and some of the co-heirs, and part of her property was the result of such litigation, as well as other portions which had accrued to her by right of succession to her Father's deceased heirs and her own co-heirs. From the time of her marriage to the year 1855, the Appellant and Respondent lived and cohabited together as Husband and Wife, during which time she bore him a daughter. Very serious dissensions, however, having arisen in that year between them, occasioned chiefly by the Appellant's dealings with her property, the alleged cause of his ill-treatment of her, the Respondent presented a petition to the Magistrate of the Zillah for protection, and obtained an Order from him, giving her the option to live where she chose, but declaring that she was not thereby separated from her position as the Wife of the Appellant; and, to prevent the commission of any acts that might lead to an affray, the Appellant was bound

over, by recognizance in Rs. 10,000, for a year, liberty being given to the Respondent to sue for having been beaten and confined by the Appellant.

[555] In consequence of these proceedings, the Respondent filed a plaint in the first suit on the 8th of April, 1856, in the Court of the Principal Sudder Ameen of Zillah Twenty-four Pergunnahs, against the Appellant, to recover the real and personal property belonging to her, including the Government paper, and alleged, that the same had been wrongfully taken possession of and dealt with by him. The plaint stated the particulars above mentioned, and gave a detailed account of the value of the property claimed, which amounted in the whole to the sum of Rs. 534,794.

The Appellant, by his answer, denied the statements in the plaint, regarding his having taken possession for his own use of the Respondent's property, especially the Government paper, but admitted having dealt with it as alleged, and stated some particulars regarding the disposition of portions of the real estate, which rendered it necessary for the Respondent to file a Supplemental plaint to make other Defendants to the suit, among whom were the Appellant, Jodonath Bose, and Mirtunjoy Bose, who were alleged to hold Benamee for the Appellant two gardens therein described, called Dum-Dum and Narain Mundul gardens; which these Defendants by their answers alleged, that they had become *bona fide* purchasers and were in possession of, on their own individual account, and not Benamee. The other Defendants by their answer disclaimed all interest in the matter the subject of the suit.

The hearing of the suit took place before Mr. E. Latour, the Judge of the Zillah Court of the Twenty-four Pergunnahs, on the 25th of July, 1859, when a decree was made in favour of the Respondent, the amount of her claim being reduced to Rs. 234,800, on [556] account of Company's paper, and Rs. 20,511 for personalty, with judgment and possession for the real estate in the possession of the Appellant, Jodonath Bose and Mirtunjoy Bose.

Moonshee Buzloor Ruheem, Mirtunjoy Bose, and Jodonath Bose, severally appealed from this decision to the High Court at Calcutta, and these appeals were heard together on the 29th of November, 1862, when the Court, consisting of Messrs. Trevor, W. Seton-Karr, and L. S. Jackson, affirmed, with some slight modifications, the decree of the Zillah Court, and dismissed the three appeals with costs. The Appellants, Moonshee Buzloor Ruheem and Jodonath Bose, separately appealed from this judgment to Her Majesty in Council, and these constituted two of the present appeals.

In the second suit, out of which the third appeal arose, the Appellant sought for a judicial determination of his right as a Mahomedan Husband under Mahomedan Law, to recover possession of his Wife's person, the marriage contract being still in force, no divorce having been decreed. The Respondent by her answer insisted that, having regard to the oppression and cruelty which had been practised upon her, it was contrary both to the Mahomedan Law and to justice to deliver her up to her Husband, and contended that, as he had become a Freemason, he had thereby become an outcast from the Mahomedan faith, and could no longer assert his marital rights. The other Defendant, Zahoore Ahmed, his wife's son-in-law, by his answer denied that the Respondent left the Appellant's House by his advice, but admitted petitioning the Magistrate for the Respondent's release from confinement in the Appellant's House.

[557] The material issues recorded in bar to the suit were, whether, as the Foujdary Court had made an Order allowing the Respondent to remain anywhere, according to her inclination, the suit brought by the Appellant could be entertained; whether the Appellant had committed any act not sanctioned by his religion, or had been guilty of any oppression on his Wife; whether, having regard to the circumstances stated in the first issue, even if he were proved guilty of the cruelty alleged, he could obtain restitution of her against her consent; and whether, if not proved guilty, he could obtain possession of her. Upon the question of law, the issues were, first, whether, according to the Mahomedan Law, a Husband, against the wish of his Wife, could bring her under his control or not; second, whether by joining the Freemasons and becoming a Freemason the Appellant had, according to the Mahomedan Law, lost caste and become an outcast; third, whether a person made an outcast could

have, according to the Mahomedan Law, control over his Wife; and lastly, whether a Husband using oppression on his Wife loses the right as Husband over her.

Upon the points of law involved in this suit, the opinion of the Law Officer of the Zillah Court was to the effect that a Mahomedan by embracing Freemasonry became an outcast; but that, if he remained a Mussulman, he was entitled to his Wife's person, notwithstanding he was guilty of tyranny and oppression. Another opinion, of a contrary tenor, with respect to the effect of becoming a Freemason, was filed by the Appellant, and the Principal Sudder Ameen ultimately decided in his favour on this point, that he had not thereby lost caste.

[558] Evidence was entered into for the Appellant. Two of the witnesses, who were his relatives, stated that they had access to the female apartments of the Respondent, and had not observed any acts of oppression practised on her. The Respondent put in evidence the petition to the Magistrate and the Order made thereon giving her leave to live apart from the Appellant, but there was no evidence given of any specific act of ill-treatment towards her, except such as was alleged regarding the deprivation of her property.

As to the merits of the case, the Principal Sudder Ameen (Tarucknauth Sen) found, that the oppression had been proved, and that the Respondent was in danger of her life. That danger he considered was not lessened by the fact, that she had instituted the before-mentioned suit against her Husband to recover property of which she alleged he had fraudulently deprived her during her marriage, and had obtained a decree against him for five lacs of Rupees, and, relying upon two Futwas filed by the Respondent, the Judge held, that neither by the Mahomedan Law nor by natural justice was the Appellant under such circumstances entitled to the aid of the Court to enable him to recover possession of his Wife's person.

An appeal from this decree was brought by the Appellant to the High Court at Calcutta, and heard by Messrs. C. Steer and W. S. Seton-Karr, two of the Judges of that Court, who pronounced the following judgment:—"It appears that the Defendant was left a young Widow, and with large means. The Plaintiff induced her to marry him, and they lived together for some years. In that time, however, the Plaintiff managed to make away with a [559] great part of his Wife's fortune, and he did so by fraudulent means on some occasions. Having, by these and other means, done great damage to the property of his Wife, he commenced then to illuse her. He behaved oppressively to her, and shut her up as if in a Prison. At length this state of things came to the knowledge of the Magistrate, and he went and released her. Judging from what he saw, and from what was told to him, it did not appear to the Magistrate that it would be safe to allow the Defendant to live any longer under the absolute control of her Husband, and at her desire she was allowed to quit his roof, and to find another residence for herself. She, lately the rich Widow, left the Plaintiff's dwelling with the bare clothes on her back, and since then she has succeeded in an action against her Husband, in which a decree has been given against him for upwards of five lacs. These are all facts which have been judicially ascertained, and now the Plaintiff comes into Court to invoke the aid of the law, to compel his Wife to return to his House and to live with him. The Pleader for the Plaintiff in this Court argues, that this is a case which must be decided in conformity to the Mahomedan Law; that that law does not permit a Wife to separate from her Husband, except upon a divorce; that at present there has been no divorce, and the Wife should, therefore, be compelled to go back to her Husband; that cruelty is no ground for the Court to set aside the provisions of the Mahomedan Law, for in ordering the Wife back, the Court can impose such conditions upon the Plaintiff as will ensure his Wife good treatment for the future. Referring to the Hedaya under the head of 'Divorce,' we see that the Mahomedan Law does not per-[560]mit a Wife to divorce herself, but the Husband can divorce his Wife whenever he pleases. This has also been ruled in a decision of the late Sudder Court, *vide* Vol. V. of the Select Reports, p. 200, the decision being dated the 5th of May, 1832. There is, however, a ceremony called 'Kolah,' by which a Wife may possibly obtain a separation from her Husband, but this requires also the consent of the Husband, and it does not appear that the Wife can by any possibility separate herself, except by the consent of her Husband. This being so, are we required to decide this case in conformity to the principles of the Mahomedan

Law? Are we to compel the Defendant to return to her Husband, convinced as we are that she should not be forced to return? If under the Mahomedan Law no Wife can separate herself from her Husband under any circumstances whatsoever, the law is clearly repugnant to natural justice, and we are not bound to follow it. The Mahomedan Law giving no relief to a Wife, be the conduct of the Husband ever so bad, it is a case to be disposed of by equity, and good conscience. And on these principles, we have no hesitation in saying, that the grounds upon which the Defendant has separated from her Husband justify her in that step, and that we should be making the Court the engine of a grievous injustice, if we gave the Plaintiff free power and control over the person of the Defendant, by ordering her to return to him. As to the suggestion of the Plaintiff's Vakeel that we might impose such conditions upon his Client as would ensure his Wife proper treatment at his hands, it is out of the question. It would not be just to the Defendant to adopt such a course, she being herself unwilling to return on any terms, and her [561] grounds for separation being so well founded, nor would it be possible, living as Mahomedans of rank do with their Wives, to adopt any measures of prevention which would hold out any hope of being efficacious. On these grounds we uphold the judgment of the Lower Court, and dismiss the appeal with costs." From this decision the third appeal was brought.

The third suit was also instituted in the Zillah Court of the Twenty-four Pergunnahs on the 31st of December, 1861, by the Respondent against the Appellant. The principal questions raised were, first, whether, under sec. 7, Act, No. VIII. of 1859, the claim made by the suit could be entertained and adjudicated upon by the Court, inasmuch as the subject matter had been omitted from the first suit, and might have formed a part, being, as before stated, brought by the same Plaintiff against the same Defendant; and, secondly, whether the suit was not barred by effluxion of time, under the twelve year's rule of limitation. The object of the suit was to recover the possession of a single Government security (Company's paper) distinguished as No. 16,142 of 1832-3, for the principal sum of Rs. 10,000, with interest alleged to be due thereon, amounting to Rs. 21,155. 9a. 5p. The plaintiff stated, that the Company's paper in question formed a part of the estate of the Plaintiff's Father, and had been delivered to her on the 16th of September, 1847; but that, as the same was standing in his name, she was unable to obtain payment of the interest in respect of the same from the Government Treasury; that in consequence she presented a petition to the Zillah Judge to obtain a Certificate of administration, under Act, No. XX. of 1841, and that such petition was, by the Order of the Judge, dated the [562] 5th of May, 1848, rejected. The plaintiff then stated, that she was induced, by the Defendant's representation that he would draw the interest, to indorse the Government paper in his name, and that the Defendant, through the indorsement, represented that he had purchased the paper, filed an appeal before the Sudder, in dissatisfaction with the aforesaid Order of the Judge; and, as he held in his hands her seal, he caused a petition to be filed on her part to the effect that the paper had been purchased by him; and upon this, on the 11th of September, 1848, an Order was passed. The plaintiff then stated the circumstances relating to her withdrawal from her Husband's house, as already detailed, and admitted that she had instituted a previous suit to recover her real and personal property, distinguished as suit, No. 30 of 1856, against the Defendant, and that she had obtained in such suit a decree in her favour. She excused herself from having omitted in that suit the Company's paper now sued for, and for not then suing for it, by stating, that as she was a Purdahnusheen (a veiled or secluded woman), and unacquainted with reading and writing, she could not ascertain anything about the Government paper for Rs. 10,000, and the interest of the same, and consequently that was not included in her former claim. That she obtained knowledge of the Government paper in the month of July, 1859, and that the cause of action arose from that time; and she accordingly instituted the suit to obtain the Government paper, or the sum of Rs. 21,155 9a. 5p., according to an annexed account.

The Appellant, by his answer, insisted that the Respondent had in fact sold to him the Company's paper in question on the 16th of July, 1848, for C. [563] Rs. 13,315. 8a. 15p., and that he had, on the 30th of October following, sold and

transferred the same to a third party he named, for Rs. 13,777. 12a. 5p. The answer then pleaded three several pleas in bar to the Plaintiff's suit. First, that the suit was barred by Ben. Reg. III. of 1793, sec. 14, as twelve years had elapsed from the dates of his purchase and sale aforesaid. Secondly, that on the 30th of November, 1856, the Respondent had instituted a suit against him to recover Rs. 534,794, on the same cause of action as the present suit, and had obtained a decree therein on the 25th of July, 1859, and submitted to the Courts that the suit ought to be dismissed on that ground, under Act, No. VIII. of 1859, sec. 2 (the Code of Civil Procedure), as well as under Ben. Reg. III. of 1793, sec. 16, as she had sued again on the same cause of action; and thirdly, that the suit ought to be dismissed also under sec. 7 of the Act, No. VIII. of 1859, and that the rule therein enacted had been always in force, that all claims coming under one and the same cause of action are to be brought in one suit, and that this rule was enjoined by the Circular Order dated the 30th of September, 1847.

Issues in the suit were recorded by the Principal Sudder Ameen. Those on the part of the Plaintiff being, first, whether the Defendant, being a Trustee for the Plaintiff, could be held liable to the Plaintiff in this suit? And on the part of the Defendant in bar of suit, first, whether the action, having been divided, could be maintained? Secondly, whether the action was barred by the operation of limitation? On the merits, whether the Government paper was fairly purchased by the payment of consideration?

The hearing of the suit took place before Mr. E. [564] Latour, the Judge of the Zillah of Twenty-four Pergunnahs, on the 20th of March, 1862, when he delivered the following judgment:—"By her own account, the Plaintiff knew all about the Company's paper in May, 1848, indeed, it was made over to her in 1847; failing in obtaining a Certificate, she indorsed it over to her Husband for the express purpose of drawing the interest; the present suit is preferred on the last day of limitation, under the old law, 31st of December, 1861. It is clear, therefore, that this suit is barred by limitation of time; to let in the larger limitation, fraud must be specially pleaded, and there is one point only in which, if pleaded specially, this Court might hold that limitation would not apply, viz., that the Defendant was a Trustee for his Wife; but the Court will not enter into this matter at length, because the action must fail under sec. 7 of Act, No. VIII. of 1859. By that section, if a Plaintiff relinquish or omit to sue for any portion of his claim, a suit will not eventually lie to recover such portion. It is argued, that, 'omission' means 'intentional omission,' that the Plaintiff did not know of this rule, and therefore, did not intentionally omit to sue for it; but omission is a negligent omission in contradiction to a voluntary surrender of a portion of a claim, and laches, is loss. It is quite clear, that the facts connected with this Note were openly known through the different proceedings. The Defendant claimed the Note, as indorsee for value, on the petition of the 30th of Srabun, 1255, on the execution against his Wife, the Plaintiff; he also sued to set aside the summary Order rejecting his claim, which action was dismissed in Jeyt, 1257 B.S., so that there has been an extraordinary quantity of sunlight about this particular [565] paper at variance with any idea of fraudulent concealment. The case of *Casseenath v. Pemberton* (21st September, 1843) is referred to, where a claim to a portion of estate was recognized which had not been included in the original action. In that case the Defendant had fraudulently concealed that portion of the estate; and, therefore, there is no analogy common to the present suit. I think that ignorance cannot be pleaded on the face of available knowledge, and that the Plaintiff was bound to include the present claim in her previous action. Secondly, that no case is made out for extraordinary limitations," and he accordingly gave judgment for the Defendant upon both pleas in bar.

The Respondent appealed to the High Court at Calcutta, objecting to the ruling of the Judge as to sec. 7 of Act, No. VIII. of 1859 operating as a bar to the suit, submitting, that the subject of her claim was not included in the former suit, owing to her ignorance, and not from design.

The hearing of the appeal took place on the 13th of February, 1863, before Messrs. Bayley and Seton-Karr, two of the Judges of that Court, who gave judgment as follows:—"The Plaintiff, it is clear, had a knowledge of the existence of this paper before she brought her first suit, and might have included it in that suit:

and the real question for us to decide is, whether this omission, neglect, or oversight is sufficient to bar her present claim under the law, fairly applied." And, after referring to the provisions of sec. 7 of Act, No. VIII. of 1859, the judgment proceeded,—"The Plaintiff could not have been actuated by any fraudulent or dishonest motive in omitting this portion of her claim. In this view, we are of opinion, that though it might [566] be desirable for the ends of justice, and for the sake of perspicuity, that the various items claimed by the Plaintiff should form the subject of one single action, and though, in fact, they were mainly included by her in one action, yet there is nothing in the law, as we read it, to make it absolutely imperative on her to include every item of such a claim as hers in one single suit. Nor do we think that, under the circumstances of the case, the Plaintiff may not fairly plead that she has a distinct and separate cause of action for the recovery of this piece of paper made over to the Defendant on a particular date. When we consider, further, that the action rests on the alleged fraudulent misappropriation by the Defendant of property given to him in trust, we think it extremely desirable that the case should go to trial on the merits, if the law allows this, as we hold it does. As regards limitation, in point of time, which we infer from his remarks, that the Judge holds to apply to this case, we think it only necessary to observe, that limitation would not run against a Wife in the case of a Husband, who is a Trustee of valuable property for her benefit, he holding strictly as Trustee for her use, and would be found to account for the property to whatever shape or uses he himself had put it. Holding, therefore, these views, after a careful consideration of the legal points urged, we set aside the Judge's decree of dismissal, and remand the case for a full trial on its merits."

The Appellant brought the present appeal (the fourth) from the decree founded on this judgment.

The Attorney General (Sir John Rolt, Q.C.), and Mr. Leith, for the first Appellant.—[567] These appeals being between the same parties, and substantially affecting the same rights, are now by consent argued together. Shumsoonnissa Begum, the Wife of the Appellant, Moonshee Buzloor Ruheem, is the Respondent in the four appeals, and was the original Plaintiff in two of the suits, and the Defendant in the other. The suits which constitute the two first and fourth appeals relate to the real and personal estate of the Respondent, and may be termed the "Property suits." The other appeal is known as the "Restitution suit." In the Court below, separate evidence was adduced in each suit: it will be convenient, therefore, to keep the cases distinct in argument. Now, the first suit, which is described as suit, No. 30 of 1856, was brought by the Respondent as Plaintiff against the Appellant as sole Defendant, and sought, after a cohabitation as Husband and Wife of upwards of eight years, to recover personal property, consisting of Company's paper, endorsed and delivered over by her to him at various times subsequent to her marriage, to a large amount, besides jewels, money, and other personalty, alleged to be of the value of upwards of Rs. 534,794, and real estate consisting of shares in certain gardens. It is true, that this sum was much reduced by the decrees of the Zillah, and High Courts, but it was proved and admitted, that the Respondent had herself made over the property in question to her Husband, and after such proof the *onus* lay on the Respondent to prove the claim set up by her, and not, as the Courts below have held, on the Appellant to disprove the claim so made on him, as she alleged and proceeded on the ground of fraud, deceit, and undue influence. The *onus probandi* was on her, as she charged fraud, [568] coercion, and deceit to establish such charges, which the evidence clearly disproves. Respecting the Government securities, known as Company's paper, the evidence shows, that these securities were made over by the Respondent to her Husband, being indorsed by her, and delivered over to him for a good consideration, and the proceeds applied by him for her family. This transaction is in entire consistency with the law and custom prevailing among Mahomedans in India. Under the Mahomedan law, Husband and Wife, in relation to any property possessed by them respectively, or any money obligations they may be severally under, are treated and considered as altogether distinct persons in law, and, as such, respectively capable of selling and purchasing, or making or receiving gifts to or from each other, and even of contracting debts with each other. The Respondent is proved by the evidence to have had a sufficient capacity for business, and to have been always keenly alive to her own

rights and interests whenever they were in any way imperilled. Nothing, therefore, but clear evidence of fraud, deceit, or coercion, which was entirely wanting, could have justified the Courts below in setting aside and declaring null the legal transfers by the Respondent of her property. There was no such evidence; on the contrary, her own admissions on the record, as to the fact of the sales effected by her in favour of the Appellant, operated as an estoppel to the claim made by her, and ought to have been so treated by the Courts below. As regards the claim for jewels and other personal estate, the claim to such property was reduced in the first instance by the Zillah Court to Rs. 20,511, but the High Court disallowed the claim altogether, and we submit that there is [569] no evidence that could warrant any other judgment. The claim regarding the real estate arose upon the supplemental suit, and the Appellant, Jodonath Bose, through deriving his title through Moonshee Buzloor Ruheem, appeared separately in the Courts below, and is here represented by other Counsel; it is not requisite for us, therefore, to go into his case, though the evidence of fraud or connivance is in all respects similar, the transactions regarding the dealing with the personal and real estate being mixed and simultaneous, and there is an equal deficiency of proof in respect of the real estate, as we have already shown, regarding the dealings with the personal estate.

The other suit, out of which the second appeal arises, is the "Restitution suit." Now, we contend, that the Courts below have entirely miscarried in their judgments in this suit, and that the decree refusing to order the Respondent to return to her Husband's home was not warranted either by Mahomedan law, or the facts of the case. The parties are Mahomedans, and by Ben. Reg. IV. of 1793, sec. 15, their rights ought to have been determined according to the Mahomedan law. However obnoxious to English notions, the law regulating caste, custom, and inheritance in India must be observed, as held in the Sutte case (heard before the Privy Council, 23rd June, 1832). Even now slavery is recognized in India. By the Mahomedan law, a Wife cannot separate herself from her Husband, and divorce must proceed from the Husband. Hedáya, Vol. I. Book IV. ch. 1, p. 201. And this, as observed by the Judges of the High Court, has been followed by the Sudder Dewanny Court [570] in the case of *Maulvi Abdul Wahab v. Mussumat Hingu* (5 Ben. Sud. Dew. Ad. Rep., p. 200). That case shows that a suit for restitution of conjugal rights will lie in the Civil Court; *Mussumat Ameena v. Kuttoo Khan* (7 Ben. Sud. Dew. Ad. Rep., p. 27), *Mussumat Dooveen Beehee v. Sheik Mennoo* (Sel. Rep., 103); although he has no right to force his wife to come to his house, Macnaghten "On Moohummadan Law," p. 282. The law was rightly stated by the Judges of the High Court, but the conclusion to which they came to, that, notwithstanding the Mahomedan law, "It was repugnant to natural justice" to administer it, and that the case was to be disposed of by them according to what they termed "equity and good conscience," was not only inconsistent with the law governing the case, but was an erroneous application of the rule of decision directed by Ben. Regs., IV. of 1793, sec. 15; III. of 1793, sec. 21, VI. of 1793, sec. 31, and VII. of 1832, sec. 9, to be observed by the Courts. The Court ought to have decided the case according to the Mahomedan law, and not have exercised a fanciful discretion in refusing a just right by that law. In the case of *The Queen v. Shapurji Bezonji* (Perry's Oriental Cases, 91), the Supreme Court issued a Habeas Corpus to deliver the custody of a Child to its Father, although the Father had changed his religion. The Parsee case, *Ardaseer Cursetjee v. Perozeboyee* (6 Moore's Ind. App. Cases, 348), though it may be relied on by the Respondent, is no authority against the Court's jurisdiction to compel the Respondent to return to her Husband's home: all that was decided in that case was, that the remedy was not to be obtained on the [571] Ecclesiastical side of the Court, contrary to the ruling in the case of *Buchaboyee v. Merwanjee Nassarwanjee* (Perry's Oriental Cases, 73). Here the proceedings are in a Civil Court. The Futwas of the law Officers of the Court were conclusive, and ought to have guided the Judges. If they were dissatisfied with the opinions so taken in the Zillah Court, it was the duty of the Judges of the High Court to obtain a further exposition of the law from the Mahomedan law Officers of that Court. Then as to the alleged cruelty by the Appellant, supposing even that, according to the law applicable to the case, namely, the Mahomedan law, ill-treatment or

alleged cruelty could form a ground for such a judgment as is appealed from. There was no cruelty on the part of the Appellant; he could by the Mahomedan law, Baillie's "Dig. of Moohummudan Law," p. 13, as well as by the English law, prevent his Wife leaving her home if she wanted to go away, *Rex v. Cockrane* (8 Dowling's P.C., 63). There was really no evidence of the acts of cruelty alleged, or of any such cruelty as could have justified the decision of the Courts below; the Judges referred only to the Roobekary of the Magistrate, which was made *ex parte*, and they assumed, without any warrant, that his conclusion was well founded. But even if all that was alleged had been proved, the Fugwas of the law Officers, as well as the authorities on the Mahomedan law already referred to, show that the proper course for the Judges to have taken would have been to decree a restitution of conjugal rights, with, if necessary, an inhibition against the Appellant from acting in a tyrannical or oppressive manner to his Wife, or to have taken other precautionary measures as were within their power and authority, to [572] prevent the occurrence or repetition of the acts complained of.

The third appeal by this Appellant relates to the suit for recovery of the Company's paper for Rs. 10,000 and interest. It is confidentially submitted, that the High Court were wrong in their decision. First, as the suit of the Respondent was barred under section 7 of Act, No. VIII. of 1859, inasmuch as her claim in the latter suit ought to have been included in the former suit brought by her against the Appellant. By that section of the Act, the Court below was absolutely prohibited from entertaining any suit for such portion of a Plaintiff's claim as she may have omitted to sue for in a previous suit, the decree of the Court below properly found that the Respondent had a knowledge of the existence of the Company's paper in question before she brought her first suit, and she might have included her claim in respect of it in that suit, but the decree, we submit, erroneously refused to give effect to the statutory prohibition, on the ground that the Respondent could not have been actuated by any dishonest or fraudulent motive in omitting this portion of her claim, although there is no such exception to be found in the above Act, and, secondly, the suit was barred by the period of limitation having expired by effluxion of time, from the date of the cause of action, Ben. Reg. III. of 1793, sec. 14. Even on the merits the decree cannot be supported, as there is no sufficient evidence to support the facts pleaded.

Mr. Pontifex, for the Appellant, Jodonath Bose.—The Appellant, for whom I appear, was first made [573] a party to the suit by supplemental plaint. He was in possession of a very small portion only of the real estate formerly belonging to the Respondent, but part of which was sold by her, first to her Husband, the other Appellant, and purchased from him by this Appellant and one Mirtunjoy Bose, who is not an Appellant here, and the other part purchased direct from the Respondent herself. The allegation of the Respondent, that the property so purchased was held Benamée, or in trust by this Appellant for her Husband, is entirely without support or foundation. The purchases, both from the Respondent herself, as well as from the Appellant, Moonshee Buzloor Ruheem, were *bona fide*. There is no evidence of fraud on the part of this Appellant, nor is it even alleged, that the purchases made by him were made at an undervalue or by collusion. The *onus* of proving such lay upon the Respondent, and no such proof has been given.

Sir R. Palmer, Q.C., and Mr. Cave, for the Respondent.—Though the facts, in these appeals, are numerous, the points at issue and for determination, are neither difficult nor complicated. We propose to take all the cases together, and first, as to the property suit. The same principles that would be applied in our Courts here, in circumstances such as this suit present, are applied to the Courts in India. The law in both countries is founded on the inalienable rights of moral justice. These principles are well defined and illustrated in the cases of *Cooke v. Lamotte* (15 Beav., 234), and *Smith v. Kay* (7 H.L. Cases, 750); and as regards [574] transactions between Husband and Wife in *Rich v. Cockell* (9 Ves., 369-375), and *Darkey v. Darkey* (17 Beav., 581), *Childers v. Childers* (1 De. G. and J., 482), *Curtis v. Perry* (6 Ves., 739). The same rules are applied by the Courts in India, Strange's "Hindu Law," Vol. I., 26-30 [Ed., 1827]. These authorities establish that, though a gift by a *Feme covert* of her separate estate to her Husband is not to be impeached without clear evidence of fraud, coercion, or deception; yet a gift to him is not to be inferred,

and if there be evidence of fraud or deception on his part, then the transaction is either void altogether or enures as a trust for the Wife. That is exactly our case here; we admit the several indorsements of the notes and transfers of them by the Respondent to her Husband, but it was only for the purpose of obtaining the interest on them for her. Any sale by him of the notes to the purchasers, we insist was for her benefit, and such transfers were Benamée, creating a trust for the Respondent, and that the sale and conveyance of the real estate was fraudulent and void, if not a Benamée transaction. All the evidence goes to prove the allegations made by the Respondent in her pleadings, that the transfer made by her of her property to her Husband was for purposes of his management, and not for his personal benefit; and that would make all the transactions Benamée. Now, this is a case of a Mahomedan woman living in seclusion, and it is an acknowledged principle of law in India that the Courts will protect Native women so situate against their own acts, as they can scarcely be considered *sui generis*, *Latchem Umma v. [575] Lewcock and Others* (1 Str. Mad. Rep., 30); *Chellummal v. Garrow* (2 Str. Mad. Rep., 159); *Narsummal v. Latchmana Nate* (7 H.L. Cases, 750). In such circumstances the onus of proving the *bona fides* of the alleged sales, and the payment of the consideration, was rightly laid by the Indian Courts upon the Appellant, *Smith v. Kay* (2 Str. Mad. Rep., 14). The Zillah Court was of opinion, that the Appellant had failed to prove such *bona fides* or payment, and the Judges of the High Court were of the same opinion, though they modified the decree of the Zillah Court. The finding of both Courts on the facts was substantially the same, and this Court will not disturb the finding of the Court below upon a mere question of fact. *Musader Mahomed Cazzum Sherazee v. Meerza Ally Mahomed Khan* (8 Moore's P.C. Cases, 91). The Appellant's defence is, that the Respondent indorsed the several securities to him, first, because she could not obtain the interest due on them; second, because she could not manage her affairs herself; third, because she was afraid of her servants embezzling; and fourth, because she found herself in debt. The first and second reason assigned by the Appellant was discredited by the Courts below: the third and fourth were never suggested till the institution of the suit, and entirely failed in proof.

Second, with respect to the suit for restitution of conjugal rights. We do not now insist upon the objection taken in the Court below, that the Appellant, by becoming a Freemason, thereby lost caste, or any right to possession of his Wife's person, which he might have possessed under the Mahomedan law; but we submit, that the fact of cruelty and oppres-[576]-sion of the Wife and such danger to her life as to induce her to leave her home having been proved, the Appellant was not entitled under the Mahomedan law to the aid of a civil Court to enable him to recover possession of her person. The law relied upon by the Appellant is not in force in India. Ben. Reg. IV. of 1793, sec. 15, preserves to the Natives their rights, usages, and customs, and is recognized by Ben. Reg. VIII. of 1795, sec. 3, as amended by Reg. VII. of 1832, sec. 8, which is the same as Reg. IV. of 1793, sec. 15; but that section of the last Regulation must be construed by the light of the case in *Peeree Williams* (2 P. Will., 75; see also upon this point, *Blankard v. Galdy*, Salk., 411; *Campbell v. Hall*, Cowp., 204; S.C. Loft, 655; *Sprayee v. Stone*, referred to in *Brady v. Cubitt*, Doug., 35), where it is laid down that a conquered country is governed by such laws as the Conqueror may impose; but until the Conqueror gives new laws the country is to be governed by its own laws, unless such laws are contrary to the laws of God. The Legislature of India cannot have intended to give to the customs prevailing in India greater force than the customs which prevailed in England. If it be said, that the Indian laws, customs, and usages have been guaranteed to the Natives by law, so have been those of England by Statutes, 9th Hen. III., c. 9; 1 Edw. III., Stat. 2, c. 9; 14th Edw. III., Stat. 1, c. 1; 2 Hen. IV., c. 1, sec. 2, but not observed. In cases in which no specific rule exists, the Courts are to decide the case according to justice, equity, and good conscience. It is so enacted by Ben. Reg. VI. of 1793, sec. 31. The Court, therefore, was right in refusing to send the Respondent home to her Husband. In England if a Wife swears the peace against her Hus-[577]-band the Court will not deliver her to her Husband, *Rex v. Brooke* (2 Burr., 1991). By the Mahomedan law it is not imperative for a Wife to reside with her Husband until her dower is paid, *Mussumet Dosun Bebee v.*

Sheik Munoo (9th May, 1832, Sel Rep., 103), Morley's Dig. tit. "Husband and Wife," 42; or for brutal treatment on his part. *Précis de Jurisprudence Musulman, par Khalib Ibn Ishak, traduit de l'Arabe par M. Perron*, vol. ii. p. 511.

By Reg. II. of 1798, sec. 4, it was intended, that the Law Officers of the several Courts should expound the law, and that the Judges should be guided by their exposition in ordinary cases, but not in particular cases wherein they might have reason to doubt the accuracy of such exposition. In such cases a further exposition of the law, from the Law Officers of the Superior Courts was not intended to be excluded.

Then with respect to the third suit, we contend, first, that the omission to include this particular Company's paper in the first suit was a simple oversight, and so the Court below held, and as the omission did not arise from any fraudulent or dishonest motive, nor from a desire to bring the suit within the jurisdiction of any Court, the provision of sec. 7 of Act, No. VIII. of 1859, did not apply. *Casheenath Mookerjee v. Prawnkishen Mookerjee* (7 Ben. Sud. Dew. Ad. Rep., 131). It is distinguishable from *Radha Benode Misr v. Sheikh Musheetoolah* (ib., 350) and *Rae Hurree Kishen v. Rajah Putnee Mul* (ib., 287), the proof being necessarily the same in both cases, and the omission wilful. Secondly, with regard to the objection on the ground of the law of limitation, the Court below rightly determined that limitation would not run against a Wife in the case of a Husband [578] who was a Trustee for his Wife, therefore, the claim was not barred by the law of limitation. Ben. Reg. II. of 1805, sec. 3, ch. 4, excepts cases of mortgage and deposit, and requires possession under a title *bona fide* believed to have given a right of property, *Kuthi Begum v. Kalab Ali* (5 Ben. Sud. Dew. Ad. Rep., 123). The limitation runs only from the discovery of the fraud. *Moolhummud Reazodeen v. Akbur Ali Khan* (1 Ben. Sud. Dew. Ad. Rep., 238). Act, No. XIV. of 1859, sec. I., cl. 15, gives a saving limitation of thirty and sixty years in suits against Depositories; and sec. II. enacts, that no suit against a Trustee is to be barred by any length of time. Section IX. is in point, for it provides, that if a right of action is concealed by fraud, the time runs only from the discovery of the fraud.

The Attorney-General, in reply.—First, as to the Respondent's suit for recovery of the Company's paper and other personal and real estate. The *onus* was certainly not on the Appellant; on the contrary, it lay on the Respondent as Plaintiff to establish by evidence her allegation in the pleadings, which impeached the sales for fraud and want of good consideration. Undue influence is not to be presumed in a sale for value. Now, with regard to the alleged undue influence exercised by the Appellant over the Respondent, a great deal of confusion has arisen from the authorities cited by the Respondent on the Hindoo Law, which do not apply, and by confounding the position of a Hindoo Wife with a Mahomedan Wife. In the former case the Wife is under the tutelage of her Husband, and it is admitted that any act done by her is to be [579] jealously watched, but the Court will not strain the law to accommodate a particular case, however hard it may be; thus in *Erp. Balaram* (Perry's Oriental Cases, 516) the Supreme Court at Bombay ordered a married Hindoo woman, who had left her Husband because he became a Christian, to return to his house. A Mahomedan *feme covert* may sue, or be sued, alone, *Bihee Ameerun v. Shaik Dawood* (1 Fulton, 143); and, in some respects, she is even more independent than an English woman, for there is by Mahomedan Law on marriage no community of goods. Therefore, although, at first sight, the relation of Husband and Wife, with respect to his influence over her in such a transaction as the present, may apparently be against the Appellant, yet as a Mahomedan Wife having separate property has absolute disposition over it, in a case like the present, it should be dealt with like a sale by her to a stranger for value. In the plaint there is no allegation of undue influence being exercised by the Appellant to induce her to part with the Company's paper: all she pleads is, that she handed them over to the Appellant for the purpose of receiving the interest. Our evidence establishes the *bona fide* sale, but the Court below, in the absence of any proof on the Respondent's part, dealt only with probabilities and presumed fraud. The English authorities relied on by the Respondent do not apply: but the case of *Hunter v. Atkins* (3 Myl. and K., 157) is in point. "There," Lord Brougham says, "the circumstances of the case do not warrant the Court in ascribing undue influence, influence improperly

exerted over a person either of insufficient understanding, or under the control or management of another—the dupe of his artifices, or [580] the victim of his contrivances, or subjected to his sway.” Such undue influence must be established by positive proof.

Secondly, Ben. Reg. IV. of 1793, sec. 15, declares, that the rights of Mahomedans are to be regulated by Mahomedan Law, and it operates as a denial of justice if the Court hesitates to give the Appellant such relief as that law gives him. The case of *Maulvi Abdul Wahab v. Mussumat Hingu* (5 Ben. Sud. Dew. Ad. Rep., 200) is an authority, that a Mahomedan Husband can recover the person of his Wife by civil action, and establishes our contention, that the Court will exercise the power to order the Wife to return to her Husband's house. The Parsee case, *Ardaseer Cursetjee v. Perozeboye* (6 Moore's Ind. App. Cases, 348), does not militate against this proposition, as it only establishes that the remedy of a Parsee woman for restitution of conjugal rights was not on the Ecclesiastical side of the Supreme Court. The penalty in this country, if an Ecclesiastical Court directs a Wife to return to cohabitation with her Husband, and she refuses, is to treat it as a contempt of Court, and she can be imprisoned for such contempt.

Third, the second suit by the Respondent against the Appellant being for recovery of a single Company's paper, alleged to have been fraudulently obtained from her by the Appellant, was known to her from the first, and ought to have been included in the first suit, and comes clearly within the provisions of sec. 7, No. VIII. of 1859, which expressly disallows such a suit, and it ought to have been dismissed by the Court below as a vexatious suit, the transactions out of which it arose being identical and already disposed of. More-[581]—over the suit was barred by the Ben. Reg. of Limitation Reg. III. of 1793, sec. 14, the period of limitation being calculated from the date when the cause of action arose.

Their Lordships' judgment in these appeals having been postponed, was now delivered by

The Right Hon. Sir James W. Colvile (July 4, 1867).—The Appellant, in three of the four appeals of which their Lordships have now to dispose, is Moonshee Buzloor Ruheem, a Bengal Zemindar. The Respondent, in the four appeals, is his Wife, Shumsoonnissa Begum. Her Father, Moonshee Hossain Ali, died in the year 1837, possessed of considerable wealth. His co-heirs, according to Mahomedan law, were his three Widows, Ashruffnissa, Oomdatunnissa, and the Respondent's Mother, Komerunnissa; two Daughters, viz., the Respondent and a posthumous child, named Nujmunnissa, and his Nephew, Boooli. His estate was divisible amongst these persons, in twenty-four parts or shares, of which the Respondent and her Sister each took eight. The settlement of his affairs, however, occasioned a good deal of litigation, and the Respondent did not obtain full possession of her share until November, 1847.

She had previously, and in the month of April or May of that year, being then a Widow, with five children by her first Husband, become the Wife of the Appellant, Moonshee Buzloor Ruheem. By him she has had one Daughter. In July, 1853, in consequence of the death of her Sister, Nujmunnissa, which took place in August, 1849, and of the compromise of a suit with that Lady's Husband, she received a large accession of fortune. Her cohabitation with the Moonshee [582] continued until the 28th of December, 1855; when, on a complaint by her of ill-usage on his part, she was allowed by the Magistrate of the Twenty-four Pergunnabs to leave his house. They have since lived separately, and the present litigation dates from that time.

On the 8th of April, 1856, she instituted against her Husband a suit for the recovery of her property, which, she alleged, he had detained or made away with. On the same day he commenced against her and one of her sons-in-law a suit, of which the object was, to enforce his marital rights, by compelling her to return to his house and control. These suits, in the argument before us, were called, respectively, the “Property suit” and the “Restitution suit”—a nomenclature which it may be convenient to adopt.

The property suit was originally brought against the Husband alone. By his answer it appeared that certain portions of the landed property claimed by her had

got into the possession of two persons, named Jodonath Bose and Mirtunjoy Bose. They were accordingly brought before the Court by supplemental plaint, on an allegation that they were the dependants of the principal Defendant the Moonshee, and held Benanee for him. The suit was tried before the Civil Judge of the Twenty-four Pergunnahs. His decree, which bore date the 25th of July, 1859, awarded to the Respondent Company's paper, to the amount of Rs. 2,34,800, and cash to the amount of Rs. 20,511, dismissing the suit as to the other moveable property claimed by her. It also decreed the restitution to her of the immoveable property held by Jodonath Boscce, with mesne profits, to be paid by the Moonshee, but dismissed the suit as against Mir-[583]-tunjoy Bose without costs. All the Defendants appealed against this decree, the appeal of Mirtunjoy Bose being for his costs. The High Court of Calcutta, by its decree, dated the 29th of November, 1862, confirmed, with some slight variations, the decree as to the Company's paper, directing the Moonshee to restore the papers, to the amount of Rs. 82,000, which remained in his hands; and to replace the others by the purchase of Company's papers, to an amount equal to that of the missing papers, but reversed the Judge's decree as to the Rs. 20,511 cash. It confirmed, however, the decree as to the property held by the Appellant, Jodonath Bose, making him also responsible for the mesne profits. And it further decreed the conveyance to the Respondent, by Mirtunjoy Bose, of the immoveable property held by him. Against this decree the Appellants, Moonshee Buzloor Ruheem and Jodonath Bose, have severally appealed to Her Majesty. No appeal has been preferred by Mirtunjoy Bose.

The restitution suit was tried by the Principal Sudder Ameen of the Twenty-four Pergunnahs, who, by his decree, dated the 28th of December, 1860, dismissed it with costs. On appeal, the High Court of Calcutta confirmed that decision by its decree of the 25th of July, 1863. The Moonshee has appealed against both these decrees.

His remaining appeal is against a decree of the High Court, made on the 13th of February, 1863, in another suit instituted against him by his Wife. The object of that suit was to recover from him a Company's paper for Rs. 10,000, for which, as she alleged, she had inadvertently omitted to sue in the property suit. Objections, which will be hereafter considered were taken to the maintenance of this fresh suit, and [584] were allowed by the Zillah Judge. But the High Court reversed his decision, and remanded the cause for trial on the merits.

Having thus stated the general history and scope of this unfortunate and complex litigation, their Lordships will proceed to deal first with the appeals in the property suit. The Respondent having preferred no appeal against the decree of the High Court, her claims, in respect of the moveable property, must be taken to be now reduced to one for the Government securities, to the amount of Rs. 2,34,800, which the Moonshee has been ordered to restore or replace. And their Lordships will begin by considering, whether the decrees under appeal can be supported against him in that respect.

That all these securities came to her hands whilst she was an inmate of his Zenanah; that they all passed from her to him; that some of them remain in his possession; and that others have been traced to his Creditors,—is incontestable. That she came to his house a wealthy woman, and left it almost destitute, admits of no doubt. And it can scarcely be denied that transactions of this nature and magnitude between Husband and Wife, with such a result, require a full and clear explanation on the part of the former, supported by such evidence as shall satisfy a Court of Justice that they were conducted fairly and properly, and with a due regard to the rights and interests of the Wife. Her case is, that the securities were entrusted to him for a particular purpose, viz., that of receiving the interest on them for her, and that though they may have been indorsed, she never meant to transfer the property in them. His case is, that he purchased them from her on several occasions, and that on their indorsement and delivery he paid her [585] the full value for them. The principal of the Judgments of the Courts below seems to be, that although the Wife may have failed to establish affirmatively the precise case alleged by her, her Husband, having admitted the receipt of the securities from her, was bound to show something more than mere indorsement and delivery; that the relation of the parties being what it was, it lay upon him to prove that the transac-

tions which he set up were *bona fide* sales and purchases, and that he actually gave full value for what he received from her. Their Lordships are clearly of opinion, that this is a sound principle, and in accordance with the long-established practice of the Courts in India. The Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Mahomedan and a Hindoo woman; nay, that in all that concerns her power over her property, the former is by law more independent than an English woman of her Husband. It is no doubt true that a Mussulman woman, when married, retains dominion over her own property, and is free from the control of her Husband in its disposition; but the Hindoo law is equally indulgent in that respect to the Hindoo Wife. It may also be granted that in other respects the Mahomedan law is more favourable than the Hindoo law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from the letter of a Law, which, with the religion on which it is chiefly founded, is spread over a large portion of the Globe, any inference as to the capacity for business of a woman of a particular race or country. In India the Mussulman woman of rank, like the Hindoo, is shut up in the Zenanah, and has no communication, except from behind the Pur[586]-dah, or screen, with any male persons, save a few privileged relatives or dependants; the culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to the pressure and influence which a Husband may be presumed to be likely to exercise over a Wife living in such a state of seclusion. Their Lordships must, therefore, hold that this Lady is entitled to the protection which, according to the authorities, the law gives to a Purdah-nusheen, and that the burden of proving the reality and *bona fides* of the purchases pleaded by her Husband was properly thrown on him. They will proceed to consider whether the Courts below were right in holding that he has failed to prove his case.

The transactions are five in number, three of them being in the year 1848. On the 20th of May, in that year, she is said to have sold to her Husband the two papers for Rs. 9500 and Rs. 7000, which she received on a compromise of a suit with her step-mother, Ashruffnissa. On the 27th of the same month she is said to have sold to him all the papers specified at the foot of his answer, which make up the sum of Rs. 1,03,800, except a paper for Rs. 11,300, which is said to have been sold on the 12th of the following month. These exhaust all the papers claimed, which formed part of her original share of her Father's estate. The papers for Rs. 1,14,500, which she received in 1853 from the estate of her Sister, are said to have been sold on two occasions in 1855, viz., papers for Rs. 32,500, on the 2nd of March, and papers for Rs. 82,000, on the 2nd of July in that year.

These several transactions are sworn to by various witnesses, of whom most, if not all, are or have been dependants of the Appellant. There may be slight [587] discrepancies in their testimony, but its general effect is, that on each occasion money, being the full value of the papers purchased, passed in cash or notes from the Appellant to the Respondent. The Appellant has himself deposed to the same effect, and has produced certain Khatta Books in corroboration of his testimony. The evidence, if believed, is sufficient to establish his case.

Both the Courts below have, however, disbelieved these witnesses, and have cast discredit on the Books, as being unlike those, which were likely to be kept in order to record the transactions of a person in the Appellant's position. The Zillah Judge, obviously a Gentleman of experience and ability, appears to have tried the cause very carefully; and their Lordships cannot but feel the difficulty of holding against his judgment,—confirmed, as it is, by that of the High Court,—that either the witnesses or the Books, considered by themselves, are trustworthy. In what degree, then, do the other facts and proceedings proved in the cause tend to confirm or to cast doubt upon their testimony?

The earliest in date are the applications for a Certificate under Act, No. 20 of 1841. It appears that a difficulty had arisen in the way of drawing the interest on the two Company's papers for Rs. 9500 and Rs. 7000, which stood in the name of Moonshee Hossein Ali, the Respondent's Father. The Respondent applied for a Certificate, which is in the nature of letters of administration to his estate, on the 5th of May, 1848. Her application was refused, but the grounds of the refusal do not

appear. The transfer of these papers to the Appellant took place on the 20th of May; and on the 2nd of July the Appellant pre-[588]-sented to the Sudder Dewanny Adawlut his petition, supported by a petition from the Respondent, complaining of the Judge's order of the 5th May, and praying that a Certificate might be granted to him in her stead. The only bearing of these documents upon the present suit is, that in his petition the Appellant describes himself as the purchaser, and the Respondent as the seller of these papers, and that the Respondent in her petition says, "Owing to my having sold to Buzloor Ruheem, by an indorsement, the above-mentioned papers, etc." The importance of this as an admission is obviously very slight. We do not know,—and this is an observation which applies to all the other evidence of this kind,—how or by whom the proceeding in question was explained to her, or to what extent she had been informed of the significance of her acts in these Courts. And taking the admission at its highest, it would show only that for some cause or another, possibly only in order to facilitate the receipt of interest, the apparent ownership of the notes had been transferred from her to her Husband as upon a sale and purchase,—the only way, in truth, in which it could be done, since the Treasury in Calcutta takes no notice of trusts. This proceeding throws little (if any) light upon the nature of the actual transactions between the Appellant and his Wife.

The proceedings next in order of date that are relied upon are those in the execution suit, which began in September, 1848, and was finally disposed of in May, 1850. These relate more to part of the lands now held in the name of the Appellant, Jodonath Bose, the title to which will be hereafter considered, than to the Company's paper. It may, however, be well to [589] state their nature here. Oomdatunniassa having, in the course of the protracted litigation of this family, obtained a decree against the Respondent for the small sum of Rs. 671. 13. 1., took out execution against her share in one parcel of the lands inherited from her Father. The Appellant, the Moonshee, intervened as stating that the lands seized, as well as the other Objector, lands belonging to the Respondent, and these Company's papers, had been, before the execution, sold and transferred to him; and that the Respondent, the judgment debtor, had no interest therein. His objection was overruled by the Judge on the 12th of January, 1849. He brought a regular suit to impeach that decision, to set aside the execution, and recover the property sold under it. That suit was dismissed on the 21st of May, 1850, on the ground that the alleged transfer of the Respondent's properties to the Appellant was collusive, and in fraud of her judgment Creditor. The chief bearing which these proceedings have upon the title to the Company's papers is that, in the answer filed by the Respondent in the regular suit, she stated that, after her marriage with the Appellant, fearing lest her properties should be wasted by her Agents, she disposed of the same to her Husband, and deposited the value thereof for the benefit of her children. Now, as that answer was filed long before any disagreement had arisen between the Appellant and Respondent, it can hardly be doubted that, if not actually prepared under his direction, it was at least filed with his concurrence. And it is to be observed that this statement is by no means consistent with the case now made by him of sales out and out to him, in order to raise money to meet the Respondent's debts and other necessary expenses. [590] It suggests a different motive for the sales, and treats the proceeds as remaining in the hands of somebody or another for the benefit of her family. The sales, too, having been found to be collusive and unreal transactions, are quite consistent with the supposition that the Lady was persuaded into making them upon the suggestion that she would thereby defeat her Creditor, and that they were merely colourable, and made for that purpose. These proceedings tend more to discredit than to support the case now made by the Appellant of absolute sales of these securities to him, and of the actual payment by him out of his own funds, to the Respondent of the purchase money at the dates of the several purchases.

That case suggests the questions so much insisted upon in the Courts below, viz. first, why should the Appellant wish to purchase these large amounts of Company's paper, and how was he able to pay for them? and secondly, why should the Respondent wish to sell her Company's paper, and how has she disposed of the proceeds of it? What answer does the evidence give to these questions?

The Appellant is no doubt shown to be a Zemindar possessed of considerable estates. But the evidence tends to show that, at the time of his marriage, and at the date of the earlier, at least, of these transactions, he was, like many landed proprietors, an embarrassed man. He and his Brother owed large sums to one Ranchand Mookerjee, and to Ashotosh Day and Promothonauth Day. These were secured by Bond and by judgments confessed, probably on warrant of attorney, in the Supreme Court, of which one bore date the 27th of March, 1845, and was for C. Rs. 1,48,000, and the other, dated the 30th of [591] June, 1846, was for C. Rs. 1,00,000. The precise amounts due on these judgment debts are not shown, but it is pretty clear that neither judgment, at the time of the earlier transfers of the Respondent's papers, was satisfied. It is admitted by the Appellant that most of the Company's paper, which, he says, he purchased on the 27th of May and 12th of June, 1848, were, on the 6th of July, transferred by him to Ashotosh Day, in payment of one of these debts. He and his brother were also, at this time, bound, under an Order of the Supreme Court of the 12th of April, 1848, to pay into Court the sum of Rs. 62,000. It is not credible that a person under these liabilities should be purchasing Government securities, bearing a rate of interest considerably lower than that at which his debts were running on,—securities which, if the necessity for selling them existed, might have been sold through a Broker in the market.

Again, the Appellant's case is, that the Respondent, when she married him, was herself in debt; that she afterwards required large sums for the marriages of her children and other family ceremonies; that she sold her Government securities in order to meet these necessities, and applied the proceeds in meeting them. He is driven to this allegation, because, as it is clear that she carried nothing with her out of his house, it would be still more difficult to support a theory that the money remained with her in some other form of investment. It is to be observed, however, that some of his own witnesses assign a different motive for the sale. Some of them say that she sold in order to get rid of difficulties caused by the Company's papers standing in the name of a Purdah-[592]-nushen. Others say, as she says herself in her answer in the execution suit, that she was afraid of being cheated by her Agents. That the Respondent, during her seven or eight years of cohabitation with the Appellant, must have incurred considerable expenses in respect of her children by the first marriage, and for other family purposes, is pretty certain; but that she should have expended upwards of two lacs of rupees, the proceeds of these Company's papers, over and above the other property, which, at one time, she unquestionably possessed, is not very credible. It is to be remembered also that, on the assumption of the Courts below, she had the interest of these Company's papers wherewith to meet her necessary expenses. It is inconceivable that if these very large sums had been expended in the payment of debts, and for the other purposes alleged, the Appellant should not have been able to give better proof of the fact. It may suit his present purpose to profess that he had little personal connection with the management of her affairs; but the evidence, and in particular his petitions of the 27th of October, 1854, and the 4th of December, 1855, are strong to show that this was not the case. He there represents himself as active in the management of her property and interests.

The first of these documents is, in various particulars, strangely inconsistent with the case which the Appellant now sets up. He is there defending himself from a charge, made before the Magistrate, of having confined his Wife, and having refused to give up to her not merely the Company's papers derived from Nujmunnessa, which, according to his case, would then be still in her possession, but also Company's papers to the amount of Rs. 80,000 or [593] 90,000, which, according to his present case, he had long before 1854 purchased from her; yet he does not say a word of this purchase. He covers the whole charge with the general answer, "The entire property of Shumssoonnessa Begum being her own property, and my entire property being mine, what ground could there exist between her and me that I should confine her?"

We have hitherto considered the evidence with reference to the alleged sales of the Government securities generally. Some parts of it, however, suggest considerations which apply exclusively to the alleged transactions of 1855 and the

transfer of the papers for Rs. 1,14,300. It may be, that the means of the Appellant to make these alleged purchases had then been further diminished by the litigation in which he appears to have been engaged with his first Wife, and by the decree which she obtained against him. On the other hand, he may have been in more prosperous circumstances than he was in 1848. But if he, so late as the months of March and July, 1855, paid to the Respondent the value of these papers, it is almost incredible that he should not be able to give some better explanation how she disbursed those large sums between those dates and the following December, when she left his house destitute. Again, his petition of June, 1854, discloses a state of things which is far more consistent with the Respondent's case, that she made over to him these Company's papers in 1853, as soon as she received them, than with his, that they were not transferred to him until 1855. It shows that in June, 1854, a petition had been presented to the Magistrate, complaining of his ill-treatment of his Wife. He, no doubt, denied the charge, and treated it as emanating, not from his Wife, but [594] from discharged servants; and the Magistrate then considered that the charge was unfounded. But when light is thrown upon this transaction by what subsequently happened, by his ill-usage of the Respondent, which is proved, and by her release from the house by the Magistrate, on the subsequent petition of 1855, it is difficult to resist the conclusion, that the quarrel between the Husband and Wife had begun in 1854 (the date to which her plaint assigns its commencement), or, at all events, that in July, 1855, there must have been a state of feeling between them which would make a voluntary sale of her property to him a most improbable transaction. If he did, so shortly before the final separation, obtain a transfer of those securities to himself, the burden of showing that he did so righteously is assuredly made heavier.

Again, the evidence of ill-usage which has been given in this suit seems to have a further bearing upon the issue between the parties which is now under consideration. We have not now to consider, whether what he did was within, or in excess of, the marital powers of a Mussulman Husband. It is sufficient to say that very harsh treatment, and a restraint from which the Magistrate saw fit to release her, are proved, and that she left the house in circumstances to which no native woman of her rank, who was not suffering under a sense of intolerable wrong, would have exposed herself. Now, what was the cause of this grave quarrel? Her account of it is more probable than his, if indeed he has given any. It seems more likely that he should have attempted by harsh measures to frighten her out of a just demand, than that he should have met, in that way, [595] one which was without foundation. Her conduct, too, if the quarrel had begun in 1854, has ever since been consistent; his, as has been shown above, has been inconsistent.

It would, doubtless, have been more satisfactory if the Respondent had thought fit to support her claim by her own testimony. Her abstaining from so doing certainly affords an objection to her case deserving of serious consideration; and their Lordships do not think that it is altogether removed by the suggestion of the strong repugnance felt by native females in the Respondent's position to taking such a step. But the objection, though it may weaken, does not destroy the case made by the Respondent; and their Lordships are of opinion, that, whatever weight may be due to it, it is quite insufficient to affect the conclusions in her favour to be drawn from the facts and circumstances of the case, which have been already adverted to.

The admission of the Tutor, a witness produced on the part of the Respondent, to the effect that on the transfer to which he speaks he saw money pass, is also a circumstance in the Appellant's favour. But, if the witness has spoken the truth about the money, it is to be remembered that the transaction to which he speaks was that of the 27th of May, 1848, when it may have been desired to make a colourable sale for the purpose of defeating the execution in the manner shortly afterwards attempted.

Their Lordships, then, after carefully weighing the evidence and considering the able arguments addressed to them, have come to the conclusion, that the burden of proving *bona fide* purchases of these Company's papers was properly thrown on the Appel- [596] lant; that he has failed to do so, and that no ground has been shown

for disturbing the concurrent judgments of both the Courts below on this part of the case.

The next question for consideration is that raised by the Appeal of Jodonath Bose, as well as by that of the Moonshee, viz. whether that portion of the decree under appeal, which directs the reconveyance to the Respondent of the immoveable property held by Jodonath, and the payment to her of the mesne profits by both the Appellants, can be supported.

The property in question consists of certain shares in two gardens, of which the entirely formed part of the estate of Moonshee Hossein Ali. They are known as the Dum-Dum garden and the Narain Mundul gardens, and, like the rest of the estate, were divided amongst the coheirs in twenty-fourth shares. Of the first, the decree gives to the Respondent sixteen shares, or two thirds of the whole, comprising both her original share and the share which she inherited from her Sister. Of the other, it gives her only the eight shares inherited from her Sister, her original share having passed, under an execution sale, into the hands of a stranger to the suit.

The history of the Dum-Dum garden, after the death of Moonshee Hossein Ali, and its division amongst his heirs, is this:—As early as 1843, Boalli sold his five shares, and Ashruffnissa Begum sold her one share to one Dilrus Begum for Rs. 3000. These six shares were conveyed by one Bill of sale, dated the 29th Bysack, 1250. On the 22nd of May, 1848, the Respondent executed a Bill of sale, by which she purported to convey her original eight shares of this [597] garden to her husband, in consideration of C. Rs. 2000. On the 15th of August, 1848, he, by an Indenture in the English form, conveyed these eight shares to Dilrus Begum, in consideration of C. R. 4000. On the 20th of July, 1853, Dilrus Begum, by a Bill of sale, conveyed both the sixth shares which she had acquired from Boalli and Ashruffnissa Begum, and the eight shares which she had acquired from the Appellant, the Moonshee, to one Jeegree Khanum, for Rs. 6000; and on the 27th of September, 1853, Jeegree Khanum conveyed all these fourteen shares to the Appellant, Jodonath Bose, for Rs. 4000. On the 9th of January, 1854, the Respondent executed a Bill of sale, purporting to convey the one-third part of this garden, which she had inherited from her Sister, to Jodonath Bose, for Rs. 2000. The Appellant, Jodonath Bose, therefore holds twenty-two shares of this garden,—eight under a direct conveyance from the Respondent; eight under a title, founded on her conveyance to her Husband, but strengthened by the mesne conveyances; and six under a title, dating from 1843, and unimpeached, at least in this suit.

In May, 1848, the Respondent conveyed her original eight shares of the Narain Mundul gardens to her Husband; this property was the subject of the seizure which gave rise to the execution suit; and the sale having been declared fraudulent as against the judgment Creditor, these shares were purchased by the judgment Creditor, and cannot now be followed.

On the 12th of May, 1855, the Respondent executed a Bill of sale, purporting to convey to the Appellant, Jodonath Bose, in consideration of Rs. 1500, the eight shares of this garden, which she [598] had inherited from her Sister. That transaction is impeached. He had previously acquired part of the share of Boalli in this garden, having inherited it from his Brother, Koylas, who, in 1850, purchased it at an execution sale. His title to this portion is not impeached.

The substantial issue on this part of the case is one between the Respondent and Jodonath Bose. It is obvious, therefore, that the principle upon which, on the trial of the issue already considered, the burden of proof was shifted from the Plaintiff to the Defendant, is not necessarily applicable to the trial of this issue. The Respondent comes into Court seeking to be relieved from the effect of her own conveyances, the execution of which she does not dispute, against one who, if not an absolute stranger, stands in no fiduciary relation to her: and it lies upon her to establish her right to that relief. Has she done so?

She has proved that Jodonath Bose is the servant of Her Husband. She has produced three witnesses, Gholam Arub, Gholam Rulman, and Sheik Takee, to prove that her Husband is the person who is really in the possession, or in the receipt of the rents and profits of the property. But nothing can be less satis-

factory than the testimony of these witnesses, of whom the first is her Manager; the second, a Tailor, and the third, a menial servant: none of them having any connection with the lands.

The evidence of possession given on the other side, by Ryots and others, may not be altogether trustworthy; but, such as it is, it outweighs the loose statements of these three witnesses. Some of the inferences to be drawn from the conveyances from [599] her to her Husband are also favourable to the Respondent's case; but these apply only to that portion of the property claimed, which consists of her original share in the Dum-Dum garden.

It may be conceded that the conveyances from her to her Husband in 1848, considered with the light reflected on them from other parts of this case, and in particular from the proceedings in the execution suit, could not stand. It may also be conceded that if the question were between her and her Husband, he ought not to be permitted to say that she is bound by her fraudulent conveyance, since she may be presumed to have executed it under his influence or pressure. And if the property had passed directly from him to his dependent, the presumption that the latter is a mere Trustee for him might be stronger than it is.

But what are the facts proved? This portion of the property in dispute passed apparently by sale from Moonshee Buzloor Ruheem to Dilrus Begum. It remained with her for nearly five years; was sold, ostensibly at least, by her to Jeegree Khanum, from whom two months later it passed to Jodonath Bose. These intermediate conveyances are treated in the Courts below, and in the argument before their Lordships, as mere "circuity of fraud": and it has been argued that we have no proof who Dilrus Begum and Jeegree Khanum are, or, indeed, that there were ever such persons. But what proof, on the part of the Respondent, is there to support these arguments? On the other side, there are witnesses who state, that Dilrus Begum was the Wife of the Nawab of Chitpore, a well-known person, and that Jeegree Khanum was a Wife or concubine of apparently the same person. The conveyance to Dilrus Begum was by English deed, prepared and [600] executed in the office of a respectable English Attorney, acting apparently for the purchaser. That circumstance afforded the means of investigating that transaction. But no attempt has been made to do so. Again, that Dilrus Begum was a real personage, not necessarily connected with the Appellant, the Moonshee, is placed almost beyond a doubt by the undisputed fact that in 1843, several years before the second marriage of the Respondent, the six shares of this garden had been conveyed to her by Boalli and Ashiruffnissa. What, again, was the motive for this "circuity of fraud?" If Dilrus Begum held five years' Benamsee from the Moonshee, why raise suspicion by transferring the property from her to his known dependent, Jodonath Bose? Sir Roundell Palmer insisted strongly on the fluctuations in the amounts of the purchase-money for which the different instruments purported to convey the same property, as a badge of fraud. The first transaction, which we may admit to have been fictitious, expresses a consideration which, on a comparison with the price for which the six shares were sold in 1843, seems to be below the real value of the property. Tried by that test, the sum of Rs. 4000, for which it was conveyed to Dilrus Begum, would be about the true value. This fact, taken by itself, tends to support the reality of the sales to Dilrus Begum. Again, if she sold for Rs. 6000, property which had cost her Rs. 7000, the difference is not greater than might be accounted for by the necessities of the Vendor, or by a diminution in the value of the property in the period during which it remained in her hands. The further reduction of the price to Rs. 4000, in the sale to Jodonath Bose, is certainly a more suspicious circumstance. It is not, however, one which [601] seems to go very far to supply any defect of proof on the part of the Respondent. It is not impossible that Jeegree Khanum may have found that she had made a bad bargain, or that Jodonath Bose may have made an extremely good one. On the other hand, if the transactions were fictitious, and the price cost the professed purchaser nothing, it is not easy to see why an adequate consideration was not expressed in the conveyance. There seems to have been no inquiry or cross-examination on this point in the Courts below.

Again, what is the case proved in respect of the conveyances from the Respondent herself to Jodonath Bose? She is proved to have executed those conveyances. She

has not met this fact fairly in her pleadings. In the original plaint there is no mention of Jodonath Bose's title; and on the face of the supplemental plaint it is not very clear whether she treats the conveyances as forgeries, or admits the execution and impeaches their effect. She has certainly not stated on what grounds she impeaches them, nor has she come forward as a witness to explain her execution of them. It lay upon her to do so; to show by her own or other testimony under what circumstances they were procured from her, and to rebut the evidence that the consideration money passed to her. Again, the purchase of these parcels of land by Jodonath Bose is not wholly improbable. The purchases are not beyond the means of a person in that rank of life. He already held portions of both gardens by titles not deduced from the Respondent, and unimpeached. The first conveyance from the Respondent was executed in January, 1854, when the Moonshee was absent from home and at Singapore. The Zillah Judge treats the circumstances of his absence as [602] indicative of fraudulent forethought and contrivance. His presence probably would have afforded the inference of pressure and undue influence. The habit may be superinduced by the manifold cases of fraud with which they have to deal; but Judges in India are perhaps somewhat too apt to see fraud everywhere. The second conveyance was in May, 1855. At that time the quarrel with her Husband had, according to the Respondent's case, begun. She is not likely to have executed this instrument voluntarily at his instigation. She has not shown that she was forced to do it. And, on the other hand, it is not improbable that the circumstances in which she thus stood, she may have been glad to raise the comparatively inconsiderable sum which is stated to have been the price of the property.

On the whole, then, their Lordships are of opinion, that the Respondent has failed to show a sufficient title to recover any of the shares in these gardens from the Appellant, Jodonath Bose. The habit of holding land Benamee is inveterate in India; but that does not justify the Courts in making every presumption against apparent ownership. This principle was enforced by this Committee in a recent case (*Sreemanchunder Dey v. Gopaulchunder Chuckerbutty*, ante [11 Moo. Ind. App.], p. 28). Their Lordships do not deny that in this particular case the connection of Jodonath Bose with the other Appellant, the proved conduct of the latter towards his Wife, and other circumstances, threw some cloud of suspicion over the title to these parcels of land. But such suspicions are not proof. Their Lordships think that the Judges of both Courts below have given too much weight to them; that they have not [603] sufficiently considered in what degree the burden of proof lay upon the Respondent; and that when the proofs which she ought to have given and might have given were defective, they have allowed the deficiency to be supplied by presumptions and inferences which the facts do not altogether warrant. Their Lordships cannot, therefore, recommend Her Majesty to confirm this portion of the decrees in the "Property suit."

As the third suit also concerns property, and the point raised by the appeal in it is very short, their Lordships think it will be convenient to dispose of it before they proceed to consider the appeal in the "Restitution suit." Two objections were taken to the maintenances of this suit. It was pleaded, first, that the Respondent's claim was barred by the law of limitation; and, secondly, that she was precluded from suing to enforce it by the 7th section of Act, No. VIII. of 1859, which provides that "if a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained." From the plaint it appears that the Company's paper for Rs. 10,000, which is the subject of the suit, was specified in the petitions for a Certificate under Act, No. XX. of 1841, already referred to, together with the papers for Rs. 9500 and Rs. 7000, which are included in the Respondent's demand in the "Property suit," and that her claim respecting it is precisely the same as her claim for the other two papers. The only reason she assigns for not suing for it in the former suit is, that "as she was a Purdah-nusheen and unacquainted with reading and writing, she could not ascertain anything about the aforesaid Government [604] paper and the interest of the same." She says she discovered her mistake in July, 1859, and insists that her cause of action arose at that time. The Zillah Judge held that the second objection was fatal to the suit, which he accordingly dismissed on that ground.

The High Court has reversed this decision, for the following reasons:—They

hold with him that the omission to include this item in the first suit was an oversight; that she knew of the existence of this paper before she brought her first suit, and might have included it therein; and that the real question to be decided was, whether that omission, neglect, or oversight was sufficient to bar her present claims under the law fairly applied. This question they decide in the negative, on the ground that it was clear she was not actuated by any fraudulent or dishonest motive; that the stamp paid on the first suit would have covered also this paper; that she cannot have omitted this claim in order to bring the case within the cognizance of a particular Court; and that although it may be desirable for the ends of justice that the various items claimed by a Plaintiff should form the subject of one single action, yet there was nothing in the law to make it imperative upon her to include every item of such a claim as hers in a single suit.

To these reasons their Lordships cannot assent. If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. The words of this law are,—“If a Plaintiff relinquish or omit to sue for any portion of his claims.” [605] It plainly includes accidental or involuntary omissions as well as acts of deliberate relinquishment. In their Lordships’ opinion, the only ground on which (if at all) the judgment of the High Court could be supported, is that which is somewhat doubtfully expressed by the Judges in the following sentence:—“Nor do we think that, under the circumstances of the case, the Plaintiff may not fairly plead that she has a distinct and separate cause of action for the recovery of this piece of paper made over to the Defendant on a particular date.” Their Lordships think that the correct test in all cases of this kind is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit, and they have accordingly considered whether the present suit can be maintained on that ground. But the cause of action in the former suit of the Respondent seems to them to be the refusal by the Husband to restore, or his misappropriation of, the Wife’s property, which she says she intrusted to him. There is nothing to distinguish the deposit of this particular Company’s paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand, and is admitted on the face of her present plaint to have been omitted from it, for no other reason than the very insufficient one before mentioned. If she was justified in instituting a separate subsequent suit for this particular Company’s paper for Rs. 10,000, she would have been equally justified in making each one of the Company’s papers which are comprised in the “Property suit” successively the subject of an independent suit. Their Lordships are of opinion, that [606] the ruling of the Zillah Judge on this point was correct, and that the suit was properly dismissed. This being their view, it is unnecessary to say anything on the question of limitation. They are disposed, however, to think that the claim being founded on an alleged breach of trust, was not, as pleaded, subject to limitation, either under the old law or under Act, No. XIV. of 1859, which, the suit having been commenced in December, 1861, seems to be the law applicable to it. If the Plaintiff had failed to prove a breach of trust, but had established some other title to relief, the question of limitation might have arisen. But this could only happen upon a trial of the suit on its merits.

Their Lordships will now address themselves to the novel and difficult questions raised by the appeal in the “Restitution suit.”

The first is, that which has been strenuously argued at the Bar, though it does not appear to have been raised in the Courts below, or even in the Respondent’s case, viz., whether any suit by a Mussulman Husband will lie in the Civil Courts of India, to enforce his marital rights under the Mahomedan law, by compelling his Wife, against her will (she being a free agent, and not detained by others), to return to cohabitation with him. If the law which regulates the relations of the parties gives to one of them a right, and that right be denied, the denial is a wrong; and unless the contrary be shown by authority, or by strong arguments, it must be presumed that for that wrong there must be a remedy in a Court of Justice. Of authority negating the jurisdiction there is none. It has been argued that the proper remedy, if there be one, is the denial of [607] maintenance to the rebellious Wife,

or, at most, a suit for damages; because a suit to compel the Wife to return to her Husband, though obviously a more complete remedy than either of them, is in the nature of a suit for specific performance; and being founded on the contract of marriage, which the Mahomedan law regards as a civil contract, the Court entertaining the suit must be prepared to enforce all the obligations, however minute, which, according to that law, flow from the contract, whichever party has a right to insist upon them. And referring to the definition of some of those obligations, as given with somewhat prurient particularity in certain Mahomedan Treatises, the learned Counsel argued that it was impossible for Courts constituted like those of British India to exercise such a jurisdiction. It may be admitted that the Courts of India would properly decline to entertain such question; although amongst the Wahabees of Central Arabia, or other communities in which the Mahomedan law is observed in its utmost strictness, the Magistrate might perhaps take cognizance of them. But this admission is not decisive of the question. The Canonists lay down many things concerning the relative duties of man and Wife which the Courts Christian, at least of our Country, feel compelled to leave as duties of imperfect obligation. They do not, therefore, refuse to enforce the broad duty of cohabitation. In the words of Lord Stowell, quoted by Mr. Attorney-General, "They are content to take the Wife to the Husband's door and to leave her there."

But how does this question stand upon the authorities? In the case of *Ardaseer Cursetjee v. Perozeboyee* (6 Moore's Ind. App. Cases, 390), in which it was here decided, that a suit for restitution of con-[608]-jugal rights between Parsees, and *a fortiori*, one between Hindoos and Mahomedans, did not lie on the Ecclesiastical side of the Presidency Courts, Dr. Lushington, in delivering the judgment of the Committee, says, "The Civil Courts in India can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mahomedans, Hindoo law to Hindoos; but the Ecclesiastical law has no such flexibility." And after ruling that the Court below had not the jurisdiction which it claimed, he adds, "But we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them (the Parsees). We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between the Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws, or some customs having the effect of laws, which apply to the married state of persons of this description." And he afterwards observes, "Such remedies (the remedies afforded by their own usages) we conceive that the Supreme Court on the civil side might administer; or at least remedies as nearly approaching to them as circumstances would allow." It may be said that those *dicta*, though proceeding from so high an authority, are extrajudicial, and merely indicate an opinion that suits of this kind might possibly be entertained by the Civil Courts of India. The Attorney-General, however, has cited positive authorities which support the jurisdiction, and shows the principles upon which it ought to be exercised. There are the cases of *Maulvi Abdul Wahab v. Mussumat Hingu*, decided in 1832, and reported in [609] 5 Ben. Sud. Dew. Ad. Rep. p. 200; of *Mussumat Ameena v. Kuttoo Khan*, decided in 1841 and reported 7 Ben. Sud. Dew. Ad. Rep. p. 27; and the case of *Kulleemooddeen v. Sana Chand Bibi*, decided in 1848 and reported in the Reports of the Bengal Sudder Court for that year, at p. 795. In the last of these cases the suit was dismissed on the ground that the marriage was not proved, but the jurisdiction was not questioned. The second case may be distinguishable from the present on the ground that the Wife was of tender years, and under the control of the co-Defendants in the suit. But in the first case the Wife was clearly of full age, and a free agent. The co-Defendant in the suit, though charged with harbouring her, had little more control over her than the co-Defendant in the present case had over the Respondent. The suit, which went through three Courts, was resisted by the wife on grounds personal to herself; and it was finally decided that, according to the Mahomedan law, by which the question was to be decided, the Plaintiff had a right to the possession of his Wife, and she was compelled to return to him. It does not very clearly appear by what process the judgment in this case, or in that of *Mussumat Ameena v. Kuttoo Khan* [7 Ben. Sud. Dew. Ad. Rep. 27] was to be enforced. From some passages it might be inferred that in

the event of disobedience the Wife was to be given bodily into her Husband's hands. Whether this could be done under the new Act of Procedure, which now regulates the Civil Courts of India, may well be doubted. Disobedience to the Order of a Court directing the Wife to return to cohabitation would seem to fall within the 200th section of the Code, and to be enforceable only by imprisonment, or attachment of property, or both.

[610] Upon authority, then, as well as principle, their Lordships have no doubt that the Mussulman Husband may institute a suit in the Civil Courts of India, for a declaration of his right to the possession of his Wife, and for a sentence that she return to cohabitation: and that that suit must be determined according to the principles of the Mahomedan law. The latter proposition follows not merely from the imperative words of Ben. Reg. IV. of 1793, sec. 15, but from the nature of the thing. For since the rights and duties resulting from the contract of marriage vary in different communities: so, especially in India, where there is no general marriage law, they can be only ascertained by reference to the particular law of the contracting parties.

The matrimonial law of the Mahomedans, like that of every ancient community, favours the stronger sex. The Husband can dissolve the tie at his will, subject to the condition of paying the Wife her dower and other allowances: but she cannot separate herself from him except under the arrangement called Kolah, which is made upon terms to which both are assenting parties, and operates in law as the divorce of the Wife by the Husband (see *Moonshee Buzul-ul-Raheem v. Luteefat-oon-Nissa*, 8 Moore's Ind. App. Cases, 379). It cannot, we think, be doubted that, whilst the tie subsists, his power over her is considerable. The cases already cited are to the effect that he may compel her to return to his House, if she has left it. We do not find this expressed in the Hedaya, which speaks only of her forfeiting her right to maintenance if she be disobedient or refractory, or go abroad without her Husband's consent, until she return and make submission [611] (Vol. I. Book IV. ch. xv. p. 394): but it seems implied throughout, that she, from the time she enters his house, is under restraint, and can only leave it legitimately by his permission, or upon a legal divorce or separation, made with his consent. In fact, the principle of keeping a man's harem in seclusion and under his control, is so essential a part of the framework of Oriental society, that it is naturally assumed and taken for granted by the Mussulman expounder of the law.

On the other hand, the law assures to the Wife considerable rights as against her Husband. She may insist on maintenance according to her rank and his ability; and if he fails to give it, she may enforce that right before the Kazeer (Hedaya, Vol. I. Book IV. chap. xv. sec. 1, pp. 393, 394). If he has power to keep her within the Zenanah, and to prevent access to her, subject to certain qualifications, he is bound to provide her with a separate apartment, exclusively appropriated to her use (*ib.* p. 402). As to personal violence, there are certainly passages in the Hedaya which, founded on a text in the Koran, imply that the Husband may use it for correction: but this right of corporal chastisement is expressly said to "be restricted to the condition of safety": and it may be questioned whether these authorities go the full length of the Futwa at p. 14 of the record (see Hedaya, Vol. II. Book VII. ch. 6, pp. 75-81). The Mahomedan law, on a question of what is legal cruelty between Man and Wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:—"There must be actual violence of such a character as to endanger personal health or safety: or there must be a reasonable apprehension of it." "The Court," as Lord Stowell said, [612] in *Evans v. Evans* (1 Hagg. Con. Rep. 37, *et seq.*), "has never been driven off this ground."

If, however, it be granted that, according to Mahomedan law, the Husband may sue to enforce his right to the custody of his Wife's person: and that, if her defence be cruelty, she must prove cruelty of the kind just described, it by no means follows, that she has not other defences to the suit which would not be admitted by our Ecclesiastical Courts in a suit for the restitution of conjugal rights. The marriage tie amongst Mahomedans is not so indissoluble as it is amongst Christians. The Mahomedan Wife, as has been shown above, has rights which the Christian—or at least the English—Wife has not against her Husband. An Indian Court might well

admit defences founded on the violation of those rights, and either refuse its assistance to the Husband altogether, or grant it only upon terms of his securing the Wife in the enjoyment of her personal safety, and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the Kazeer by the Futwa (if the law, indeed, warrants such a jurisdiction), of selecting a proper place of residence for the Wife, other than her Husband's house.

Enough has been said to show that, in their Lordships' opinion, the determination of any suit of this kind requires careful consideration of the Mahomedan law, as well as strict proof of the facts to which it is to be applied. Has the present case been so tried and determined in the Courts below? Their Lordships are constrained to say, that this has not been the case. In the first place, they think that the *ratio decidendi* adopted by the Judges of both Courts [613] is erroneous. The Principal Sudder Ameen held, that oppression had been proved (the correctness of his conclusion will be hereafter considered). He did not then proceed to consider, whether the oppression was so far beyond the bounds of marital authority, under the Mahomedan law, as to constitute an answer to the suit. He seemed to think that, oppression once proved, the case was taken out of the Mahomedan law, and was to be decided on what the Court, upon general principles, might deem to be expedient for the security of the Wife's person. He then proceeded to argue, apparently without the slightest foundation of proof, that the Wife, having been ill-treated, had probably been unfaithful, and that if she were restored to her Husband, he was not unlikely to revenge himself by taking her life. He afterwards argued, with more reason, upon the danger of restoring her to one who had been decreed liable to pay her a very large sum of money.

The facts upon which the Judges of the High Court proceeded were, that the Magistrate had seen fit to release the Respondent from her Husband's house, and that a decree had passed against him for having made away with her property for a large sum, of which they overstated the amount. They appear to have considered that, according to the Mahomedan law, these facts were not an answer to the suit; and they then say, "This being so, are we required to decide this case in conformity with the principles of the Mahomedan law? Are we to compel the Defendant to return to her Husband, convinced as we are that she should not be forced to return? If, under the Mahomedan law, no Wife can separate herself from her Husband under any circumstances whatsoever [614], ever, the law is clearly repugnant to natural justice, and we are not bound to follow it. The Mahomedan law giving no relief to a woman, be the conduct of the Husband ever so bad: it is a case to be disposed of by equity and good conscience. And on these principles we have no hesitation in saying, that the grounds upon which the Defendant has separated from her Husband justify her in that step."

The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Mahomedan law, but according to what is termed, "equity and good conscience," *i.e.*, according to that which the Judge may think the principles of natural justice require to be done in the particular case.

Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India, and particularly to the enactment already referred to (Reg. IV. of 1793, sec. 15), which directs, that in suits regarding marriage and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindoo laws with regard to Hindoos, are to be considered as the general rules by which Judges are to form their decisions; and they can conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision, that their law, the application of which has been thus secured to them, is to be over-riden upon a question which so materially concerns their domestic relations. The Judges were not dealing with a case in which the Mahomedan law was in plain conflict with the general Municipal law, or with the requirements of a more advanced and [615] civilized society,—as, for instance, if a Mussulman had insisted on the right to slay his Wife taken in adultery. In the reports of our Ecclesiastical Courts there is no lack of cases in which a humane man, judging according to his own senses of what is just and fair, without reference to positive law, would let the Wife

go free: and yet, the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her Husband.

In what they have just said their Lordships must be taken to object only to the general supersession of the Mahomedan law as the *ratio decidendi* in cases of this description, which seems to them to be implied in the judgments under review.

They do not mean to lay down that it was sufficient for the decision of the case to show that, according to the Mahomedan law, the Husband has a right to the custody of his Wife, or that there was no answer to his suit unless it could be shown that the Wife had been separated from him either by Talāk or Kolah, either of which would dissolve the *vinculum*. This assumption, which seems to have been made by the Judges of the High Court, is, their Lordships think, erroneous. It seems to them clear, that if cruelty in a degree rendering it unsafe for the Wife to return to her Husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the Husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the Wife, might, if properly proved, afford good grounds for refusing him the assistance of the Court. And as their Lordships have already intimated, there may be cases in which the Court would qualify its inter-[616]ference by imposing terms on the Husband. But all these are questions to be carefully considered, and considered with some reference to Mahomedan law.

Before, however, any of these principles can be applied, the facts to which they are to be applied must be established by legal proof: and this, their Lordships are of opinion, has not been done in the present case. Besides the evidence on the futile and now abandoned issue about Freemasonry, there is little evidence in the cause.

The Zillah Judge's judgment in the "Property suit" was put in evidence. The fact, therefore, that the Appellant had been decreed liable to make good a large sum of money to the Respondent in respect of the property which he had misappropriated was established: but the proof of personal cruelty rests almost entirely on the proceeding of the Magistrate. That proceeding is neither one *inter partes* nor even a conviction of the Appellant upon a criminal charge. It was treated by the Nizamut Adawlut as being the record of an act done by a Police Officer, and not the judicial proceeding of a Magistrate. It is, therefore, difficult to see how, in strictness, it can be evidence at all against the Appellant: but at most it proves only that the Magistrate set the Lady free from what he considered improper restraint.

To establish a case of cruelty as a defence to the suit, the Respondent might have called the Magistrate, if then still in India, to speak to the state in which he found her when he set her free. She might also have given such evidence of her treatment as she adduced in the "Property suit," but which, whatever were her reasons for it, she did not adduce [617] in this suit. And, lastly, she might have given her own testimony, which it is most desirable to have on such an issue. She has failed to do any of these things; and it is impossible to say that the Courts below had before them in proof, the facts from which any Court could infer that a defence on the ground of cruelty had been established.

From what has been said, it must be obvious, that their Lordships are not prepared to affirm the decrees under appeal in this suit. They do not, however, feel themselves in a condition to make a final decree, which would put an end to this painful litigation. They will not visit upon the Respondent the mismanagement of her cause by sending her back at once to her Husband. Enough has been shown to render it doubtful, whether she can be restored to his zenanah with safety, at least whilst the relation of Debtor and Creditor continues to subsist between them, unless proper security for her protection is taken. It may ultimately turn out that she ought not to be sent back at all. Their Lordships must, therefore, unwillingly recommend that this cause be remitted to the High Court, with directions to put the same in a course of re-trial, and with power, if necessary, to amend the issues or frame new ones. If cruelty be relied upon as a defence, there should be a distinct issue as to the fact of cruelty.

Their Lordships, however, cannot help suggesting, for the consideration of the parties, that it is for the interest, the happiness, and the respectability of both to settle the questions still open between them by amicable arrangement rather than by

further litigation. They have surely friends who might effect such an arrangement between them.

[618] Their Lordships have now only to recapitulate the several recommendations which they will humbly make to Her Majesty on these appeals. These are—

First; that the appeal of the Appellant, Moonshee Buzloor Ruheem, in the "Property suit," be dismissed, except so far as it relates to his liability to pay the mesne profits of the shares in the Dum-Dum and Narain Mundul gardens jointly with the Appellant, Jodonath Bose; that the appeal of the last-named Appellant in the same suit be allowed; and that the decree of the High Court be amended, by omitting so much thereof as relates to the shares in those gardens, and by directing, in lieu thereof, that that portion of the Respondent's claim be dismissed with costs, and that the said decree be in all other respects confirmed.

Secondly, that in suit, No. 256 of 1862, the decree of the High Court be reversed, and that, in lieu thereof, the decree of the Zillah Judge dismissing the Respondent's suit, with costs, be affirmed, with the costs of the appeal in the High Court.

Thirdly; that in the "Restitution suit" the decrees of the High Court and of the Principal Sudder Ameen be reversed, and the cause be remitted to the High Court, with directions to have the same re-tried on fresh evidence, and with power to amend the issues, or to frame new issues, if they shall see fit to do so.

Lastly; that the Respondent should pay the costs of the appeals in suit, No. 256 of 1862, and in the "Restitution suit." That she should also pay the costs of the appeal of Jodonath Bose in the "Property suit." And that the Appellant, Moonshee Buzloor Ruheem, should pay the costs of his appeal in that suit.

[619] CAVALY VENCATA NARRAINAPAH,—Appellant: THE COLLECTOR OF MASULIPATAM,—Respondent * [Dec. 11, 12, 1867].

On Appeal from the High Court of Judicature at Madras.

A. made advances to a Hindoo Widow in possession, which were secured by a mortgage on the immoveable estate of her late Husband, and the advances were applied by her to purposes for which she had power by the Hindoo law to charge or alienate her Husband's estate, without his heirs' consent. Held, that A. was entitled as against the Crown, who took the estate by escheat on the death of the Widow for want of heirs, to possession of the estate under the mortgage, as security for the amount advanced and interest, subject to the equity of redemption by the Crown.

The *onus probandi* lies on the Mortgagee to prove, first, that the charge on the estate was the act of the Widow; and secondly, that the debt so charged was a competent act of the Widow; but the rule which throws the burthen of proof on the party who alleges payment to prove it, or that the debt is presumed to be satisfied, unless the contrary is shown by the Creditor, is not always to be strictly enforced, but is to be governed by the circumstances and probabilities of the case.

An appeal in this case was heard by the Judicial Committee in 1860, to determine the right of the Respondent to seize an estate called the Zemindary of Visunnappettah in his Collectorate, belonging to the deceased Zemindar, Varegondah Ramanappah, as an escheat to the Government, for want of an heir to the person last possessed, when their Lordships decided in favour of the general right of the Crown to take by escheat the estate in question, subject, or not subject, to a mortgage charge on the Zemindary, alleged to have been created by the Zemindar's Widow, Varegondah

* Present: Members of the Judicial Committee,—The Master of the Rolls (the Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor,—The Right Hon. Sir Lawrence Peel.

Lutchmedevammah, after his decease, and remitted the [620] case to India for further inquiries. The Court having, on the remit, heard the case, decided that there was a subsisting charge on the Zemindary in favour of the Appellant; an appeal was again preferred by the Respondent to Her Majesty in Council against that decision, when it was decided by the Judicial Committee, that the mortgage charge on the Zemindary in favour of the Appellant had not been sufficiently established, and that further evidence ought to be adduced on that point.

The circumstances under which the Appellant claimed the Zemindary in question, and under which the two former appeals arose, are stated in detail in the reports of those appeals (8 Moore's Ind. App. Cases, pp. 500 and 529).

The suit having been thus remitted to the High Court of Judicature at Madras, that Court on the 2nd of May, 1863, in order to carry into effect the Order of Her Majesty in Council, directed the following issues to be tried by the Civil Judge of the Zillah Court of Guntoor.

First, that the Civil Judge, having regard to the declarations contained in the Order in Council, dated the 6th of January, 1862, was to inquire and decide, whether the right of the Crown was absolutely defeated by the Razenamah in the pleadings mentioned. Secondly, to inquire and decide what advances, if any, were made by Cavalv Vencata Lutchmiah, the Father of the Appellant, to the Widow of Varegondah Ramanappah, in the plaint respectively mentioned, and whether all, or any, and which of such advances, were made for purposes for which, according to the Hindoo law, Varegondah Lutchmedevammah would have been entitled to alienate the [621] estate in dispute, as against the next heirs of her Husband, if such there had been. Thirdly, further to inquire, what other property, besides the estate in dispute in this suit, Varegondah died possessed of, and whether at the time when such advances, if any, were respectively made, Varegondah had any of such property; and, if so, whether the same was sufficient to answer the purposes for which the advances were made by Cavalv Vencata Lutchmiah to Varegondah Lutchmedevammah. Both parties being at liberty to adduce further evidence.

Both parties entered into evidence. The Appellant's evidence consisted of the depositions of witnesses in favour of the genuineness of the documentary evidence, which consisted, so far as the same is material to mention, of the following documents, numbered respectively as follows:—No. XIII. A Karanamah Bond, dated, the 9th of October, 1804, alleged to have been executed by Varegondah Ramanappah, the last Zemindar, to three Obligees, mortgaging twelve villages of the Zemindary for a term of eight years, as a security for 1100 house or pagodas, and stipulating that the Mortgagees should receive the profits of such villages, and credit the surplus after paying the Revenue Assessment against the debt. This Bond bore an indorsement to the effect, that on the 24th of September, 1800, or 1810, Kavali Seethiah paid the balance of principal and interest due as per accounts, after deducting the payments already made. No. XIV. A mortgage Bond alleged to have been executed on the 28th of December, 1810, by the Widow to Kavali Seethiah, mortgaging thirteen out of the fourteen villages of the Zemindary as a security for 5924½ house, and interest, of which [622] 879 house were said to have been borrowed by the Widow, as per accounts, extending from the 29th of February, 1810. This Bond stipulated that the Mortgagee should receive the profits, and thereout pay the revenue assessment and outgoings, and apply the balance in discharge of the debt. The Bond also stated as follows, "we have received the former Bonds, etc., relative to our Taluq, which you have returned to us." No. XV. A receipt, dated the 15th of January, 1811 (eighteen days after the date of the Bond), given by the Collector for Rs. 620. 6a. 3p., paid through Kavali Seethiah for the revenue assessment up to November, 1810. No. XVI. A Document, dated the 28th of May, 1813, purporting to have been executed by Kavali Seethiah to the Appellant's Father, acknowledging the payment by the latter of the balance of debt due to Kavali Seethiah under the Bond of the 28th December, 1810. No. XVII. A notice from the Collector, dated the 11th of March, 1811, stating that there was an arrear in the discharge of revenue assessment up to that date, amounting to 1400. 11. 30 star payodas, being the amount of revenue assessment for a whole year. No. XVIII. An Arsi, dated the 18th of May, 1822, and alleged to have been written by the Widow to the Collector, in which she stated, that up to that date, the debts on the Zemindary amounted to Rs. 20,000, and that she had borrowed large

sums of money, and part of arrears of revenue due to Government. No. XXV. A Letter, dated the 30th of October, 1828, from the Collector to the Widow, stating that as she had paid Rs. 1033. 3a. 3p., the balance of the instalment due by her to the Government, he had ordered three of her villages to be [623] attached. No. XIX. A Letter, dated 24th of November, 1828, written by the Widow to the Appellant's Father, in which she referred to the latter having paid off Kavali Seethiah, and having, in 1817, given her assistance in paying the revenue assessment, and requested an immediate loan to meet the demands of the Circar. No. XX. A petition, dated the 7th of January, 1832, preferred by the widow to the Board of Revenue, stating that she had given away the Zemindary to Kavali Venkata Rajeswara Row, the grandson of her elder Brother, to whom she was "indebted in a very large amount," and asking that the Zemindary might be registered in his name. This petition made no mention of any debt owing to the Appellant's Father. No. XXI. The Mortgage Bond of the 20th of April, 1838, executed by the Widow to the Appellant's Father, to secure Rs. 48,614. 13a. 6p. on which the Appellant founded his right to possession of the Zemindary, as against the Crown.

The Respondent examined witnesses, and produced documentary evidence, but neither the evidence of his witnesses nor the documents produced were found material to the points at issue.

The suit was tried by Mr. William Elliot, the Civil Judge of the Court of Gunttoor, when that Judge, upon the evidence, came to the conclusion, that a great portion of the debt claimed by the Appellant was contracted, and the estate made security for it by the late Husband of the Widow, Varegondah Lutelmedevammah. That it did not appear to have been possible for the Widow to have paid off the debts left by her late Husband, or to provide for her own customary and requisite expenses, and, at the same time, to meet the demand of the Government on account of the fixed [624] revenue. That in 1841, the Widow being unable to pay the debt against the estate, which had accumulated to the amount of Rs. 67,444, up to the date of the Razenamah, alienated the estate, which was already security for the debt, and, under the circumstances of that period, did not appear to be worth more than the amount then due. For these and other reasons, the Judge was of opinion, that the alienation by the Widow was for legal purposes sanctioned by Hindoo law, and that the right of the Crown, as next heir to her Husband, was, therefore, absolutely defeated by the Razenamah in the pleadings mentioned. With regard to the second issue, the Civil Judge decided, that up to the date of the Razenamah filed in 1841, the amount due to the Appellant had, with interest, accumulated to Rs. 67,444. 12a.; he had no data to go upon to enable him to fix any other amount than the above as the aggregate of sums really advanced by the Defendant's Father, with interest accruing thereon, or for declaring that they were advanced for other than legal purposes, as alluded to by him when considering the first issue. With regard to the third issue, the Judge was of opinion, that Varegondah Ramanappah died possessed of no property available for any purpose, except the estate in dispute, which, at his death, was not unincumbered.

From this decision the Respondent appealed to the High Court at Madras; and on the 22nd of January, 1866, the appeal coming on to be heard before Messrs. Frere and Innes, two of the Judges of that Court, they recorded their judgment, finding, amongst other things, that the Widow, Varekondah Lutelmedevammah, was left at the death of the Zemindar, her Husband, in a very embarrassed position, [625] and that the mortgage then made by her, was executed *bona fide* in discharge of the debts which it recited, left by the Zemindar at the date of his death, and since necessarily incurred by the Widow; that there was good ground for believing that in 1822, the Widow, Varegondah Lutelmedevammah, was still indebted in the sum of Rs. 20,000 to the Appellant's Father, and that, in the absence of accounts and of other evidence, they could not feel satisfied that any part of the debt subsisting in 1822 was still subsisting in 1838, and being unable to feel satisfied from the evidence that the mortgage deed of 1838, which gave rise to the decree in the suit No. 18 of 1838, and the Razenamah by the Widow, dated the 5th of April, 1841, confessing the debt, and undertaking to pay it by instalments, was executed for a debt for which the Widow might lawfully have created a charge upon the estate without the consent of the next heirs of her Husband, if such there had been, or of any other then subsisting debt, they

reversed the finding of the Civil Judge in regard to the points which the Order of Her Majesty in Council required them to determine, and they declared, that the right of the Crown to take by escheat was not defeated by the Razenamah, that from the death of the Zemindar, in 1810, up to the year 1813, advances were made to the Widow by Defendant's Father for purposes for which, according to the Hindoo law, the Widow would have been entitled to alienate the estate as against the next heirs of her Husband, if such there had been, and that on the 18th May, 1822, the balance due by the Widow upon these advances, with interest, was about Rs. 20,000, that in the year 1828 a [626] further advance was made for similar purposes of Rs. 1033. 3a. 3p., and that at the times at which the advances before mentioned were respectively made, the Widow had not other estates of her Husband sufficient to answer the purpose for which the advances were taken and to which they were applied, that the Defendant had not shown what, at the date of the advances last mentioned, was the debt upon the former advances, or whether any such former debt still subsisted, that no advances were made from this date to the date of the mortgage deed (Exhibit, No. XXI.) in 1838; that the Defendant was bound to show, and had not shown, that the Widow was in debt to the Defendant's Father at the date of the execution of the mortgage deed, for advances made for the purposes aforesaid, and that the Plaintiff on the part of Government, was, therefore, entitled to take the estate by escheat, unencumbered with charges created in favour of the Defendant's Father and the Defendant, and that the parties should each bear their own costs.

The appeal was from this decree.

Sir R. Palmer, Q.C., and Mr. Ayrton, for the Appellant.—The decision of the High Court, so far as it differed from the decree of the Zillah Judge, was contrary to evidence. It was established, that the Widow, Varegondah Lutchmedevammah, had lawfully charged and alienated the Zemindary to secure a debt due by her Husband to the Appellant's Father, which debt would have bound the heirs of her Husband, if there had been any, *Hunoomanpersaud Pandey v. [627] Mussumat Babooee Munraj Koonweree* (6 Moore's Ind. App. Cases, 393; and see Cases there collected, *ib.*, p. 407). Both the High Court and the Zillah Court having decided, that the debt so due to the Appellant's Father, was lawfully contracted, that the Zemindary was held by him in mortgage to secure the same in the year 1822, there was, therefore, no ground for presuming that the debt was not due with interest at the Widow's death, or that the debt was not further secured by the mortgage of 1838. The decree was clearly wrong in throwing the *onus probandi* on the Appellant. It was not for the Mortgagee's representative to show, that the debt secured by the mortgage had not been paid off. It has been proved, that at a certain date there was a debt due and a mortgage on the Zemindary executed to secure it; and further, that the Mortgagor, at a latter period in 1838, acknowledged that such debt, with interest, still subsisted. Such evidence was sufficient to establish the claim. Neither can it be maintained that the Appellant was bound to prove every item of the account.

Mr. Forsyth, Q.C., and Mr. Pontifex, for the Collector of Masulipatam.—The Widow had no power to dispose of or mortgage the Zemindary, except in order to raise money for certain necessary purposes, defined by the Hindoo law; and no such exigency has been proved to exist in the several instruments of charge, including the mortgage of 1838, purporting to secure advances, made in respect of which the Widow had no authority to charge the Zemindary. The case of *Hunoomanpersaud Pandey v. Mussumat Babooee Munraj Koonweree* (6 Moore's Ind. App. Cases, 393), relied on by the Appellant, is distinguishable from the present. There the question was as to the power of a Manager to charge the estate of a Minor, and, as it was for the benefit of the estate, the power of charging was upheld. It lies on those who claim under an alienation of real estate from a Hindoo Widow to show, that the transactions were within her limited powers, and for that purpose to prove by accounts and vouchers the necessity for and the due application of advances made to her, and no such proof in this case has been furnished. The instrument set up by the Appellant, and especially the alleged mortgage deed of the 20th of April, 1838, was simply a colourable contrivance for transferring the estate in spite of the Widow's disability.

The appeal stood over for consideration.

Judgment was now pronounced by

The Right Hon. Sir James W. Colville (Dec. 20, 1867).—This is the third appeal to Her Majesty in Council in this unfortunate case. On the first it was determined that the Crown, which is represented by the Respondent, was entitled to the Zemindary in question by escheat, subject to whatever interest the Appellant might have acquired therein by virtue of the transactions between his late Father and Vargondah Lutchemdevammah, the Widow of the last Zemindar. The Order in Council made on the second appeal, which bore date the 6th of January, 1862, amongst other things, declared, that the Crown, taking by escheat, had the same right to impeach the alienation of the [629] Widow which the next heirs of the Husband (if such there had been) would have had; and that the Appellant, then the Respondent, was entitled to a charge upon the estate, and to be paid and satisfied thereout, the full amount of all such of the advances (if any) made by his Father to the Widow, as were made for purposes for which, according to the Hindoo law, she would have been entitled to alienate the estate against the next heirs of her Husband, in so far as she had no other estate of her Husband to answer such purposes,—and by the same Order the cause was remitted to the Sudder Dewanny Adawlut of Madras, with directions to inquire whether, having regard to the declarations aforesaid, the right of the Crown was absolutely defeated by the Razenamah relied on by the Appellant, and if not, to inquire what advances, if any, were made by the Appellant's Father to the Widow, and whether all, or any, and which of such advances, and to what amount, were made for the purposes for which, according to the Hindoo law, the Widow would have been entitled to alienate the estate as against the next heirs of her Husband, and whether the Widow had, when such advances were made, other estates of her Husband sufficient to answer such purposes.

The High Court sent down the issues so directed for trial in the Zillah Court. The judgment of the Civil Judge (Mr. Elliot) states very carefully the facts which he found to have been proved before him, and came to the following conclusions:—First, that the alienation by the Widow was for legal purposes sanctioned by the Hindoo law, and that the right of the Crown, as next heir of the Husband, was, therefore, actually defeated by the Razenamah; secondly, that [630] the sums due for such advances amounted in April, 1838, to Rs. 48,614. 13s. 6p., the balance of the account then adjusted and settled; and thirdly, that the Zemindar the late Husband of the Widow, died possessed of no property available for any purpose, save and except the estate in dispute, which at his death was not unincumbered.

The decree of the High Court, made on appeal from this judgment, declared that the right of the Crown to take by escheat was not defeated by the Razenamah; that from the death of the Zemindar in 1810 up to 1813 advances were made to the Widow by the Appellant's Father for purposes for which, according to the Hindoo law, the Widow would have been entitled to charge or alienate the estate as against the next heirs of the Husband, and that on the 18th of May, 1822, the balance due to the Widow on these advances, with interest, was about Rs. 20,000; that in the year 1828 a further advance of Rs. 1033. 3s. 3p. was made for similar purposes; and that when the before-mentioned advances were respectively made, the Widow had not other estates of her Husband sufficient to answer the purposes for which they were taken, and to which they were applied; but that the Defendant had not shown what, at the date of the advances last mentioned, was the debt on the former advances, or whether such former debt, or any part of it, still subsisted; that no advances were made from that date to the date of the mortgage deed in 1838; and it lay upon the Appellant to show, and that he had failed to show, that the Widow was in debt to his Father at the date of the execution of the mortgage deed for advances made for the purposes aforesaid; and that accordingly the [631] Respondent, on the part of the Government, was entitled to take the estate by escheat, unincumbered with charges created in favour of the Appellant or his Father.

Against this decree the present appeal has been brought; and their Lordships have now only to inquire what facts must be taken to have been proved on the trial of the issues directed by Her Majesty's Order in Council of the 6th of January, 1862, and what conclusions ought to be deduced from them.

That the Zemindar, the Husband of the Widow, died in debt, and left little or nothing except the Zemindary in question, is undisputed. There is, therefore, no contest as to the correctness of the conclusion to which both the Courts below have

come upon the last issue. It seems to be also admitted that the gross annual revenue of the Zemindary was, on the average, little, if at all, in excess of Rs. 10,000, that the Peishcush, or Government revenue, was upwards of Rs. 1000, and that the balance was not much more than would cover the Zemindary and other expenditure of the Widow. The probability, therefore of her getting out of debt, if she ever found herself in debt to a considerable amount, was exceedingly small.

Again, it is proved, that the pecuniary transactions between the late Zemindar and the Uncle and Father of the Appellant (who were first cousins of his Wife), began before the year 1804. This is shown by Exhibit No. XIII. which both the Courts below have treated as genuine, and from which they have, as their Lordships think, legitimately inferred that the statements in Exhibit, No. XIV. (also found to be genuine) may be accepted as true. If this be so, we have it established [632] that in 1810, when the Widow came into possession, her late Husband was indebted to the Appellant's Uncle, Kavali Seethiah, in a sum exceeding Rs. 20,000, and that she had to borrow from him a further sum amounting to about Rs. 3200, in order to defray the expenses of her Husband's obsequies, and perhaps also for other purposes. That the debt so due to Kavali Seethiah was transferred to the Respondent's Father on the 15th of April, 1811, is proved by Exhibit, No. XVI.

It is unnecessary to consider, whether the debt thus assigned included any further sums paid for Peishcush, as the Appellant would infer from Exhibits, No. XV. and No. XVII., because the Courts below have, as their Lordships think, correctly held, that effect must be given to the Widow's admission, contained in her Letter (No. XVIII.) of the 18th of May, 1822; that at that date the debts on her own showing did not exceed the sum therein mentioned, a sum which this Letter states to be about Rs. 20,000, but which according to the printed record is Rs. 22,000. The antecedent proof, in the absence of any evidence to the contrary, is, their Lordships think, sufficient to establish that the whole of that sum represented debts which the Widow was entitled to charge upon the Zemindary as against the heirs of her Husband. The High Court has held, that the only other advance established to their satisfaction is that of Rs. 1033. 3a. 3p. paid for Peishcush in 1828. And their Lordships will accept that finding as correct, though there is undoubtedly some evidence of other advances of the like nature.

This being so, the determination of this appeal must turn on the question, whether the High Court [633] was right in holding, that it lay on the Appellant to show, by positive proof, what part (if any) of these debts remained unpaid in 1838, at the date of the mortgage, and that, in the absence of such proof, it was to be inferred that no part of these debts subsisting in 1822 or in 1828 was subsisting in 1838.

The Appellant had, no doubt, to sustain an extraordinary burthen of proof. He had to establish not only that he had a charge on the estate by the act of the Widow, but that the debt charged was of a particular character. He has shown that such a debt once existed. It does not, however, follow that because the Respondent had the right to demand this peculiar proof, the ordinary rule, which requires the party who alleges payment to prove payment, is to be inverted in his favour, or that the debt is to be presumed to be satisfied unless the contrary is shown by the Creditor. If, indeed, the facts had shown a strong probability of the satisfaction of the debt by the proper application of the surplus revenues of the estate by the Widow, the High Court might have been justified in pressing against the Appellant the non-production of accounts, or of other satisfactory proof that the debt had not been so satisfied. They might legitimately have held, that the facts establishing that probability afforded *prima facie* evidence of payment. But to their Lordships, it appears, that the facts proved are such as fairly lead to the opposite conclusion.

The Widow is shown to have succeeded to the Zemindary, encumbered with debts which she had no means of discharging, except the income, that is admitted to have been in ordinary years little more than sufficient to pay the Government revenue, and [634] provide for the expenses of her establishment and family. A landholder, whether male or female, when in such circumstances, rarely, very rarely in India, succeeds in getting out of debt. Again, in the present case, the Zillah Judge has shown that more than one of the years, in the course of which the process of payment is assumed to have taken place, were years of distress and famine,

when the collections from the estate must have fallen short of the Government revenue. And there is also evidence of occasional litigation, in which the Widow had to defend her title against adverse Claimants. She seems to have been throughout her tenure of the estate a needy and embarrassed woman. Nor can their Lordships find reasonable grounds for assuming that, between the years 1822 and 1838, she was in a condition to make payments in excess of those which, from the account said to have been settled in 1838, it must be inferred that she had then made on account of interest.

The transaction of 1838, is on the face of it a settlement of accounts between the Widow and her Creditor; a balance struck; and a mortgage taken to secure that balance. It is treated by the Respondent as a mere contrivance to give the estate to the Appellant's family in accordance with the desire which the Widow's correspondence with Government shows she had expressed in 1832. There might be good grounds for so treating it, if the other evidence in the cause was in favour of the conclusion that she had then discharged the whole of the debts of Rs. 22,000, and Rs. 1033. But their Lordships have already stated, that they cannot draw that conclusion from the evidence.

[635] They think that the burthen of proof, that this settlement of accounts was not a *bona fide* transaction between the Debtor and the Creditor, lies on the Respondent, and that he has failed to adduce any evidence to that effect. Assuming it then to have been a *bona fide* transaction, it follows, that advances with which she was entitled to charge the estate as against her Husband's heirs had previously been made to her to the amount of Rs. 21,000 or Rs. 23,000; and that there is no sufficient proof that she had then paid off these debts. What, then, is the effect of the transaction? Those advances, with the interest thereon, would considerably exceed the sum secured by the mortgage. Their Lordships think, that it is a fair and just inference to take this sum of Rs. 48,614. 13a. 6p., which was secured by the mortgage, to be the balance due in respect of such advances after giving credit for all payments on account, and after deducting the Rs. 5000, paid at the time of the settlement. If it be urged that the Appellant's case assumes other advances which the Courts below have not found to be of the character required, the answer is, that in a case like this, wherein both Debtor and Creditor were interested in appropriating the payments so as to make this balance a charge upon the estate, the transaction itself, which could only be valid in the event of appropriating the payments made towards discharge of advances which could not constitute a charge upon the estate, may reasonably be treated as evidence that such an appropriation was made. Their Lordships, therefore, are of opinion, that the Appellant has succeeded in establishing that, under the mortgage of 1838, his Father acquired a charge on the estate for the sum therein [636] named, which, on the Widow's death, would have been valid against the next heirs of the Husband, if such there had been.

Further than this their Lordships are not prepared to go. They do not agree with the finding of the Zillah Judge, that the title of the crown was absolutely defeated by the Razenamah of the 5th of April, 1841. They do not think that the Crown is bound by that document, or by the judgment of the 20th of March, 1839, on which it was founded.

The result is, that their Lordships must humbly recommend Her Majesty to reverse the decree of the High Court, and to declare, that on the 20th of April, 1838, there was due from the Widow to the Father of the Appellant in respect of advances for which she would have been entitled to alienate the estate, as against the next heirs of her Husband, if such there had been, the sum of Rs. 48,611. 13a. 6p.; that that sum was duly charged upon the estate by the mortgage of the 20th of April, 1838, and that accordingly the Appellant is now entitled to hold the Zemindary against the Crown as a security for so much of the said sum and of the interest thereon as now remains unpaid. This declaration is fatal to the Respondent's claim to immediate possession of the Zemindary; but it will leave an equity of redemption in the Crown. In strictness the present suit should stand dismissed, leaving the Crown to assert that equity, if it shall be so minded, in a suit properly framed for that purpose. It has, however, been suggested at the Bar that provision for redemption might be made in this suit. If the parties can agree as to the terms of redemption, their Lordships would not be unwilling to have them embodied in the Order

[637] to be made on this appeal. But if they do not so agree, the Order which their Lordships must recommend to Her Majesty, as the consequence of the before-mentioned declaration is, that the Respondent's suit stand dismissed, without prejudice to the right of the Crown to redeem.

The Appellant is entitled to have the costs of this appeal and of the proceedings in the Courts below under Her Majesty's Order in Council of January, 1862, and the general costs of the suit below, except such portion of them as was occasioned by his contesting the title of the Crown to take by escheat. This latter portion ought to be borne by him, and unless already paid, should be set off in the usual manner. The apportionment of these costs will be dealt with by the Court below in India.

By an Order in Council made on the appeal, it was thereby ordered, that the decree of the High Court of Judicature at Madras of the 22nd January, 1866, be and the same is hereby reversed, and that it be, and it hereby is declared, that on the 20th of April, 1838, there was due from the Widow to the Father of the Appellant, in respect of advances for which she would have been entitled to alienate the estate as against the next heirs of her Husband, if such there had been, the sum of Rs. 48,611. 13s. 6p., that that sum was duly charged upon the estate by the mortgage of the 20th of April, 1838, and that accordingly, the Appellant is now entitled to hold the Zemindary against the Crown as a security for so much of the said sum and of the interest thereon as now remains unpaid, and Her Majesty is further pleased to order, and it is hereby ordered, as the [638] consequence of the foregoing declaration, that the suit of the Respondent do stand dismissed, without prejudice to the right of the Crown (if it shall so think fit) to assert its equity of redemption in a suit properly framed for that purpose, and the costs of this appeal, as well as the general costs of the suit below, are to be awarded in compliance with the terms of the Report.

REPORTS OF CASES heard and determined by the Judicial Committee and the Lords of the Privy Council, on Appeal from the Supreme and Sudder Dewanny Courts in the East Indies, 1867-69. By EDMUND F. MOORE, Barrister-at-Law. Vol. XII.

BABOO BEER PERTAB SAHEE,—*Appellant*; MAHARAJAH RAJENDER PERTAB SAHEE—*Respondent*; and cross appeal, MAHARAJAH RAJENDER PERTAB SAHEE,—*Appellant*, BABOO BEER PERTAB SAHEE.—*Respondent* * [Dec. 6, 7, 9, 10, and 19, 1867].

On appeal from the High Court of Judicature at Bengal.

The Zemindary of Hunsapore in Behar is an impartible Raj, which by family usage and custom descended, for many generations, on the death of each successive Rajah, to his eldest male heir, according to the rule of primogeniture, subject to the burthen of making Babooana allowances to the junior members of the family for maintenance [12 Moo. Ind. App. 18].

In the year 1767, F., the then reigning Rajah of Hunsapore, having rebelled against the British Government, was expelled by force of arms, and the Raj confiscated by Government, who kept possession of the same for upwards of twenty years, and ultimately, in 1790, granted the Raj to C., a younger member of the family of F., on whom, some years afterwards, the Government conferred the title of Rajah. Held,—that, although the Zemindary was to be treated as the self-acquired estate of C., yet that the grant being from the ruling power, in the absence of evidence of the intention of the Grantors to the contrary, carried the incidents of the family tenure as a Raj, as the Government's intention must be taken to have been to restore the estate as it existed before its confiscation, with no change other than that as affected F. and his descendants, and was not, therefore, the creation of a new tenure, but simply a change of tenant, by the exercise of a *vis major* [12 Moo. Ind. App. 36].

Held further, that the title of Rajah is not absolutely essential to the tenure of a Raj [12 Moo. Ind. App. 36].

Ben. Reg. XI. of 1793, does not affect the succession by special custom, of a single male heir to a Raj, or subject it to the ordinary Hindoo law of succession [12 Moo. Ind. App. 36, 37].

* Present: Members of the Judicial Committee.—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colville, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley.

Although there is no mention in the ancient Hindoo Treatises of a testamentary disposition, yet modern authorities have determined, that a Hindoo has testamentary power, which can be exercised by him, at least within the limits which the Hindoo law prescribes to alienation by gift *inter vivos* [12 Moo. Ind. App. 37, 38].

Where the Mitacshara prevails, a Hindu without male descendants may dispose by Will of his separate and self-acquired property, whether moveable or immoveable. If there be male descendants, he may by Will dispose of self-acquired moveable property, subject to the restriction, that he cannot wholly disinherit any one of such descendants [12 Moo. Ind. App. 38].

Whether, by the Benares school of Hindoo law, a Hindoo can by Will make an unequal distribution of self-acquired immoveable property without the consent of his male descendants? *Quære* [12 Moo. Ind. App. 38].

If a party founds his title on a nuncupative Will, it is incumbent on him, in so uncertain a foundation as spoken words, to allege in the pleadings with the utmost precision, as well as to prove, the words on which the party relies, and every circumstance of time and place [12 Moo. Ind. App. 28].

The subject of the first appeal related to the successions to the Zemindary or Raj of Hunsapore, in the Zillahs of Sarun and Goruckpore, in the District [2] of Behar, of which Maharajah Chutterdharee Sahee died seized, and raised two principal questions: first, whether the estate was by family custom and usage a Raj, impartible and indivisible, descending to a single male heir to the exclusion of the co-heirs: and secondly, as to the power of the Maharajah, according to the Hindoo law of the Benares school, to make a testamentary disposition of a Raj to one member of his family to the prejudice of his other male descendants and co-heirs. The second, or cross appeal, was confined to such parts of the High Court's decree which directed an allowance of Rs. 1000 per mensem [3] to Baboo Beer Pertab Sahee, for maintenance as a member of the family, the non-admission of the verbal appointment of the Respondent as the successor to the estate, an alleged nuncupative Will of the late Maharajah, and lastly, with respect to the costs awarded.

The history of the case was as follows:—

The Raj of Hunsapore, an ancestral ancient Tributary Principality, was, by the evidence in the suit, traced back as being held as an entire estate in the same family for upwards of two hundred years. The common ancestor was Rajah Beer Sein, and each successive possessor of the Raj, during the whole of that period, had been a sole male heir of the Rajah last seized, and the eldest or nearest in the line of succession, without a single instance of the succession of the relations of any heir succeeding as co-parceners or joint heirs to the ancestral estate. The other members of each successive Rajah being entitled only to an allowance out of the estate for maintenance and support. This course of descent to the rights in the Raj continued uninterruptedly down to one Rajah Futtch Sahee, who, having rebelled against the British Government, was, in the year 1767, expelled from his possessions by force of arms, and the Raj confiscated and taken possession of by the East India Company. From that period until the year 1790 the Raj remained in their possession, and they leased the same to Farmers. In that year the East India Company, after repeated applications by members of the deposed Rajah's family for its restoration, by a Firman granted the Raj to Chutterdharee Sahee, the representative of a younger branch of the family, and put him, then a minor, in possession, and afterwards conferred on him the title of Rajah. Rajah Chutterdharee [4] Sahee had issue two sons, who predeceased him. The eldest, Ram Sahee, left two Sons, Ongur Pertab (the Respondent's Father), and Baboo Deoraj Sahee, him surviving, and the younger Son, Puthee Paul Sahee, also left two Sons, named Telluckdharee Sahee and the Appellant, Baboo Beer Pertab Sahee. Ongur Pertab had issue a Son, the Respondent, Maharajah Rajender Pertab Sahee, whom it was alleged, Maharajah Chutterdharee Sahee, the day before his death, verbally appointed to succeed to the Raj as his heir, and installed him as Rajah. It appeared, that the Maharajah afterwards executed a written Will, or testamentary disposition, dated the 16th of March, 1858, shortly before his death, appointing the Respondent, Maharajah Rajender Pertab Sahee, his great-grandson, his sole heir and successor

to the Raj. Disputes having arisen as to the Respondent's right of succession, an investigation took place before the Deputy Collector of the District where the estate was situate, who made an Order to the effect, that the Raj had devolved on the Respondent, and his name, as proprietor, was thereupon entered on the Government Records. This Order was affirmed by the Commissioner. Summary suits were also instituted under Act, No. XIX of 1841, for appointment of a Curator; and under Act, No. XX. of 1841, for a certificate of administration, and the Judge, Mr. Atherton, on the 22nd of May, 1858, declared the Respondent entitled, and his possession, as successor to Rajah Chutterdharee Sahee, was confirmed by a judgment of the late Sudder Dewanny Adawlut, on the 26th of August, 1858.

Some time afterwards Government conferred on the Respondent the title of Maharajah.

[5] In consequence of these proceedings the suit, out of which the principal appeal arose, was commenced in March, 1859, in the Zillah Court of Sarun, by the Appellant and his Brother, Tilluckdharee Sahee, (who afterwards withdrew from the suit), as two of the Grandsons and joint heirs of Maharajah Chutterdharee Sahee, against the Respondent, Ongur Pertab, his Father (who waived and surrendered his rights by inheritance in favour of his Son, the Respondent), Deoraj, his Uncle, and others, to dispossess the Respondent of a moiety of the above-mentioned Raj or Zemindary, and for a declaration by the Court, that the Raj or Zemindary was liable to division and partition, as ordinary immoveable and moveable property by the Hindoo law, and also seeking as subsidiary to the former, to set aside the summary proceedings under the Acts, Nos. XIX. and XX. of 1841, as well as the Orders of the Revenue authorities for recording the Respondent's name in the Books of the Government Collector as sole proprietor of the Raj.

The principal questions raised by the suit were, first, whether the Zemindary, which was admitted to have been an ancient family Raj, and had descended through a regular succession of ancestors, had been originally, and down to the time of Rajah Futteh Sahee, impartible and only descendible to one sole heir; or whether it was divisible and descendible as ordinary property by Hindoo law to the general heirs; and secondly, whether, if established to have been impartible and descendible to a single heir, the rebellion and flight of Rajah Futteh Sahee and the consequent khas management of the Zemindary by the East India Company, for a long period of years, and the subsequent transfer by the [6] Government, and settlement with the Maharajah Chutterdharee Sahee (such transfer being made to him as a member of the same family, and as next heir in the established line of succession after the Rajah Futteh Sahee and his Sons) had necessarily the effect of destroying the original tenure of the Raj as a Tributary Principality, under the customary law of the country, and also according to the particular custom of the family, and so destroying the legal incidents of the tenure as regarded the inheritance and the succession of a sole heir. There were also other subordinate questions of fact raised in the suit respecting the validity of, first, the alleged verbal appointment and installation of the Appellant and a nuncupative Will of the late Maharajah; and secondly, a written Will, subsequently executed by him, by which the Respondent was appointed the Maharajah's sole successor.

By the decree of Mr. D. G. Wilkins, the Judge of the Zillah Court of Sarun, dated the 24th of August, 1860, it was declared, that the Raj was an ancient Tributary Principality, impartible, and as such, inheritable by the eldest male heir solely; that the Plaintiffs had failed to prove that it was ever subjected to division or partition during the long course of succession thereto; and that the original and established course of descent to a single male heir had not been broken up or destroyed by the displacement of the elder branch of the family and the subsequent transfer to and succession of a member of the same family, being the next heir of the late Maharajah Chutterdharee Sahee. The decree also declared, that the special course of descent had been established as a family custom or usage, and that such custom was binding on the Maharajah, as the representative of the younger branch, as it had been previously on the elder branch, of the same [7] family, and decided, that the Respondent must be confirmed in his possession of the Zemindary in its entirety, without any division or partition, Will or no Will; but that the nuncupative Will and verbal appointment and assignment of the Raj to the Respondent had

not been sufficiently proved, nor the written Will, which, if proved, would, the Court considered, be void and inoperative by Hindoo law. It further declared, that the Plaintiffs were entitled, by virtue of the family custom or usage, to an allowance charged on the Zemindary for maintenance, which was fixed at the rate of Rs. 2000 monthly, with arrears to be calculated from the 16th of March, 1858; and the decree directed the costs of both the Plaintiffs and of all the other Defendants to be paid by the Respondent.

From this decision the Plaintiffs appealed to the High Court at Calcutta. The Respondent, Maharajah Rajender Pertab Sahee, also appealed on the ground, that the gift and delivery of the Raj and the nuncupative and written Wills ought to have been upheld, that the amount decreed for maintenance was excessive, and that the costs ought not to come out of the estate.

Before the appeals were heard, Tilluckdharee Sahee assigned his interest in the matters in dispute to his son, Narnicke Pertab Sahee, who effected a compromise with the Respondent, the Maharajah, and withdrew from the suit, which was afterwards prosecuted by the Appellant alone.

The appeals were heard before Messrs. Steer and Levinge, two of the Judges of the High Court, and by a decree of that Court, bearing date the 28th of April, 1863, the Court affirmed the first portion of the decree of the Zillah Court, both as to the legal character of the tenure of the estate and its incidents impressed on the Raj, and also as to the [8] same having been transferred to and received by the late Maharajah, subject to these incidents, but declaring that there had not been any confiscation or forfeiture either in fact or law. The decree also declared that, the Raj was one of those Principalities upon which was impressed the law of primogeniture, involving the succession of one member only of the family to the entirety of the estate as an inherent condition essential to its existence, and that the evidence in the suit had proved a family custom or usage to exist in favour of the same course of succession; that the late Maharajah Chutterdharee Sahee, being a member of the family, must have received the Raj subject to this family custom or usage, while those who claimed through him, being also members of the family, were equally bound by it. The decree dealt differently with the evidence with respect to the alleged nuncupative Will, declaring that the words and acts of the late Maharajah did not amount to a nuncupative Will but were consistent with the supposition that they were said and done by the Maharajah in the belief and under the impression that the Respondent would be, under and by virtue of the kooloochar (family custom), his sole heir, and as such would succeed to everything. As to the written Will, the decree reversed the Zillah Court's finding, on the ground, that it had been established by the evidence; and with respect to the allowance decreed on account of maintenance, the decree altered the Zillah Court's decree by cutting down one-half of the sum fixed, and decreeing Rs. 1000 per mensem instead of the Rs. 2000; and, as to the costs, the Zillah Court's decree was also altered and amended by decreeing, that the Respondent should pay his own costs and [9] his co-Defendant, his Father, Ongur Pertab's costs, and the costs of the Plaintiff; but the costs of the other co-Defendants were decreed against the Plaintiffs, as having been unnecessarily incurred, and the parties unnecessarily brought into Court, supported by unfounded and reckless allegations of Benamie and fraudulent transfers not attempted to be proved.

From this judgment of the High Court, and the decrees founded thereon, the Appellant brought the present appeal. The Respondent also instituted a cross appeal against those portions of the decree which related to the non-admission of the verbal appointment of the Respondent; the nuncupative Will of the late Maharajah; the refusal of his costs; the making the costs of the Plaintiff and of the Defendant, Ongur Pertab, payable by him, and also against the allowance of Rs. 1000 per mensem to the Appellant, Baboo Beer Pertab Sahee, from the date of the decease of the late Maharajah.

Both appeals were heard together.

Mr. Field, Q.C., and Mr. Cave, for Baboo Beer Pertab Sahee, argued, that Maharajah Chutterdharee Sahee's immoveable property did not, at the time of his death, constitute a Raj or Zemindary, indivisible either by Hindoo law or by family custom; that, assuming that the alleged custom of the descent of the family estate

undivided to the eldest Son had prevailed up to the time of the expulsion of Rajah Futteh Sahee, such custom, if not then extinguished by the breaking up of the family estate, would follow the elder branch represented by Rajah Futteh Sahee and his Sons, or at any rate could not be pleaded by a Son or Grandson of Rajah Chutterdharee Sahee himself, belonging to [10] the younger part of the family, while the elder branch descendants of Rajah Futteh Sahee continued to exist. And they insisted, that the custom, if it ever existed, was broken up and put an end to by a descendant of Rajah Futteh Sahee, who, it was alleged, divided the family estate. That, even supposing that a custom of the descent of the family estate undivided prevailed up to the time of Rajah Futteh Sahee, the provisions of Ben. Reg. XI., of 1793, would apply to such portion of the property as was situated in the British territories, and would so have applied even had Rajah Futteh Sahee himself continued in possession. That the Court below ought to have found that Maharajah Chutterdharee Sahee died possessed of immoveable property, both ancestral and self-acquired, other than that which had formerly belonged to Rajah Futteh Sahee, and to which neither the Hindoo law, with regard to the descent of property forming a Raj, nor the alleged family custom (if it ever existed) applied; and it should have declared, that Baboo Beer Pertab Sahee was entitled, as one of the heirs of Maharajah Chutterdharee Sahee, to succeed to one-fourth of such property, and should have found either that such property comprised all the immoveable property of which Maharajah Chutterdharee Sahee died possessed, other than that which Maharajah Rajender Pertab Sahee proved to have formerly belonged to Rajah Futteh Sahee, or should have framed an issue for trial by the Court of the Judge of Sarun to determine what part of the immoveable estate of which Maharajah Chutterdharee Sahee died possessed, had formerly belonged to Rajah Futteh Sahee, the burthen of proving the affirmative of such issue being upon the Respondent. That the Court below ought to have found, that Maharajah Chutterdharee Sahee had [11] died possessed of very valuable moveable property, to which neither the Hindoo law, with regard to the descent of property forming a Raj, nor the alleged family custom (if it ever existed) could apply, and should have declared the Appellant as one of the heirs of Maharajah Chutterdharee Sahee, entitled to succeed to one-fourth of such property. That the verbal gift and Wills were rightly held by the Judge of the Zillah Court not to have been established. But that, even assuming the gift and Wills were proved, they were inoperative by the Hindoo law of the Benares school; and that, assuming the Appellant to be entitled to maintenance only, he was entitled to the amount fixed by the Zillah Judge, together with arrears from the death of Maharajah Chutterdharee Sahee, and interest at the rate of twelve per cent., and that such maintenance should have been decreed to be continued to his male issue. And, as to the costs of the suit, it was submitted, that the order of the Zillah Judge was, in the peculiar circumstances of the case, right.

Sir R. Palmer, Q.C., and Mr. Leith, for Maharajah Rajender Pertab Sahee, contended, that the decrees of the Courts below were right in finding and declaring, that the ancient Raj or Zemindary of Hunsapore was originally, and had all along, continued to be an impartible and indivisible estate, descending to the eldest or nearest male heir alone, as a Tributary Principality, according to the custom of the country, and also by the custom of this family. That on those grounds the Respondent, on the death of his Great-grandfather, Maharajah Chutterdharee Sahee, and the surrender of the rights of his Father, became [12] entitled to succeed to the Raj or Zemindary as such eldest or nearest male heir of the Maharajah, to the exclusion of the Appellant. That the Appellant had failed to prove any interruption or disturbance of the customary course of descent to a single male heir by any such division or partition of the Raj, or Zemindary, among the general joint heirs, according to Hindoo law, previous to the possession of the late Maharajah, and that he also failed to establish that there had been any confiscation, in fact or by law, of the Raj or Zemindary by the Government as alleged in the plaint; or if there had been such confiscation, that the same, either necessarily and *ipso facto*, determined and put an end to the course of descent under the family custom, or destroyed and obliterated the legal character and incidents of Principality impressed on and inherent in the tenure of the Raj or Zemindary under the custom of the country. That, even if such alleged confiscation had been established, which was decreed, yet

that it was rightly declared upon the evidence by the decrees, that the possession of the Raj or Zemindary as it then stood, and without any change in its legal character or incidents, was given by the Government to the late Maharajah, he being a member of the family, and the nearest male relative of the then former possessor, after his own children, and the late Maharajah had accepted and entered into such possession as the successor, *de facto*, to an ancient ancestral estate subject to such family custom; and that further, it was rightly decided, that as the Appellant and the Respondent were also members of the same family, their rights and claims to the succession of the Raj or Zemindary must be governed by the same family usage and custom. That, if it had been other-[13]-wise found and decided on the facts, and that the late Maharajah had, under the transfer of possession to him, taken from the Government a grant, as in effect alleged by the Appellant, of a new and independent estate in the Raj or Zemindary, in the nature of a grant to him and his heirs general, under the Hindoo law, the late Maharajah would have held and possessed the Raj or Zemindary as a self-acquired estate, and if so, had an absolute power of alienation over the same, and had duly exercised such power in favour of the Respondent, and to the exclusion of the Appellant. That the Zemindary, the right of succession to which was in question in the suit, was an ancient Raj, and was held and enjoyed as a Raj by the late proprietor at the time of his death, and in whom the family title of Rajah (for a time in abeyance) had been revived by a grant of the Government many years previous to his death; that the succession to such Raj must, therefore, be governed by the custom of the country, which limits the right of succession to a Raj to a sole heir, the eldest or nearest male, who was the Respondent, and in whom the title had been continued as such heir by the Government. That the decree of the High Court was right in declaring on the evidence, that the written Will of the late Maharajah Chutterdharee Sahee was duly proved; and also that the same was valid by the Hindoo law, and that the Respondent was thereby appointed his successor and heir. That, if the Raj or Zemindary were to be considered and treated as an ancestral estate in the possession and enjoyment of the late Maharajah, the Respondent was entitled to succeed thereto on his death, as such special heir, under the custom of the country, and also under the family custom; and that [14] if it were to be considered and treated as a self-acquired estate in the late Maharajah, the Respondent was entitled to succeed him, under and by virtue of the special nomination and appointment of him as successor and heir, either under the verbal or the written appointment of the Maharajah as proved to have been made. That the Zemindary was from time immemorial held as a Raj, with all the usual incidents of a Raj, and that after it came into the possession of the late Maharajah Chutterdharee Sahee, the Government revived in him the family title of Rajah, and the Zemindary was thereafter held, considered, and treated by him and by all others as a Raj up to and at the time of his death. And that, therefore, according to the custom of the country, the same would descend to his eldest or nearest male heir solely, to the exclusion of the other members of his family, including the Appellant, who would only be entitled thereto to maintenance; and that the Respondent was such sole heir, and as such, rightly succeeded to the Raj, and his possession thereof had been recognized and confirmed by the Government, who had by a distinct act continued the family title to him.

And, upon the cross appeal, it was submitted by the Respondent that, as it was declared by the decree of the High Court that the witnesses (two European Officers of Government) who gave evidence in support of the nuncupative Will were persons of undoubted veracity, and it sufficiently appeared from their evidence, and confirmed by the petition of the late Maharajah, proved to have been sealed and dispatched by him, that his words and acts, constituting the nuncupative Will, were intended by him as a solemn and formal appointment of the Appellant as his successor and heir, and [15] such appointment was valid and operative according to Hindoo law and custom, without any instrument in writing; that even if such verbal appointment were not to be held valid and operative for the reason in the decree mentioned, namely, that the words and acts of the Maharajah spoken to by the witnesses, did not sufficiently show a testamentary intention on his part, or amount to a nuncupative Will, yet that the written petition, with his seal, declaring that he had appointed the Appellant his successor or heir, and expressly excluding

his Grandsons from all participation in the inheritance, ought to have been considered in the nature of a valid and binding testamentary disposition, and to which effect ought to have been given. That the direction was wrong, whereby the Appellant was ordered to pay his own costs, and the costs of the Respondent, and also the costs of the co-Defendant, Ongur Pertab, notwithstanding that the suit and appeal of the Plaintiffs were dismissed and a decree made generally in favour of this Appellant; and, lastly, that the allowance for maintenance to the Respondent from the death of the late Maharajah was excessive, and ought to be reduced and altered, both as regarded the amount and the time from which such maintenance should be decreed to run.

Upon the nature of the tenure and right to succession to Hunsapore, whether it constituted, according to family custom and usage, at the date of Maharajah Chutterdharee Sahee's death, a Raj, impartible and indivisible, descending to a single male heir, as recognized by Hindoo law, the following cases and authorities were referred to:—*Urjim Manik Thakoor v. Ramgunga Deo* (2 Ben. Sud. Dew. Ad. Rep. 139); *Ranee Soomitra v. Ramgunga* [16] *Manik* (3 Ben. Sud. Dew. Ad. Rep. 40); *Maharajah Gurunrain Deo v. Unund Lal Singh* (6 Ben. Sud. Dew. Ad. Rep. 282); *Anund Lal Sing Deo v. Maharajah Dheraj Gurrood Narayan Deo* (5 Moore's Ind. App. Cases, 82); *Thakoorai Chutturdharee Singh v. Thakoorai Telukdharee Singh* (6 Ben. Sud. Dew. Ad. Rep. 260); *Rawat Urjun Sing v. Rawat Ghunsiam Sing* (5 Moore's Ind. App. Cases, 169); *Katama Natchier v. The Rajah of Shiragunga* (9 Moore's Ind. App. Cases, 543); *Muha Raj Kowur Basdeo Singh v. Muha Rajah Boodur Singh Buhadur* (7 Ben. Sud. Dew. Ad. Rep. 228); *Baboo Ganesh Dutt Singh v. Maharajah Moheshur Singh* (6 Moore's Ind. App. Cases, 164); *The Secretary of State in Council v. Kamachee Boye Sahaba* (7 Moore's Ind. App. Cases, 476); *Mussumat Bhoochan Moyee Debia v. Ram Kishore Acharj Chowdhry* (10 Moore's Ind. App. Cases, 279); *Koonwur Bodh Singh v. Seonath Singh* (2 Ben. Sud. Dew. Ad. Rep. 92); Ben. Reg. XI. 1793; W. H. Macnaghten's "Hindoo Law," Vol. I. p. 18, note; Strange's "Hindoo Law," Vol. I. p. 198, note 3 (2nd Edit.), *ib.* p. 208, *ib.* Vol. II. p. 328; Inst. of Menu. Ch. VIII. par. 41; Elberling on Inheritance, p. 69.

Or, whether, upon the grant and transfer by the Government to Maharajah Chutterdharee Sahee, the estate became a self-acquired Zemindary, and on his death divisible by the ordinary Hindoo law, *The East India Company v. Syed Ally* (7 Moore's Ind. App. Cases, 555), were cited.

[17] With respect to the capacity of a Hindoo by the ordinary Hindoo law, to make a Will, assuming the property self-acquired, and the custom of descent to the Raj to a single heir not to prevail, *Nana Narain Deo v. Huree Punth Bhao* (9 Moore's Ind. App. Cases, 96; and cases cited, p. 98); *Mulraz Lachmia v. Chalekany Vencata Rama Jagganadha Row* (2 Moore's Ind. App. Cases, 54); *Rewun Persad v. Mussumat Radha Beeby* (4 Moore's Ind. App. Cases, 137); *Sonatum Bysack v. Sreemutty Juggutsoondree Dossee* (8 Moore's Ind. App. Cases, 72); Morley's Dig. tit. "Will," p. 616; F. Macnaghten's "Cons. on Hindu Law," p. 319; Strange's "Hindu Law," Vol. I. pp. 254, 262, *ib.* Vol. II. p. 16 [2nd Edit.]; W. H. Macnaghten's "Hindu Law," Vol. I. p. 3, and cases in note, *ib.*, were cited. And, as to the distinction of and exceptive restrictions by the Benares school of Hindoo law upon a Hindoo giving or devising to one heir ancestral estate in unequal shares, *Sham Singh v. Mussumat Umraotee* (2 Ben. Sud. Dew. Ad. Rep. 74); *The Mitashara*, Ch. I. Sec. I. pars. 27, 30; Strange's "Hindu Law," Vol. I. pp. 261, 262 [2nd Edit.]; W. H. Macnaghten's "Hindu Law," Vol. II. p. 147; F. Macnaghten's "Cons. on Hindu Law," pp. 317-18, were relied on by the Appellant.

Upon the validity of a nuncupative Will, or gift by the Hindoo law, the case of *Crinnasammah v. Vijaayammah* (2 Mad. H. C. Rep. 37) was referred to.

As to the allowance for maintenance out of the estate to the younger branches of the family, *Chuoturya Run Murdun Syn v. Sahub Purhulad Syn* (7 Moore's Ind. App. Cases, 18, 52) was relied on.

[18] Judgment having been reserved, was delivered by

The Right Hon. Sir James W. Colville (March 4, 1868).—The subject of this appeal is the right of succession to the very considerable estate of the late Maha-

rajah Chutterdharee Sahee, who died at Hutwah in Zillah Sarun, on the 16th of March, 1858. He was the owner of a large Zemindary called Hunsapore, which had been in the family of which he was a member for many generations before the East India Company, under the grant of the Dewanny in 1765, became the virtual rulers of Bengal, Behar, and Orissa. Like some other extensive Zemindaries in Behar, it was during that period an impartible Raj, and by family custom descended on the death of each successive Rajah to his eldest male heir, according to the rule of primogeniture, who took the whole, subject to the obligation of making to the junior members of the family certain allowances by way of maintenance called Babooana. The nature of the tenure, and the custom regulating its descent, were no doubt in dispute in the Courts below, but the evidence establishing them is conclusive; and accordingly they were faintly, if at all, contested on this appeal. The Rajah in possession of the property when the East India Company assumed the government of the Province was one Futteh Sahee. In consequence of his refusal to acknowledge the Sovereign or *quasi* Sovereign rights of the Company, or to pay revenue to them, a contest ensued; and about the end of 1767 he had been driven from Hunsapore by the Company's troops into the jungles dividing their [19] territories from Goruckpore, which then formed part of the dominions of the Nawab Vizier of Oude.

The East India Company thereupon attached the estate of Hunsapore, and let it out to Farmers. Rajah Futteh Sahee, however, from his retreat in the jungles, or in the dominions of the Nawab Vizier, in which he seems to have had another estate, made sundry incursions upon it, and is supposed to have killed Govindram, one of the Farmers under the East India Company. Soon after that occurrence there was a sort of Treaty of peace between him and the Company's Government; he was permitted to return to Hunsapore, and received an allowance by way of maintenance, but was not restored to the possession of the estate. That arrangement lasted only two months; he again withdrew from the Province, and renewed his predatory life on its borders. And in May, 1775, he attacked and murdered his own cousin, Bissunt Sahee, the Grandfather of Chutterdharee Sahee, who was then the renter or Farmer of Hunsapore under the East India Company. It will hereafter be necessary to consider more particularly the acts of the Government and its Officers during their possession of the estate. For the present, it is sufficient to state, that the Company retained possession of it from the date of the first expulsion of Rajah Futteh Sahee until 1790, either making the collections by their own Officers, or letting it out to Farmers; but in either case applying the whole of the surplus revenue to their own purposes. In 1790, however, when the Decennial settlement was in contemplation, or in the course of being made, the Government of Lord Cornwallis granted the property to Chutterdharee Sahee, then a Minor, under circumstances [20] which will be more particularly considered hereafter.

Chutterdharee Sahee attained his majority in 1802. In 1837 the title of Maharajah was, on his application, conferred upon him by Government for the first time. He had not previously been distinguished by any title from other Zemindars.

The pedigree in the Appellant's case (the correctness of which is not disputed) shows that the late Maharajah Chutterdharee Sahee had two sons who predeceased him. The elder of them, Ram Sahee, left two Sons, viz., Ongur Pertab and Deoraj, and the other, Pritipal Sahee, also left two Sons, viz., Tillukdharee and Baboo Beer Pertab Sahee (the Appellant). These four Grandsons were living at the time of the Maharajah's death, and were his co-heirs according to the ordinary Hindoo law of inheritance. Ongur Pertab is the Father of the Respondent, the Maharajah Rajender Pertab Sahee. Upon the death of Maharajah Chutterdharee Sahee, a contest arose as to the succession to his estate; Deoraj, Tillukdharee, and the Appellant, insisting that it descended *ab intestato* to his four Grandsons in equal shares, according to the ordinary course of the Hindoo law; the Respondent setting up the exclusive title, which will be next stated, and Ongur Pertab favouring the pretensions of his Son, and relinquishing his own rights in his favour.

The title set up by the Respondent is, shortly, as follows:—

The late Maharajah had for several years before his death expressed his desire that his estate should descend, as the Raj of Hunsapore had up to the time of Rajah Futteh Sahee descended, to a single heir; and that the Respondent, in whose favour his Father had [21] waived whatever rights he, as the eldest male descendant of

the Maharajah, might possess, should be that heir. Accordingly, on the 15th of March, 1858, being the day before his death, the Maharajah made, in the presence of some members of his family, including the Appellant, and a considerable number of his servants and dependents, what in these proceedings is called a consignment (Tusleem) of the Raj to the Respondent. On the same day he caused his servants to write out four Arzis, for the purpose of notifying this fact to the principal authorities in the District, viz., the Magistrate, the Judge, the Collector, and the Commissioner. All these documents were directed to be forwarded to Chuprah, the Sudder or principal station of Zillah Sarun. Early the next morning the Maharajah directed his servants to prepare a similar Arzi for transmission to the Deputy Magistrate, Mr. Lynch, who lived at Sewan, a place much nearer than Chuprah to the Maharajah's residence at Hutwah. Before this was done, Mr. Lynch, accompanied by Dr. MacDonnell, the Sub-Deputy Opium Agent of the District, called to pay a visit at Hutwah. They had an interview with the Maharajah, who presented the Respondent to them as his heir; recommended him to Mr. Lynch's protection; and told him that an Arzi to his address was in course of preparation, and would be forwarded. That Arzi accordingly varies in form from the others by introducing the circumstances of this visit. Later in the day the Maharajah gave what is called "Tilluck" to the Respondent; and afterwards caused his servants to prepare a testamentary paper, which he executed. He died somewhat suddenly about 4 P.M. of the same day.

[22] In these circumstances, the Respondent rests his title to succeed to the whole estate of his Great-grandfather, first, upon the several before-mentioned acts of the Maharajah, relying on the latest instrument as a Will, but insisting that if that be not well proven, there is *aliunde* sufficient evidence of a disposition by nuncupative Will in his favour. He contends, however, further, that the Raj being impartible, and descendible by custom, according to the rule of primogeniture, he, by reason of his Father's abdication in his favour, is entitled to it to the exclusion of the other members of the family, independently of any act of the late Maharajah. But he admits, that in either case they are entitled to have Babooana allowance of a paper amount assigned to them.

The contest between the parties was commenced very shortly after the death of the late Maharajah by those summary proceedings touching the fact of the right of possession, which are in India the ordinary prelude to a regular suit for the determination of a disputed title. The Respondent, on the 26th of March, instituted a proceeding before the Collector for the mutation of names, and this was opposed by the Appellant, and also by Tilluckdharee and Deoraj. The Respondent also instituted a summary suit in the Judges' Court for a certificate under Act, No. XX. of 1841, as to the whole estate of the late Maharajah, which was met by cross suits of the same nature by the Appellant, Tilluckdharee, and Deoraj, for certificates confined to their respective shares. The three last-mentioned parties also instituted two suits in the same Court, under Act, No. XIX. of 1841, for the appointment of a Curator. All these suits were decided in the Respondent's favour by the [23] Judge on the 22nd of May, 1858, and his judgments were confirmed on appeal by the Sudder Court in the month of August, 1858. And, on the 14th of June, 1858, the Collector, proceeding in part on the decisions of the Judge in the last-mentioned suits, granted the mutation of names for which the Respondent had applied. That Order was confirmed by the Collector on the 5th of August, 1858, and again by the Commissioner on the 8th of October, 1858. The effect of these preliminary proceedings was to put the Respondent in possession of the whole of the estate under the title set up by him, and to cast upon the rival Claimants the burthen of disputing that title in a regular suit.

Deoraj did not accept this burthen, but seems to have abandoned his claim, after making an arrangement with the Respondent for his Babooana allowance. The Appellant, however, and his Brother, Tilluckdharee Sahée, commenced the suit out of which this appeal has arisen on the 31st of December, 1858; but the latter, after the decrees in the Respondent's favour had been made in it, also came to an arrangement touching his allowance, and abandoned the appeal which he had contemplated. His claim, therefore, is now no longer in question; and it will be convenient to treat the suit as one between the Appellant alone and the Respondent.

The Appellant insists on his title as one of the co-heirs of the late Maharajah.

according to the ordinary Hindoo law. He impeaches, as fraudulent fabrications in support of the Respondent's title, the Will and the several Arzis, or petitions, alleged to have been sent by the Maharajah's desire, and under his seal, to the different Civil authorities of the Dis-[24]-trict; and he denies that the alleged consignment or installation of the Respondent took place. These are all questions of fact. But he further denies, as matter of law, the power of the Maharajah to make a Will to the prejudice of his male descendants, of whom he is one. He contends that whatever may have been the previous course of descent of the Raj of Hunsapore, according to family custom or otherwise, up to the time of Rajah Futteh Sahee, the law or custom determining that course of descent ceased on his expulsion; and that the grant to Chutterdharee Sahee was not one of an indivisible Raj, descendible according to a special custom, but one of a mere Zemindary, governed by the ordinary law. In his case he further contended, that even had the grant been one of a Raj, or had the Raj continued in the line of Rajah Futteh Sahee, the special rule of succession would have been abrogated by the provisions of Regulation XI. of 1793. These points, with one or two others, to which it is not necessary now to advert, seem to have been sufficiently raised by the amended issues settled in the suit.

The judgment of the Zillah Judge, Mr. Wilkins, which was given on the 24th of August, 1860, found that the family custom, according to which the estate was impartible, and descended to the eldest male heir, subsisted at and up to the time of Rajah Futteh Sahee; that this custom was not abrogated by his expulsion, the retention of the property by Government, and the grant of it to Chutterdharee Sahee; and that the estate was in his hands an impartible Raj, descendible to his next male heir alone, and, therefore, on the renunciation of Ongur Pertab, to the Respondent. The Judge made no distinction in this respect between the moveable and immoveable property, and, on the [25] above ground, decreed in favour of the Respondent. He held, however, that the alleged consignment or transfer of the 15th of March, 1858, and the Will, were not well proven; and he decreed an allowance of Rs. 2000 per mensem to each of the Plaintiffs, viz., the Appellant and his Brother.

The judgment of the High Court on appeal from this decree is dated the 28th of April, 1863. That Court also held, that the Raj was originally impartible, and descendible by custom to the eldest male heir alone; and that it did not lose this character on its restoration to Chutterdharee Sahee. It denied that there had been, or could have been, any confiscation in the proper sense of the term; and, in Mr. Justice Levinge's separate note, this point is more fully argued. But the High Court, differing therein from the Zillah Judge, affirmed the validity of the Will. It also reduced the allowance to each of the Plaintiffs to Rs. 1000 per mensem.

At the Close of the argument for the Appellant, their Lordships intimated, that in their opinion the judgment of the High Court, touching the *factum* of the Will, was correct, and ought not to be disturbed. They will now state their reasons for coming to that conclusion.

That the disposition was in accordance with the Maharajah's general wishes and intentions is shown by the strongest and most trustworthy evidence. Upon this point the concurrent and unimpeachable testimony of the witnesses, Dampier, Dr. Fleming, L. MacDonald, John Macleod, W. F. McDonnell, Tayler, R. Macleod, and Richardson, being all of them European Gentlemen in the public service, or otherwise of respectable station, is to the effect, that from 1851 [26] up to the time of his death, the Maharajah continuously entertained and constantly expressed the desire to keep his property together as a Raj, and his intention to make the Respondent his successor and universal heir.

That he retained that desire and intention on the morning of his death, and was then in full possession of his senses, is proved beyond all question by Mr. Lynch and Dr. McDonnell. The general intention of the alleged Testator in favour of the Respondent, and his testable capacity, are, therefore, established. It is true, that in the interview with Mr. Lynch and Dr. McDonnell the Maharajah did not express his intention to make a Will. It is also true, that to the *factum* of the Will there is no testimony but that of his native servants and dependents. It is, however, most improbable that the Maharajah should have relied on what passed between him and the two European Gentlemen when none of his family, except the Respondent, and but few of his dependents, were present. And though he might also have relied on the

Tusleem or consignment, of the preceding day as public expression of his wishes, and the formal installation of the Respondent as the new Rajah (supposing that ceremony to have taken place), yet it must be recollected that the question, whether the estate was impartible and descendible as a Raj was a doubtful one, and that he himself, as Mr. Dampier proves, had long known it to be so. There is, therefore, nothing improbable in the hypothesis that, pressed by this doubt, as well as urged by his strong desire to secure the succession to the Respondent, he may, even after his interview with Mr. Lynch and Dr. McDonnell, have conceived and executed the intention of making [27] a Will, in order to supply by the force of that instrument any defects which his preceding acts may have left in the Respondent's title. And, if the positive testimony to the execution of the document is not of a high character, it is contradicted only by that of witnesses who, swearing to the actual incapacity of the Maharajah, are utterly discredited by the evidence of Mr. Lynch and Dr. McDonnell; and it is not contradicted (as it might have been contradicted) by the oath of the Appellant, whom the witnesses deposing to the Tusleem and to the execution of the Will state to have been present on both occasions. Their Lordships are aware that the latter inference is met, as usual, by arguments founded on the unwillingness of natives of rank to appear and be examined as witnesses in a Court of Justice. There are, however, examples, increasing, fortunately, in number, of men who disregarded this prejudice; and considering the vastness of the stake, and the pointed manner in which the contradiction was challenged by the witnesses on the other side, their Lordships cannot think that the failure of the Appellant to tender himself as a witness is sufficiently accounted for by the feeling in question. In any case, the fact remains, that there is no contradiction of the Respondent's witnesses, except the testimony of witnesses wholly unworthy of belief, and that the probabilities are in favour of the truth of their story. Their Lordships must, therefore, hold, that the execution of the Will has been proved; a conclusion which, though opposed to that of Mr. Wilkins, was also that of the Judge of First Instance and of the Sudder Court when dealing with the same question in the summary suits under Act, No. XX. of 1841, as well as that of the High Court in this suit. [28] This being so, we have in the Will executed by the Maharajah a corroboration of the positive testimony as to the facts of the Tusleem or consignment, and of the execution and despatch of the Arzis, which far outweighs the arguments that have been founded on the lateness of the time at which four of the latter reached Chuprah. Nor do their Lordships see anything in the objection that the Tusleem and the execution of the Will are inconsistent acts; that if the former took place, the Maharajah had nothing to dispose of, and the Will was superfluous. Their Lordships look upon the events of the last two days of his life as a series of acts, of which the execution of the Will was the crowning one, all being designed by the Maharajah to effectuate, so far as his acts legally could, his intention to leave his estate as a Raj, and to make the Respondent his successor.

It is unnecessary for their Lordships to give any opinion upon the question raised in the Courts below of a disposition in favour of the Respondent by nuncupative Will. They will only remark, that they would have had much difficulty in supporting his title on that ground upon the pleadings and evidence in this suit. There was great confusion in the Courts below on this point. The Respondent seems at one time to have relied on the Tusleem; at another on what passed between the Maharajah and Mr. Lynch as a nuncupative Will. But if any party is bound to strictness of pleading, it is he who sets up a nuncupative Will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place.

[29] Having thus determined the principal issues of fact on this appeal, their Lordships have now to consider, whether the Maharajah had by law the power to make the Will which he did make; and also by what law the succession to his property, and especially to that portion of it which formerly constituted the Raj of Hunsapore, is to be regulated if he had not the power to devise it.

In order to determine either of these questions, it is material to ascertain what was the nature of the estate or interest which Chutterdharee Sahee acquired through the acts of the East India Company's Government in 1790. And for that purpose

it is necessary to go more particularly into the history of the state after the expulsion of Rajah Futteh Sahee.

It has already been stated that, after that event, the property was for nearly twenty-three years held by the East India Company, who, whether they let it to Farmers, or kept it under their own management, applied the whole of the surplus revenues to their own use. During great part of that period, Rajah Futteh Sahee continued to wage war with them from his retreat in the jungles, or in the territories of the Nawab Vizier, and appears to have been consistently treated by them, at least after 1773, as a public enemy, with whom no terms should be made.

The murder of Bishunt Sahee took place, as before stated, in 1775. In 1778 the Revenue Council of Patna, on the application of Mohesh Dutt, the son of the murdered man, and the Father of Chutterdharee Sahee, proposed that Rajah Futteh Sahee should be declared to have forfeited his Zemindary, and that it should be bestowed on Mohesh Dutt, but the Government of Warren Hastings declined to comply [30] with that proposal, or to do more at that time than hold out vague hopes of reward to Mohesh Dutt for his fidelity.

In 1784 the claims of Mohesh Dutt were again under the consideration of Mr. Hastings' Government. The proceedings that took place clearly show, that it was then considered that any grant to him, though he founded his claim on being the next heir to the Zemindary after the extinction of Rajah Futteh Sahee's line, was matter not of right but of favour; and that it was actually proposed to insert in the Sunnud by which any such grant should be made, a condition for avoiding it in case the Grantee should, by negligence or from any cause unsatisfactory to Government, fail to deliver up the person of Rajah Futteh Sahee within one year. Ultimately nothing was done on this application; Mohesh Dutt afterwards died, and the estate remained as before in the hands of the East India Company.

In 1790, the question what should be done with it came before the Government of Lord Cornwallis, in consequence of the steps which were then being taken in order to effect the Decennial settlement. On the 16th of June in that year the Collector, Mr. Montgomerie, having received instructions for the disposal of all lands "the immediate property of the Company," wrote to inform the Board of Revenue that there were no lands within his District which answered that description, unless they were this Zemindary and another somewhat similarly circumstanced. On the 21st of July in the same year, the Board of Revenue submitted this Letter to Government, with a recommendation that such part of Hunsapore as was the property of Rajah Futteh Sahee should be declared con-[31]-fiscated, and sold subject to the interests of the existing Farmers. But on the 28th of July the Government, in answer to this communication, directed "that such part of Hunsapore as was stated by the Collector to have been the real property of the rebel, Rajah Futteh Sahee, should be conferred on the infant Son of the late Mohesh Dutt, after the usual publication had been made." That Letter also provided, that upon the lands being finally confirmed to the Son of Mohesh Dutt, he should receive the allowance fixed for disqualified landholders.

The Collector having, on the 18th of November, 1790, reported that "no admissible claim had been preferred to the lands ordered to be confirmed to Chutterdharee Sahee," the Board of Revenue, on the 17th of January, 1791, recommended that Chutterdharee Sahee, the infant Son of Mohesh Dutt, should be "declared proprietor of the land in Hunsapore, which belonged to Futteh Sahee," and the Government, on the 21st of January, ordered accordingly.

A subsequent Letter of the Board of the 29th of April, 1791, fixes the Malikana allowance for the infant at S. Rs. 1027. 7a. 4p. per mensem, and makes it payable from the 11th of October, 1790.

In October, 1802, Chutterdharee Sahee having come of age, entered into a formal engagement for the payment of the Government Revenue; and the revenue Officers who had managed the estate during his minority, relinquished it to him and issued a proclamation directing the Ryots and tenants to pay the collections to him. These documents, called respectively the Dowl and the Amuldustuck, are set out in the record, but they do not throw much light upon any of the questions raised in the suit.

[32] It is material to observe, that during all these proceedings, Rajah Futteh Sahee and his line continued to exist, and that the latter exists to this day. He himself was alive in 1808, but had then become a Fakeer, having given up even his Goruck-

pore property to his family. In 1790 his Wife and one of his Sons appealed to Government for an allowance, but their application was rejected on the 25th of June in that year. In April, 1792, one of the Sons, and in April, 1808, four of the Sons of Rajah Futteh Sahee made applications for the restoration of the estate, and for allowances out of it. On the 29th of April, 1808, the latter application was rejected by Government in a Letter which stated that "the estate of Futteh Sahee had been forfeited to Government." Areenurda Sahee, one (and apparently the eldest) of the four Sons, made similar claims by petition in 1816, and again in 1821. In both these petitions he stated, that his younger Brother had come forward before Mr. Montgomerie in 1790 claiming, on behalf of Rajah Futteh Sahee's line, to settle for the revenue. The claim, if made, was clearly treated as inadmissible. The Order indorsed on the petition of 1821 is to the effect that, "whereas the property of Futteh Sahee was confiscated on account of rebellion," no further proceedings on the petition are necessary. In June, 1829, the Great-grandson of Rajah Futteh Sahee brought a regular suit against Chutterdharee Sahee and the Government for the recovery of the estate, which was dismissed on the simple ground that the claim was barred by the Regulation of Limitations. And the same persons seem to have appeared on the proceedings before the Collector of the 14th of June, 1848, which is above referred to, alleging that the grant to Chut-[33]-terdharee Sahee was for life only, and again setting up his own title as the descendant and representative of Rajah Futteh Sahee.

On these facts, it is at least clear, that there was a virtual confiscation of the interest of Rajah Futteh Sahee and his descendants in the property, and the assertion of full dominion over it on the part of the East India Company. The Government has not only persistently treated the estate of Rajah Futteh Sahee as forfeited, and refused to recognize any claim on the part of his descendants; it has for more than twenty years applied the revenue to its own purposes; it held itself at liberty either to reject (as it ultimately rejected) the applications of Mohesh Dutt, or to make a fresh grant of the estate to him, imposing new conditions upon the tenure; it held itself at liberty in 1790 to dispose of the property by sale, though as a matter of grace and favour it finally conferred it on Chutterdharee Sahee.

Their Lordships are, therefore, unable to see the force of the argument which the Judges of the High Court, and in particular Mr. Justice Lvinge, have founded upon the supposed obligation of the East India Company to govern the Provinces which they held under the Mogul Emperor by virtue of the grant of the Dewanny according to Mahomedan law, and upon the doctrine of that law which denies to the ruling power the right to confiscate the property of a rebel. Such an argument might, perhaps, have been plausibly urged in the suit which the Great-grandson of Rajah Futteh Sahee brought against Chutterdharee Sahee and the Government, if that had ever come to a hearing. In this suit, however, both parties claim under Chutterdharee Sahee; and as between [34] them, and for the purposes of this suit, it must be taken for granted that he derived his title (whatever may have been the nature of his estate, or the incidents to it) by grant from the East India Company, which had full dominion over the estate, and, therefore, the power to grant it.

One consequence from this conclusion (and it has a material bearing on the question of testamentary power) is, that the estate must be taken to have been the separate and self-acquired property of Chutterdharee Sahee. The fact that he was the member of the family which had so long held the estate, next in succession to the line of Rajah Futteh Sahee, and the son and Grandson of persons who had established claims on the gratitude of the Company, may have been a motive determining the selection of him as Grantee; but it does not affect the nature of his estate, or give to it the character of ancestral property. The legal foundation of his title is still the grant to him from those who had power to make or to withhold it. This point was ruled in the Shivagunga case (9 Moore's Ind. App. Cases, 610).

The question remains, what was the nature of the estate granted, whether it was a fresh grant of the family Raj with its customary rule of descent, or a grant of the lands formerly included in that Raj to be held as an ordinary Zemindary.

There was not in this, as in the Shivagunga case, a new Sunnud. We have no evidence of the intention of the Grantors except that which is to be collected from

the proceedings and correspondence already referred to, nor have we any record of the proceedings before the Governor-General, or any means of knowing the precise grounds on which Lord Cornwallis's Government rejected the recommendation of the Board of Revenue, and determined to confer the property on Chutterdharee Sahee. Again, it cannot be denied, that in these proceedings the term "Raj" is never used, or that in some of them the subject of the grant is spoken of as "the land in Hunsapore which belonged to Rajah Futteh Sahee." On the other hand, there is no expressed intention to alter the nature of the tenure. The estate whilst it was in the hands of the Company, had never been broken up. The policy of the Decennial settlement was to form a body of landholders by ascertaining in whom the Zemindary interest in the soil actually was, and making with those persons a Permanent settlement of the Government revenue, so as to give them greater fixity of tenure. Lord Cornwallis's Government determined to set up Chutterdharee Sahee as the Zemindar with whom the Settlement in respect of this property should be made. But the estate of a Zemindar was not merely the right to the possession or enjoyment of certain lands. It involved rights against, and corresponding obligations to, dependent Talookdars, or other under-tenants, Ryots of various classes, and others; and the Decennial settlement, as a reference to the Rules re-enacted by Regulation VIII. of 1793 will show, proceeded upon an inquiry into all or many of these particulars. In the absence of all evidence to the contrary, it must be presumed, that the Settlement was made precisely as it would have been made had the estate continued in the line of Rajah Futteh Sahee; and, therefore, that the subject conferred on Chutterdharee Sahee was the old Zemindary with all its incidents, excepting, at most, its descendible quality. It seems to follow, that the [36] intention to alter that quality, if it existed, would have been expressed. Again, the selection of a member of the old family, the next in succession to the excluded line, though it cannot make ancestral that which was self-acquired, is a very strong circumstance in favour of the hypothesis, that the intention of Government was to restore the Zemindary as it had existed before the confiscation or attachment, making no further change than was involved in the forfeiture of the rights of Rajah Futteh Sahee and his descendants, and in the substitution, by an act of power, of the person next in the order of succession, and consequently that the transaction was not so much the creation of a new tenure, as the change of the tenant by the exercise of a *vis major*.

The circumstance that the grant was in the first instance of the Zemindary without the title of Rajah, has been urged as a strong argument in favour of the Appellant's view of the case. But that the title was not absolutely essential to the tenure of the estate as a Raj is shown by the Tirhoot case (6 Moore's Ind. App. Cases, p. 191); and in 1837 the title was conferred on Chutterdharee Sahee upon his application, founded on the fact, that it had been enjoyed by his predecessors, and annexed to the Zemindary. This act of the Government in 1837 could not alter the legal effect of what was actually done in 1790; but the grant of the title on this representation at least shows that the Government of 1837 did not dissent from the construction which Chutterdharee Sahee then put upon the acts of their predecessors in 1790.

Another argument for the Appellant is founded on Regulation XI. of 1793. Mr. Field does not contend, in the face of the authorities cited by Mr. [37] Leith, that if the estate granted to Chutterdharee Sahee in 1790 was a Raj, descendible by family custom, according to the rule of primogeniture, it lost that character on the passing of the Regulation in question; but he insists on that Regulation as evidence of intention. He argues that, inasmuch as it was passed to reduce the number of estates descendible by special custom, the intention of Lord Cornwallis's Government was, presumably, to make the property restored to Chutterdharee Sahee subject to the ordinary law of succession.

Their Lordships, however, are of opinion, that they cannot safely draw any inference concerning the intentions of Government in making a particular grant in 1790, from the passing in 1793 of a general law which, confessedly, does not affect the descent of the large Zemindaries held as Raj, or subject to Kooloochar, or family custom.

Upon the whole, then, their Lordships have come to the conclusion, that the Courts below were right in holding that the estate granted to Chutterdharee Sahee in 1790 was the Raj of Hunsapore, and that the right of succession to it from him was to be governed by the law or custom which regulated its descent in the time of his ancestors.

This view of the case removes many of the objections to the testamentary power of the late Maharajah, which it is nevertheless necessary to consider, since the title of the Respondent to at least part of Chutterdharee Sahee's estate may depend on the Will.

It is too late to contend that, because the ancient Hindoo Treatises make no mention of Wills, a Hindoo cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation, by gift *inter vivos*. Accordingly, it has been settled that even in those parts of India which are governed by the stricter law of the Mitashara, a Hindoo without male descendants may dispose, by Will, of his separate and self-acquired property, whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property, if moveable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants. It is, however, objected that a Hindoo in those Provinces who has Sons or other male descendants must, on the application of the doctrine in question, be held to be incapable of making by Will an unequal distribution amongst them of immoveable property, whether self-acquired or ancestral; because by the law of the Mitashara his Sons in both cases take, on their birth, an interest in the property, which their Father without their consent cannot displace.

For the Respondent it is contended, that this question is concluded by the Bithoor Case (9 Moore's Ind. App. Cases, p. 96). It cannot be denied that in that case, the Testator being a Mahratta, domiciled at Cawnpore, and having real as well as personal estate, made by Will an unequal distribution of both amongst his Sons; and that his legal power to do so was affirmed by this Committee, and by both the Courts below. The Appellant, however, insists, that this decision is opposed to the law of the school of Benares, and relies on the texts of the Mitashara, which show, that a Father cannot alienate his self-[39]-acquired state, or make an equal distribution of them by partition, without the consent of his Sons; and also upon passages in Strange's "Hindu Law," and other authorities. Mr. Leith, on the other hand, has argued, that all these authorities are to be reconciled with the decision in the Bithoor Case, by holding, that they relate to property acquired by the Father, with the use or by the aid of ancestral estate; and that they have no application to separate any self-acquired property in the strict sense of the term. Their Lordships are relieved from the necessity of determining whether this distinction is well founded, or whether, if it be not so, the present case must be governed by the Bithoor Case [9 Moo. Ind. App. 96]. For if they are right in holding, that the grant was of a Raj descendible, according to custom, to the eldest male heir, the question, whether, according to the law of the Benares school, a Hindoo can by Will make an unequal distribution of his self-acquired immoveable property amongst his male descendants without their consent, does not in this case arise. The only person entitled to impeach the disposition by Will is Ongur Pertab, the eldest Grandson, who is a consenting party to it: There are no inchoate rights of inheritance in the junior members of the family. They did not by birth acquire that community of interest with their Grandfather in his self-acquired lands which is the foundation of the supposed restriction on his power. And, *cessante ratione cessat et ipsa lex*. (See the remarks of Sir William Macnaghten on the case of *Esachund Rai v. Eshorund Rai* (1 Ben. Sud. Dew. Ad. Rep., 2), 1 W. H. Macnaghten's "Hindu Law," p. 7).

It follows, then, that either by the special law of [40] inheritance, or by the Will, the Respondent was entitled to the estate of Hunsapore, and to whatever other wealth the late Maharajah could dispose of by his Will.

Mr. Field has objected, that this ruling does not cover that portion of the estate (if any) which came to Chutterdharee Sahee from his Father, Mohesh Dutt. This may be true, but their Lordships are of opinion, that the pleadings and evidence in

this suit do not properly raise such a case, and utterly fail to show what that property (if any) was. And the Respondent being in possession of the whole, it was for the Appellant, if he failed to establish his title to share in the whole, to show in what part he was entitled to share.

With respect to the questions raised by either appeal touching the amount of the Babooana allowance, and the costs of the proceedings in the Courts below, their Lordships have only to say, that they see no sufficient ground for interfering with the discretion exercised on those points by the High Court. The result is, that their Lordships will humbly advise Her Majesty to dismiss both the appeal and the cross appeal with costs. The Appellant and the Respondent will each bear the costs of his appeal.

[Often quoted as *The Hunsapoor Case*. See *Periasami v. Periasami*, 1878, L.R. 5 Ind. App. 61; *Rajah Venkata Narasimha Appa Row Bahadur v. Rajah Narayana Appa Row Bahadur*, 1879, L.R. 7 Ind. App. 38; *Mutta Vaduganadha Tevar v. Dorasinga Tevar*, 1881, L.R. 8 Ind. App. 99; *Rani Sartaj Kuari v. Rani Deoraj Kuari*, 1887-8, L.R. 15 Ind. App. 51; *Srimantu Raja Yarlagadda Mallikarjuna v. Srimantu Ruja Yarlagadda Durga*, 1890, L.R. 17 Ind. App. 134; *Zemindar of Merangi v. Sri Rajah Satrucharla Ramabhadra Razu*, 1891, L.R. 18 Ind. App. 54; *Bai Motivaloo v. Bai Mamobai*, 1897, L.R. 24 Ind. App. 104; *Rao Balwant Singh v. Rani Kishori*, 1898, L.R. 25 Ind. App. 54.]

[41] **BISSONAUTH CHUNDER and Others.**—*Appellants*; **SREEMUTTY BAMA-SOONDERRY DOSSEE and Others.**—*Respondents* * [Dec. 13, and 16, 1867].

On appeal from the Supreme Court at Calcutta.

A Hindoo Testator by his Will, directed, that his five Sons, continuing joint in food, should take care of his property and carry on his business, and that on the death of any one of his Sons, "not leaving Sons and leaving Daughters," that the Daughters should receive a certain sum out of the estate, and in the event of any one of his Son's Widows continuing in the family, provision was made for her maintenance; but if the Widow should leave the family, she was to receive the sum of Rs. 2000 out of the Testator's real and personal property. After the Testator's death, the five Sons lived together and carried on their Father's business, without any partition taking place. One of the Sons died, leaving a Widow and Daughters. Held, upon the construction of the Will (1), that the five sons took an absolute estate in the property, and (2), that on the death of one of the Sons, his share in the *corpus* did not go to his Widow, but (3), that his share of the accumulations was not affected by the Will, and passed to his Widow by descent.

Held, further, that in the event, which happened, of one of the Widows leaving the family, she was entitled to Rs. 2000, independently of her Husband's share in the accumulations.

In the absence of any direction to the contrary, it is the rule of Hindoo law that accumulations go with the capital [12 Moo. Ind. App. 60].

The partnership property consisted in part of Company's paper, which was indorsed in blank by the deceased Son of the Testator shortly before his death, and handed over by him to his Brothers. Held, that it was a mere ordinary partnership transaction, for the purpose of carrying on the business, and that they formed part of the partnership assets, in which the deceased Son was entitled to share after the expenses of the partnership were discharged [12 Moo. Ind. App. 64].

* Present:—Members of the Judicial Committee—The Right Hon. Lord Romilly (The Master of the Rolls), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kindersley. Assessor:—The Right Hon. Sir Lawrence Peel.

In this suit the question turned upon the construction of the Will of Ramtonoo Chunder, a Hindoo. The point raised being, whether the Plain-[42]-tiff, as the Widow of Muddoosoodun Chunder, a Son of the Testator, was entitled to her Husband's share of the *corpus* of his Father's estate, and if not then, whether she was entitled to her Husband's share of the accumulations which accrued from the estate between the date of the death of the Testator, the Father of her late Husband, and the death of Muddoosoodun Chunder, his Son. The Plaintiffs' case was, that under the Will of the Testator, hereinafter set out, she was entitled to her deceased Husband's share of the *corpus*. On the part of the Defendants it was contended, that she was not entitled to anything beyond the sum of Rs. 2000, bequeathed to her by the second paragraph of the Testator's Will.

The facts were these:—

Ramtonoo Chunder, a Hindoo resident in Calcutta, died in the year 1836, leaving five Sons, named Nilmoney Chunder, Goluckchunder Chunder, Gocoolchunder Chunder, Muddoosoodun Chunder, and Bissonauth Chunder, having previously made a Will.

The important passages in the Will (which was in Bengalee) were the following:—

"I am of advanced age in ill health, considering the body perishable. My ancestral and self-acquired, whatever real and personal property, and trading business and dealings, that there are the same after my death, my five Sons, the eldest, Sri Nilmoney Chunder, the second, Sri Goluckchunder Chunder, the third, Sri Gocoolchunder Chunder, the fourth, Sri Muddoosoodun Chunder, the fifth, Sri Bissonauth Chunder, whatever these shall obtain and continue possessed of, and the Dabee services, and acts, ceremonies, etc., and to whomsoever whatever I intend to give, I direct the same in the following written paragraphs:—

[43] "First paragraph.—My five Sons, the eldest, Sri Nilmoney Chunder, and second, Sri Goluckchunder Chunder, and the third, Sri Gocoolchunder Chunder, and the fourth, Sri Muddoosoodun Chunder, and the fifth, Sri Bissonauth Chunder, these, after my death, all continuing joint in food being unanimous, will preserve and look after my real and personal properties, etc., and business, trading business, etc., whomsoever, whatever there are the same, they will carry on conformably to the directions hereinafter written, they will perform the daily usual acts, etc., should they disagree and wish to separate, then deducting my real and personal properties and business, trading business, etc., they shall be unable to make and take a partition and division and demarcation, on account of my regulated acts, ceremonies, etc., and family expenses, and the profits and losses of the trading business, and after deducting the establishment charges, the surplus proceeds, the money that shall remain out of the same they will receive their respective shares.

"Second paragraph.—From amongst my aforesaid Sons, God forbid should any die without Sons, that is, die not leaving Sons, and leaving Daughters, and leaving a Wife; then the said Son's Daughters, each of them, will receive Rs. 100; and should his Widow continue in the family then, whenever whatever *brito neom* acts, ceremonies proper, that she perform, the expenses for the same she shall receive from my estate; should she be disobedient, and not remain in my House, depart, or live elsewhere; or, should she not wish to continue in the family, then the said Widow woman shall receive Rs. 2000, on my real and personal properties, business, trading [44] business, and properties, etc., she will be unable to make a claim or demand to her Husband's suitable share; and if, in like manner, the Son's Daughters have Sons born, then the said Sons, each person, will receive Rs. 200."

"Ninth paragraph.—From amongst my Sons, whenever whatsoever shall be the elder, under his direction all the business shall be performed, I hereby appoint the above five Sons the Turney of this my Will."

After his death his Sons, without proving their Father's Will, lived together in the usual way as a joint Hindoo family, carrying on their Father's business of Iron and Brass Founders.

Muddoosoodun Chunder, one of the Sons, married the Respondent, Sreemutty Bamasoondery Dossee, in 1847, and died soon afterwards intestate, leaving her, then only about eleven years of age, his sole Widow and heiress. He had no Son, but left two Daughters by a former marriage.

Part of the co-partnership assets consisted of Company's paper, which Muddoo-
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soodun Chunder, before his death, indorsed in blank and transferred to his four Brothers.

Another Son of the Testator, Goluckchunder Chunder, died in September, 1851, intestate, without any issue, leaving two Widows, the Appellants, Bermomoye Dossee and Comulmoney Dossee.

Towards the end of the year 1855 the Respondent, Sreemutty Bamasoondery Dossee, who had left her Husband's relations and gone to the house of her Father, and who was ignorant that Ramtonoo Chunder had left a Will, filed a Bill in the Supreme Court against his three then surviving Sons and the [45] Widows of Goluckchunder Chunder, claiming one-fifth of Ramtonoo Chunder's estate, on the ground of his having died intestate. The surviving Sons, by their answer, set up as a defence, that Ramtonoo Chunder had made the above Will, and the Respondent's Bill was, therefore, on the hearing, dismissed with costs, and the decision was affirmed on a re-hearing. Another suit was instituted by her, but abandoned for want of means to carry it on.

The Respondent then instituted the present suit. In her Bill of Complaint she set out the above-mentioned Will, and stated, in substance, that the Brothers remained joint without effecting any partition, and that the income greatly exceeded the expenditure, and that there had been a large increase to the estate between the time of the death of Ramtonoo Chunder and Muddosoosoodun Chunder, and that all the estate and increase had come into the possession of his surviving Brothers, and that they had made large profits thereout; and after setting up the different legal views that might be taken of her position, prayed to the following effect:—First, to have the Will established and her rights declared; second, if the Court should think her entitled to her Husband's share of the whole estate, then for an account and partition, and for allotment to her of one-fifth of the whole; third, if the Court should not so think, then for a declaration that her Husband, taking under the Will a vested interest in one-fifth of his Father's estate, became absolutely entitled to one-fifth of the accumulated income of the joint estate, and additions thereto, from the time of his Father's death to his own death, and that the Plaintiff, as his Widow and heiress, was entitled to the whole thereof; [46] fourth and fifth, for the necessary accounts and Orders for payment, in the event of the Court giving such relief as sought by the third paragraph of the prayer; sixth, if the Court should not grant either of these prayers, then in the alternative for maintenance and religious expenses, and a reference to ascertain the amount; the seventh, eighth, and ninth, were the usual prayer for admission of assets, a Receiver, and further relief.

The Defendants, Nilmoney Chunder, Gocoolchunder Chunder, and Bissonauth Chunder, filed a demurrer, plea, and answer. The ground taken by the demurrer was that, under the Will of Ramtonoo Chunder, the interest of Muddosoosoodun Chunder, in his estate, was liable to be divested, and did in fact become divested upon his dying without a Son and leaving a Daughter; and that the Plaintiff had no right to anything save her expenses, if she remained in the Testator's family, and in the sum of Rs. 2000 if she left; and also that, as the Sons were joint up to the death of Muddosoosoodun Chunder, and no partition had taken place, his right to the accumulations or increase was divested by his death. By the plea they set up the fact, that the Plaintiff had left the house, as a defence to any claim for maintenance or account; and by the answer the Defendants admitted, that the sum of Rs. 2000 was due to the Respondent, Sreemutty Bamasoondery Dossee, but claimed a set-off for the costs of the two former suits.

The answer of the other Defendants put the Plaintiff to the proof of the several facts stated in the Bill, and referred the questions of law to the Judgment of the Court.

On the 26th of September, 1859, the demurrer came [47] on for argument before the full Court, and was overruled, with costs, the Defendants being ordered to answer.

The other Defendants filed their answer, by which, while raising the same points of law as already taken, they disputed several of the allegations in the Bill as to the expenditure of income.

The Plaintiff joined issue on the answers. The cause became abated by the death

of Sri Gocoolchunder, and was revived against his Widow, Sreemutty Khantomoye Dossee.

The cause was heard before the Chief Justice, Sir Barnes Peacock, and the Justices, Sir Charles Jackson and Sir Mordaunt Wells. The material part of the judgment by the Chief Justice, which was sent with the Record, as the reasons of the Court, was in these terms:—"The Will of Ramtonoo Chunder is ambiguously worded, but we think it clear, from the second paragraph, that it was the intention of the Testator, that if any of his Sons should die without leaving Sons (the last word 'Sons' probably including Grandsons and Great-grandsons in the male line), his Widow should not take his share of the *corpus* of the estate, and that neither his Daughters nor his Daughters' Sons should take it—for provision is expressly made by that paragraph both for the Widow and Daughters of such Son and for the Sons of such Daughters. There is no express gift over of the *corpus* of the estate in the event of any of the Sons of the Testator dying without leaving Sons, as there was in the Will of Bustomdoss Mullick, which formed the subject of the dispute in the case of *Sreemutty Soorjeemonee Dossee v. Denobundoo Mullick* (6 Moore's Ind. App. Cases, p. 526); but we think it clear, that it was the [48] intention of the Testator, that if any of his Sons should die 'without leaving Sons,' the Widow and Daughters and Daughters' Sons should not inherit the Son's share of the estate which he took under his Father's Will. It was contended, on the part of the Plaintiff, that the Sons took merely a life estate under the Will, and an absolute estate in the reversion, which was undisposed of by the Will, by descent. We are of opinion, however, that they did not take merely a life estate under the Will, and are inclined to think that they took an absolute estate in the property which belonged to the Testator at the time of his death, the estate of each Son being defeasible and going over to the next heirs of the Testator in exclusion of the Widow, Daughter and Daughters' Sons, or such Son of the Testator's dying without leaving a Son or a Grandson, or a Great-grandson in the male line at the time of his death—for in the case of Hindoos there is no distinction between real and personal estate—and the declaration that the Widow would be unable to make any claim or demand to her Husband's suitable share in the event of his dying leaving no Sons and leaving a Widow, shows that the words 'From amongst my aforesaid Sons, God forbid should any die without Sons, that is, die not leaving Sons,' applied strictly to the Sons of the Testator described in the first paragraph of the Will, and were not intended to refer to an indefinite failure of male issue of the body of such Son. It is not necessary, however, to determine what estate the Sons took under the Will. We think it clear, that they did not take any estate under the Will, either in possession or reversion, inheritable by their Widows in the event of their dying without leaving Sons, [49] This, however, applies to that which was the subject of the devise, and not to the accumulations. They formed no part of the estate of Ramtonoo Chunder, they had no existence at the time of his death, and were consequently no part of the property which he could devise or which he intended to devise by his Will. Upon this point we think, that the decision of the Privy Council in the case above alluded to is clear, and we cannot draw any substantial distinction between that case and the present one in this respect. The second paragraph says, "From amongst my aforesaid Sons, God forbid should any die without Sons, etc." she (meaning the Son's Widow) will be unable to make claim to her Husband's suitable share. This shows that the Testator intended that each of his Sons was to take a share which, but for the second paragraph, would descend to his Widow. It was contended in argument, that the Sons were prohibited, by the first paragraph of the Will, from making partition, and consequently that the increment followed the principal. But it was clearly pointed out in the judgment of Lord Justice Turner, in the case to which we have referred (6 Moore's Ind. App. Cases, p. 553), that, 'admitting the family to have been joint, and the Sons joint in estate, the right of any one of the co-shares would not, under the Hindoo law, pass over, upon his death, to the other co-sharers: it would be part of the estate of the deceased co-sharer, and would devolve upon his legatees, or his natural heirs.' Admitting, therefore, that the accumulations became joint estate, the share of such accumulations belonging to each Son would in ordinary course pass to his natural heirs, unless there is something in the Will to prevent it. [50] In the case of Muddoosoodun Chunder, the Plaintiff,

his Widow, was his heir. The authority already cited shows that the Will, although it operated upon the *corpus*, did not operate upon the accumulations, although they accrued whilst the *corpus* remained joint. It also proves, that the rule of Hindoo law, that the increment follows the principal where the parties are joint in estate, cannot be carried to this extent, that the accumulations must go wherever the principal goes, for in that case the principal went over to the surviving Sons by the Will, whereas the deceased Son's share of the accumulations passed to his Widow by descent. It must be admitted, that in the case cited, the Testator did not, as in this case, impose the obligation that the Sons should not make partition of the *corpus*, but in that case, although the Sons were not prohibited from making partition, they did not in fact divide the estate, and we are unable to see what difference the prohibition made, when in fact, as in the present case, there was no partition. It should also be remarked, that in the present case, so far from there being a prohibition from dividing the accumulations, which are now the only subject of consideration, the Sons were expressly authorized to divide them. The first paragraph clearly contemplates that the Sons might make partition of something. It says, 'Should they disagree and wish to separate then deducting my real and personal properties, business, trading business, etc., they shall be unable to make and take a partition and division and demarcation on account of my regulated acts, ceremonies, etc., and family expenses, and the profits and losses of my trading business, and after deducting the establishment charges, the surplus proceeds of the money [51] that shall remain out of the same they will receive their suitable shares.' As we read this part of the Will, we think, that it was the intention to exclude the *corpus* from partition 'on account of' the Testator's regulated acts and ceremonies, etc., in other words, that the *corpus* should remain entire for the purpose of making provision for his regulated acts, religious ceremonies, family expenses, and any losses of business. This would be clear if the word 'thereof' had been inserted after the word 'demarcation,' and the word 'losses' alone had been used instead of the 'profits and losses' of the trading business, etc. To use the Testator's words 'my real and personal properties and business,' etc., that is to say, the *corpus* of the estate, were to be deducted or set apart, and not to become the subject of partition: the establishment charges were also to be deducted from the receipts, and then the 'surplus proceeds,' 'or the money that shall remain,' were to be divided, and each Son was to take a share. It is not necessary to determine whether, upon the death of one of the Sons leaving Sons, his Sons would have been precluded from demanding a partition of the *corpus*, as that question does not arise in the present case. The reason why the Widow did not take the *corpus* is, that she was expressly excluded by the Will from inheriting from her Husband that which was the subject matter of the devise. The rule of Hindoo law which says, that the increment follows the principle, does not apply to prevent the Plaintiff from taking her Husband's share of the accumulations, if we are correct in holding, upon the authority of the case above referred to, that the Will did not operate upon the accumulations, and that the rule of Hindoo [52] law did not so far connect the increment with the principal as to make the Will, by construction, operate upon those accumulations which had no existence in the lifetime of the Testator, or convert them into part of his estate. If the Sons in their lifetime had severed in estate, and they were not prohibited from so doing, so far as the accumulations were concerned, the accumulations in respect of each Son's share would have belonged to the owner of that share, according to the principle laid down by the Privy Council before cited (6 Moore's Ind. App. Cases, p. 554): and there is neither any express declaration nor any necessary inference from which it can be inferred that the Testator intended that the Sons might divide, and that each Son might take his share of the accumulations if they chose; but that if the Sons should continue joint, their shares of that which did not exist at the time of the Testator's death should go, wherever the *corpus* of his estate should go, either as part of the subject matter devised by his Will, or as part of his estate. We doubt whether, if such an intention were clear, the law would give force to it, for it would be an intention to control by Will that which had no existence in the Testator's lifetime. To use the words of the Privy Council, 'Equality among the heirs is, as we understand, the spirit of the [Hindoo] law. The law does not treat the principal and the increment as undistinguishable in

their nature, for there is no doubt they may be severed; but it treats them as united for the purpose of dividing them equally amongst all the united family, that is, amongst all the heirs; and if that entire quality cannot, as in the present case in consequence of the disposition of the Will it cannot, be obtained, the [53] partial attainment of it seems to us to be more in the spirit of the Hindoo law, than its total rejection (6 Moore's Ind. App. Cases, 555). Upon the authority, then, of the above case, we are of opinion, that in consequence of the disposition of the Will, Muddoosoodun Chunder's share of the *corpus* did not pass to his Widow upon his death without leaving a Son, but that his share of the accumulations was not affected by the Will, and, therefore (according to the ordinary rules of descent adopted by the Hindoo law), passed to his Widow, there being no precept of Hindoo law which prohibits accumulations from being severed from the principal, and requires that whenever the former goes, the latter must go likewise. If the Sons had divided the accumulations in their lifetime, being prohibited from dividing the *corpus*, there would necessarily have been a separation of the increment from the principal. We are further of opinion, that the Widow, having ceased to continue in the family, is entitled to recover the Rs. 2000, as directed by the second paragraph of the Will, instead of receiving the expenses of the acts and ceremonies proper for her to perform. This sum she is entitled to under the Will of the Testator, independently of what she inherits from her Husband. It is, therefore, no more affected by her having succeeded to her Husband's share of the accumulations which formed no part of the Testator's estate, than it would have been by her succeeding to any part of her Husband's self-acquired property, or by her having succeeded to his share of the accumulations if he had separated from his Brothers in his lifetime, and had taken his share of the accumulations under the provisions of the first paragraph of the [54] Will under a partition completed a few days before his death. The *corpus* of the estate, and not the accumulations, was the property charged with the family expenses, including the acts and ceremonies to be performed by the Widow if she remained in the family. She is, therefore, in our opinion, entitled to the Rs. 2000, as well as to her Husband's share of the accumulations. All question of incontinence on the part of the Widow was abandoned by the Defendants at the trial. As the Widow was entitled to her Husband's share of the accumulations immediately upon his death, she is entitled to any profits which may have been realized in respect of such share. Her Husband's share of the accumulations she takes by descent from him, and she will, therefore, hold it as a Hindoo Widow in the manner prescribed by the Hindoo law. The Rs. 2000 she takes under the Testator's Will, and not by descent from her Husband. She was entitled to receive that amount from the time at which she left the family dwelling-house, and she is, therefore, entitled to interest thereon from that time at the rate of six per cent. It must be referred to the Master to take the necessary accounts."

The decree founded on this judgment was to the following effect:—First, it declared the Will of Ramtonoo Chunder well proved, and ordered the same to be established, and the trusts thereof carried out. Second, it declared that the Respondent was not entitled to succeed to her deceased Husband's share of the property which his Father left at the time of his death; and, thirdly, it declared, that "Muddoosoodun Chunder was entitled absolutely to one-fifth of the accumulation and increase (if any) of [55] the joint property, moveable and immoveable, which accrued from the time of the death of the Testator down to the time of the death of Muddoosoodun Chunder; and that the Plaintiff, as such Widow and heiress of Muddoosoodun Chunder, became, on the death of Muddoosoodun Chunder, and was entitled to such one-fifth share of the accumulations and increase, and also to the gains and profits, if any, which have accrued upon, or in respect of, the one-fifth share of the accumulations and increase, or which have been made or realized by the use thereof since the death of Muddoosoodun Chunder, the same to be held, possessed, and enjoyed by her as a Hindoo Widow. Fourth, it also gave her absolutely the legacy of Rs. 2000, with interest; and, fifth, it referred the cause to the Master to take the accounts of accumulations, increase, and profits, and all necessary accounts for carrying out the decree.

The appeal was from this decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants. —According to the true

constructions of the Will, having regard to the incidents of property in the possession and enjoyment of a joint and undivided Hindoo family, the Plaintiff, as the Widow and legal representative of her deceased Husband, a member, at the time of his death, of a joint family, was not entitled to claim any share in the undistinguishable and unseparated increment formed of the surplus income of the joint property, or of such increment as the Testator expressly prohibited partition being made of, which comprised his estate and business at the time of his death, having intimated his desire that his family should continue joint. This is [56] similar to a devise to Executors, with direction either to carry on a particular trade or business, which, according to the principles recognized in Courts of Equity, only creates a trust. Here the Testator's five Sons took care that no partition ever took place, and Muddoosoodun Chunder continued, after the death of the Testator, in all respects joint with his Brothers in estate, food, and worship, up to the time of his death. The Court should, therefore, have decided that, as no separate interest, either in the *corpus* or in the increment, ever vested in him in his lifetime, nothing passed at his death to his Widow. It is important to bear in mind, that Muddoosoodun Chunder, along with his four Brothers, acquiesced in and gave effect to the prohibition in the Will against partition, and dealt with the accumulations and increase formed from the surplus income of the Testator's estate as an increment to, and as an integral portion of, the original joint estate. It follows, therefore, that the Plaintiff, as his Widow and heiress, claiming title through him after his death, was bound by his acts during his life, and could not, therefore, claim any account of such accumulations and increase; or any partition or separation of the increment from the original joint estate in respect of the one-fifth share of her deceased Husband in the estate. It is a familiar rule of Hindoo law, that accumulations go with the capital; and it has been held that increment follows principal, *Gooroohurn Doss v. Goluckmoney Dossee* (1 Fulton, 165); *Prawkissen Mitter v. Muttoosondery Dossee* (*ib.*, 389). Until partition, and even after an inchoate partition, the rights of co-sharers are not varied, the whole remains common stock. Daya-bhaga, ch. VI., sec. I., par. 50; ch. XII., par. 1; Mitācsharā, ch. I., sec. IV., par. 30; [57] Strange's "Hindu Law," Vol. I., p. 199 [2nd Edit.]; W. H. Macnaghten's "Hindu Law," Vol. II., p. 162. *Sonatum Bysack v. Sreemutty Juggutsoondree Dossee* (8 Moore's Ind. App. Cases, 66). The High Court in a great measure founded their judgment upon the case of *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (6 Moore's Ind. App. Cases, 526) as to the Plaintiff's right to the share of the accumulations arising from the surplus income; but that case is distinguishable from the present, as there was a gift over to the surviving Sons, which is not to be found in this Will. Even if the decree was right in declaring the Plaintiff entitled to her Husband's one-fifth share in the increment of the estate, yet the whole of the Company's paper ought to have been by the decree especially excepted, therefrom, inasmuch as the same had been indorsed and transferred in his lifetime, in anticipation of his death, to his four Brothers by the Plaintiff's Husband. According to the decree, he had an absolute interest in the one-fifth share in such increment, and, therefore, had full power to alienate the same, whether such alienation was to take effect in his lifetime or on his death, by way of testamentary disposition. So, again, the Respondent, as the Widow of a Son dying without leaving a Son, having left the house of the Testator, and gone to live elsewhere, is expressly excluded by the Will from any participation in or claim to the estate in respect of her Husband's share therein, except as to the legacy of Rs. 2000, bequeathed to her on that event, namely, the leaving the house. The Defendants having admitted assets sufficient to pay the legacy of Rs. 2000, no general account should have been directed by the Court below.

[58] Mr. Kar, Q.C., and Mr. W. Pearson, for the Respondents.—The Court below has put a proper construction on the Will. The five Sons of the Testator took an absolute estate in his property. They continued joint in family, without partition, so that on the Plaintiff's Husband's death, his share fell in to the surviving Brothers. All that the Plaintiff could be entitled to by Hindoo law was one-fifth of the accumulations, which she took by succession on her Husband's death. The case is on all fours with *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullic* (6 Moore's Ind. App. Cases, 526), and, unless that case is to be overruled, it must govern the

present. There it was held by this Tribunal, upon the construction of the Will of a Hindoo nearly similar in terms with the Testator's Will, that, in the absence of any direction of the Testator that his Sons should continue a joint family, such intention could not be imported into the Will, and that the Testator's intention being, that his five Sons should enjoy, during their lives, the interest of their respective shares in the property; therefore, although one of the Son's share, who had died, went over to the surviving Sons, his Widow was entitled to one-fifth of the surplus income which had accumulated since the Testator's death, and during her Husband's lifetime, and the increment arising out of such accumulations. *Sonatan Bysack v. Sreemutty Juggutsoondree Dossee* (8 Moore's Ind. App. Cases, 66) is not at variance with the principles laid down in the former case, the only distinction being, that the Testator directed that the property should never be divided; by his Sons, their Sons, or Grandchildren in succession, and that they [59] should enjoy the surplus proceeds only. In the event that has happened, namely, the Plaintiff having left the family house, she became entitled, irrespective of her right by descent as her Husband's heiress, under the Will to the specific bequest of Rs. 2000.

Their Lordships judgment was delivered by

The Right Hon. Lord Romilly.—Their Lordships are of opinion, that the decree of the Supreme Court of Judicature at Calcutta is correct. It is a question upon the construction of the Will, and the meaning of the Testator is to be ascertained by the words which he has made use of, having regard to the laws which prevail in India relative to these subjects.

It is important, in the first place, to consider what is the nature of the interest which he has given to his Sons. He has directed his Sons, using the words, "continuing joint in food," to take care of and look after his property, moveable and immoveable, and carry on his trading business. It is to be observed, that this interest is not accurately represented by the words "joint estate" in England, for if he had given the property simply to the Sons, with no further direction than that they should live jointly in respect of food, and one of the Sons had died, his share, with all the accretions, would have gone to his heir, to the person who was entitled to inherit according to the Hindoo law, so that in point of fact the interest was, as regards succession, more analogous to the tenancy in common which prevails in England. It is also proper to observe, that no analogy exists between the present case and that to which it was endeavoured to be likened, viz., where a Testator in England has given the property to Executors for the purpose of [60] carrying on his trade, in which case a trust is imposed upon the Executors, who take no beneficial interest in it, and the question is, how the profits of that trade are to be divided amongst the persons who are pointed out by the Testator. It is, therefore, in this case important to observe, whether the Testator has pointed out in his Will how the share of his property is to go, upon the death of any one of his Sons, and also how far that direction extends. According to the Will, if one of the Sons had died, leaving a Son, the share of the Son so dying would have gone to his Son, or, in other words, the Grandson of the Testator. It is only in the event of his Son not leaving a Son that the Testator has directed that the share shall go to the survivors. This is of the more importance, because their Lordships are of opinion, that this construction is not lightly to be inferred, but that it is necessary that the Testator should express distinctly what his intention is. This they think that he has done. It was argued that a considerable distinction existed between this case and the case of *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (6 Moore's Ind. App. Cases, 526), because in that case one-fifth was given to each Son, and if one died, the fifth was given over; but their Lordships are of opinion, that the effect of this Will is to direct that the share which each Son took, and which would have gone to his heirs according to the Hindoo law, was, in the case of any one of his Sons leaving no Son, directed to go to the other Sons, if not in express words, still by a necessary inference to be drawn from the expressions used by him, and this is indeed the contention of the Respondents, and was so held in the Court below, from which decision the Appellants have not appealed. The question is, [61] whether the share of profits made during the joint lives of the Sons which belonged to the deceased Son follows his share of the capital and goes over to the other Sons. In the first

place, it is to be observed, that the Testator has given no direction to accumulate; it remains, therefore, to be seen, whether the Court can find, from the words of the Will, as was argued, an irresistible inference that such was the intention of the Testator. This is the more important, because in the case of *Sonatum Bysack v. Sreemutty Jaggutsoundree Dossee* (8 Moore's Ind. App. Cases, 66), which is relied upon as governing this case, there is an express direction to accumulate. It was there directed that the surplus was to be added to the capital. There is an absence of that in this case. It is admitted that the Testator could not dispose of the property of his Son, or prevent the heir of the Son from inheriting his property; therefore, the only question here is, whether the Testator has directed the accumulations of the property to be added to and made part of his own property, because if he has not, it was the property of the Son, and the Testator had no power of disposing of it.

In this view of the case their Lordships think that this Will, on whichever construction it is taken, shows an absence of any direction to accumulate. The first direction is, that the Sons should live joint in respect of food, and that they should carry on the trading business, and so forth. If the Will had stopped there, the only result would have been, that upon the death of this Son his heir would have taken his share in the business; but the Will goes on to give a direction, that should the Sons disagree, then, after making certain directions as to the application of the income, the surplus was to be partitioned [62] equally amongst them. That is directly opposed to any accumulation. Nor does the Testator give any direction whatever in respect to what is to be done with the profits before they disagree and separate. It would follow, therefore, if the Will ended there, that the profits arising from the business would be the separate property of each of the five Sons in fifths, after they had provided for the carrying on of the business. We find nothing in the subsequent parts of the Will which interferes with that. The second section is the only part of the Will which relates to this subject. The Testator there directs, that if any of the Sons should die without a Son, then that the Daughters of that Son should receive Rs. 100, and his widowed Wife, if she lived, being included as a member of the family, should receive the expenses of *brito nam* acts, and the other religious acts and ceremonies which she should perform. Then he directs what is to be done, if ungovernable, and not living in his house, she should go and live elsewhere, or not wish to live in the family, then she "shall receive Rs. 2000." Besides this, he directs that she shall not be able to make any demand or claim on his moveable and immoveable property, trading business, and estate, etc., upon the allegation of her Husband's proper share; that is to say, she is not to be at liberty to make any claim or demand upon the moveable or immoveable property of the Testator, and there it stops. This brings it round exactly to the same question, whether the Testator has in fact by these words disposed of anything more than the capital of the fund. The words he uses are: "my moveable and immoveable property, trading business, and properties, etc., she will be unable to make a claim or demand to her Husband's suit-[63]-able share," that is, his share of the Testator's property; that is, the one-fifth of the trading business, which the Testator had given to him. If their Lordships are right in coming to the conclusion that the Testator has said nothing about what is to be done with the profits of the business, and has made no direction to accumulate, it necessarily follows, that those profits belong to each of the Sons in fifths, and accordingly would be divided as such; and, therefore, upon the true construction of the Will, their Lordships are of opinion, that the Testator has not attempted to dispose of these profits, which are the property of the Son; if he had, a question might have arisen whether such a direction could have been a valid one or not, but their Lordships are of opinion, upon a fair construction of the words he has used, that it was his intention not to touch the question of profits, but to leave them to go as they would go, according to law, in case there was no disagreement between the Sons, the result of which would be that each would take a fifth of the surplus profits, that this fifth would be the property of each Son, and would go to his heirs, exactly in the same manner as any other property that he might acquire. It will be obvious, that if the Son had taken his share of the profits, and invested it in the purchase of any other property, no question could have arisen. It is a fair inference also that the view that he took in case they dis-

agreed, viz., that they should divide the surplus profits, is a sort of guide for what he intended they should do in case they did not disagree at all.

Their Lordships also think, that this case is exceedingly close upon the case of *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (6 Moore's [64] Ind. App. Cases, 526), and, although they would reluctantly allow, in the construction of a Will, the construction of one Will to be an imperative guide for the construction of another, where the expressions were not identical, still they think that the principles laid down in that case govern the present; and they concur with the observations made by Sir Barnes Peacock in delivering judgment, that the Testator has not attempted to dispose of, and, if he had, could not effectually have disposed of, the property of his Son.

There is another point relative to the property of the partnership, consisting of Company's paper. The facts of the case appear to be these: the partnership assets consisted in part of Company's paper, which were taken in the name of the deceased Son, or in his name jointly with the names of the other Brothers, and it was necessary that they should be indorsed. The result was, that he indorsed the Notes in blank, and gave them to his Brothers. This was, in their Lordships' opinion, a mere ordinary partnership transaction for the purpose of enabling the partners to realize part of the assets of the partnership, which would not affect the right that each Son had to his share of the profits, not giving to the Son, who has died, the exclusive right to the Company's paper, which he so even indorsed, though taken in his name alone, but only making it a part of the assets of the partnership, in which he would be entitled to his share after the expenses of partnership were duly discharged.

Their Lordships, therefore, will humbly recommend Her Majesty that the decision of the Supreme Court of Judicature at Calcutta be affirmed with costs.

[65] FATIMA KHATOON CHOWDRAIN and NUSEEB A BEBEE CHOWDRAIN, —*Appellants*; MAHOMED JAN CHOWDRY, *alias* KUFEELI'DDEEN MAHOMED AHSAN CHOWDRY and others,—*Respondents** [June 29, 1868].

On appeal from the High Court of Judicature at Bengal.

In order to save a family estate about to be sold, under a decree of Court made in a suit against one member of the family; other members interested in the property, being entitled to dower charged on the estate, paid the amount decreed into Court to be handed over to the decree-holder under protest of their respective rights in the estate, and subject to a suit to be brought by them to set aside a summary Order rejecting a claim to their charge on the estate. The money so deposited was taken out of Court by the decree-holder. In an action to recover back the amount it appeared, that the decree-holder had no right to proceed against such part of the estate as belonged to the parties paying the money into Court. Held, that an action would lie against the decree-holder, to recover the amount so paid into Court, and handed over to him, as it was a deposit under protest to prevent an injurious sale.

Aliter. If the money has been a voluntary payment into Court [12 Moo. Ind. App. 79].

The Appellants were the Wives of one Kureenbuksh Chowdry, a Son of Turee-koolah Chowdry, who died in 1810, leaving a Widow, named Osmon Khatoon, and

* Present: Members of the Judicial Committee, The Right Hon. Lord Romilly (The Master of the Rolls), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Fitzroy Kelly (The Lord Chief Baron of the Exchequer). Assessor.—The Right Hon. Sir Lawrence Peel.

four Sons, Arif, Nyum, Sureetoolah, and Kureembuksh Chowdry, and two Daughters, Sobhan Khatoon, and Urman Khatoon, him surviving, entitled to succeed to his property, which consisted in part of real estate, including a share in Pergunnah Belgachee, and the [66] entirety of the Mehal of Donae Dohoo. In the year 1817, the two eldest Sons, Nyum Chowdry and Arif Chowdry, formed a plan for dividing the ancestral property amongst themselves and their two Brothers, who were then minors, to the exclusion of their two Sisters, also minors, and in pursuance of that plan they executed an instrument, dated the 4th of February of that year, which purported to divide the property into four equal parts, and to allot one of such parts to each of the Brothers. In 1823, however, Sobhan Khatoon, one of the Sisters, who had by that time attained her majority, filed a plaint against her Mother, Osmon Khatoon, as the guardian of the two Brothers, who were still minors, and also against her elder Brother, Arif Chowdry, and Eptkharoonissa, the Widow of the other Brother, Nyum Chowdry, who had died in 1818, without issue, and thereby sought to set aside the deed of division, and to recover her share of the ancestral property. This suit was dismissed by the Judge of the District of Rajshye; and the dismissal was confirmed, on appeal, by the Judge of the Provincial Court of Moorshedabad: but, on appeal to the Sudder Dewanny Adawlut of Calcutta, a decree was passed on the 4th of April, 1834, declaring that the property, left by their Father, Tureekoolah Chowdry, which the four Brothers had divided amongst themselves, was ancestral property, to which the Widow and children of Tureekoolah Chowdry were jointly entitled, in the shares and proportions recognized by the Mahomedan law, and that the division was a collusive one and in fraud of their two Sisters: and an Order was accordingly made that the decision appealed against should be set aside, and that Sobhan Khatoon, the [67] Plaintiff, should be put in possession of her share of the ancestral property with mesne profits.

The ancestral property, to a share of which Sobhan Khatoon was thus declared to be entitled, included the Mehal of Donae Dohoo: but on the 4th of March, 1837, the whole of that Mehal was sold by the Deputy Collector of Patna for arrears of revenue, and realized the sum of Rs. 22,100, which, after deducting Rs. 1730 7a. 6p. arrears of revenue due to Government, left a balance of Rs. 20,369 8a. 6p. divisible according to the decree of the Sudder Court of the 4th of April, 1834, among the heirs of Tureekoolah Chowdry, of which a sum of Rs. 3565 0a. 5p. belonged to the estate of the deceased, Nyum Chowdry, in respect of his interest (2 annas 16 gundas share) in his Father's property. This sum of Rs. 3565 0a. 5p. appeared to have been applied, together with the greater part of the residue of the money realized by the sale, in liquidation of some debts owing by Kureembuksh Chowdry and Sureetoolah Chowdry.

While the above suit was pending, Sureetoolah Chowdry married one Ruhmutoonissa, and on the occasion of his marriage executed a Kabinnamah, or marriage settlement, by which, in lieu of her dower, he settled upon his Wife, amongst other property, his interest in Pergunnah Belgachee; and on the 16th of March, 1838, Kureembuksh Chowdry married the Appellant, Nuseeba Bebee Chowdrain, and in like manner settled upon her a moiety of his interest in Pergunnah Belgachee, and in September, 1846, he also married the Appellant, Fatima Khatoon Chowdrain, and executed another marriage settlement, by which the remaining moiety of Pergunnah Belgachee was settled upon her.

[68] In pursuance of these settlements, Ruhmutoonissa and the Appellants entered into possession of the lands thereby conveyed, let them to tenants, brought suits for the recovery of the rents in their own names, and obtained decrees, and in every way enjoyed the property as their own.

In July, 1837, Anundlochan Nundy and others instituted a suit in the District Court of Ragshye against Sureetoolah Chowdry, Kureembuksh Chowdry, Sobhan Khatoon, Arif Chowdry, Osmon Khatoon, and Eptkharoonissa, as the heirs of Nyum Chowdry, deceased, to recover a sum of Rs. 23,466 10a. 8p., alleged to be due from the deceased Nyum Chowdry, and a decree was made by the Court in their favour on the 31st of December, 1842, by which it was ordered, that Sureetoolah Chowdry and Kureembuksh Chowdry, Sobhan Khatoon, and Eptkharoonissa, should pay the Plaintiffs the sum of Rs. 23,466 10a. 8p. being the amount of principal and interest and costs of suit, together with interest up to the date of payment—first, from the

property left by the deceased, Nyum Chowdry, and that if the same should not be sufficient, then that the balance should be paid by them from the proceeds of the sale of the right of the deceased, Nyum Chowdry, in the Mehal of Donae Dohoo.

In July, 1845, the above Plaintiffs sold their rights under the decree to Nujuminissa Chowdrain, and she was substituted as the decree-holder in their place. Nujuminissa Chowdrain thereupon caused Nyum Chowdry's interest in the Pergunnah Belgachee to be put up for sale, in pursuance of the decree, and became herself the purchaser, at the price of Rs. 16,000. She then, in January, 1847, instituted a suit against [69] Kureembuksh Chowdry and his Wives, the two Appellants, Ruhumutoonissa, the Widow of Sureetoolah Chowdry, Arif Chowdry, and other persons, alleged to be in possession of Pergunnah Belgachee, for the purpose of enforcing her decree and the sale made in pursuance thereof, and of obtaining possession of Nyum Chowdry's interest in that Pergunnah, which she alleged amounted to a 4 annas 11 gundas 2 cowries share.

The Court decreed the entire claim; but three appeals were preferred—one of them by Ruhumutoonissa and the Appellants, and the Sudder Dewanny Adawlut, on the 18th of November, 1856, remanded the case for further inquiry, when the interest of the debtor in the Pergunnah was found to consist of a 4 annas 8 gundas 3 cowries and 1 krant share, and the Court accordingly decreed to the Plaintiff possession of the share, with mesne profits.

As, however, this sum of Rs. 16,000, realized by the sale of Nyum Chowdry's interest in the Pergunnah, was not sufficient to satisfy the claim of the decree-holder under the decree, a petition was presented for further execution, in pursuance of which Pergunnah Belgachee was put up for sale, as the property of Sureetoolah Chowdry and Kureembuksh Chowdry. On that occasion one Khoondkar Alimoodden was declared the purchaser, and paid Rs. 8287 8a. into Court, as earnest money; but he failed to complete the sale, and the deposit became forfeited. Although the sum thus forfeited considerably exceeded the sum of Rs. 3565 0a. 5p., which alone the decree-holder was entitled to receive from Kureembuksh Chowdry and Sureetoolah Chowdry, under the decree which had thus been satisfied, [70] Nujuminissa Chowdrain prayed for another sale of Pergunnah Belgachee, and a proclamation for such sale was issued. Against this sale Ruhumutoonissa and the Appellants presented a petition to the Court in May, 1849, in which, after stating that their property in Pergunnah Belgachee had been attached as the property of the Debtor, and had been ordered to be sold, and that, in order to save their property, it was necessary to deposit in Court the full amount recoverable by the decree-holder; they averred, that they had mortgaged their interest in the Pergunnah to raise the money, and prayed to be permitted to pay the amount of the decree into Court, and that the Pergunnah should be released from the attachment and sale.

When this petition was read in Court, the Principal Sudder Ameen asked the Pleader for the Petitioners, whether his Clients had any objection to the payment to the decree-holder of the amount which he wished to deposit in Court. The Pleader answered this question in the following words:—"I will bring a regular suit for setting aside the summary Order, rejecting the claim, but the sale cannot be stayed unless the amount recoverable by the decree-holder is deposited. I, therefore, deposit the amount for the purpose of it being paid to the decree-holder, and pray that the said sum be paid to the decree-holder, and the sale be stayed." The Petitioners were thereupon ordered to pay down the full amount due to the decree-holder immediately, and accordingly paid Rs. 29,640 10a. 1p. into Court, which amount was paid, together with the forfeited deposit, on the 12th of September, 1849, to Nujuminissa Chowdrain.

Subsequently, although she had now received Rs. 53,927 in cash and land, in satisfaction of her [71] original decree for Rs. 23,466, Nujuminissa Chowdrain obtained from the Sudder Dewanny Adawlut, on the 31st of March, 1851, an Order for the revival of the execution case, for enforcing the decree; in accordance with which, an Order, dated the 13th of March, 1852, was sent to the Judge of Dacca, requesting him to cause Pergunnah Belgachee to be again put up for sale, for the purpose of realizing a sum of Rs. 13,152 10a. 11p., alleged to be yet due upon the decree, together with costs of sale. In pursuance of this Order, the property was put up for sale, and sold for Rs. 35,375; but on the 28th of June, 1853,

after the purchase-money had been deposited, Ruhumutoonissa presented a petition, detailing the above-mentioned circumstances, and praying that the sale might be stayed, and that the execution Creditors might be ordered to refund her share, being a moiety of the sum which they had received in excess of their rights under the decree. On the 6th of July, 1853, the Appellants presented a similar petition; but by an Order, dated the 29th of April, 1854, the Principal Sudder Ameen rejected both petitions, on the ground that the Petitioners ought to have brought a regular suit, and could not obtain relief in a summary manner upon petition; and also that the objection to the sale was not taken in time. The sale, however, was subsequently set aside for some informality, and a sale *de novo* ordered to take place on the 5th of December, 1854, whereupon Ruhumutoonissa and the Appellants presented another petition, praying that this second sale might be stayed, on the ground that the decree-holders had already realized far more than the sum of Rs. 3565, that being the amount of Nyum Chowdry's interest in Donae Dohoo, and the only [72] sum to which they were entitled under the terms of their decree. Nujuminissa Chowdrain objected that the whole of Donae Dohoo had belonged to Nyum Chowdry, and that Kureembuksh Chowdry and Sureetoolah Chowdry had received Rs. 18,482 out of that property, and were also in the actual possession and enjoyment of other property which had belonged to the deceased Nyum Chowdry, and was liable to satisfy their decree. The Judge, however, held in accordance with the decree of the 4th of April, 1834, that Nyum Chowdry was only entitled to Rs. 3565 out of the proceeds of Donae Dohoo; and as more than that sum had already been realized, and there was no other property of Nyum Chowdry subject to the decree, he stayed the sale, and directed that the decree of Sudder Dewanny Adawlut should be returned with a certificate that it was fully satisfied. From this Order Nujuminissa Chowdrain presented a petition of appeal to the Sudder Dewanny Adawlut, who rejected her petition, with costs.

In July, 1858, the Ruhumutoonissa executed a deed of gift, by which she assigned to the Appellants her share of the Rs. 29,640 deposited in Court to prevent the sale of Pergunnah Belgachee.

On the 23rd of June, 1859, the Appellants filed the plaint in respect of which this appeal was brought against Nujuminissa Chowdrain and her Husband, Fakeeroodeen Mohamed Ahsan, alias Azeemooddeen Chowdry, in the Court of the Principal Sudder Ameen of the District of Rajshye, and, after reciting the above facts, and alleging that Nujuminissa's name only had been used, and that the decree was really the property of the Husband, claimed the return of the sum of Rs. 29,440 (paid [73] into Court on the 7th of May, 1849), together with an equal amount of interest thereon, amounting in the whole to Rs. 59,281 4a. 10p.

Nujuminissa Chowdrain put in a written statement by way of answer, in which she, first, denied the right of the Appellants to prefer any claim, on the ground that they were not parties to the original decree against Nyum Chowdry; secondly, she alleged that the whole of Donae Dohoo belonged to Nyum Chowdry, and not a 2 annas 16 gundas share only; thirdly, she alleged that Sureetoolah Chowdry and Kureembuksh Chowdry had been in possession of the share of Nyum Chowdry in Pergunnah Belgachee, from his death in 1819, up to the sale in 1846, in execution of her decree; and had received and appropriated more than Rs. 3000 per annum out of the profits thereof, for which they were consequently liable to account to her; fourthly, she denied the alleged gift from Ruhumutoonissa to the Appellants; fifthly, she pleaded that such a gift was not valid under the Mahomedan law; sixthly, she averred that by the Order of the 29th April, 1854, the matters sought to be put in issue by the plaint had already been decided; seventhly, she asserted that the purchase of the decree was made by her for her own benefit, and not in her name for the benefit of her Husband; and lastly, she denied that the shares of Sureetoolah Chowdry and Kureembuksh Chowdry in Pergunnah Belgachee, which were ordered to be sold in execution of her decree, were the property of the Appellants, or of Ruhumutoonissa, under their Kabins or marriage settlements. The answer of her Husband denied that the purchase of the decree was made for his benefit, and also the right of the Appellants to bring [74] the suit, on the ground that they were not parties to the original decree.

On the 8th of June, 1860, the Principal Sudder Ameen (Punchanun Banerjea)

pronounced his decision. After stating the points raised by the defendants, the Judge observed, that there was one issue at law, whether the suit was admissible, when neither the Plaintiffs nor their Donor were parties to the execution case. There were also three issues of fact: first, whether the property ordered to be sold belonged to the Plaintiffs or their Donor, by virtue of the Kabins or not; second, whether Ruhumutoonissa had executed a deed of gift of her interest, and, if so, whether such gift was valid; third, whether the decree-holder by causing an attachment, contrary to the decretal Order, had fraudulently and illegally realized the amount claimed in the Order. As to the issue of law, the Judge decided in favour of the Appellants. Passing then to the issues of fact, the Judge found that the Kabins had been proved by the testimony of respectable witnesses: that they had on different occasions been produced in Court; and, on their being found to be proved, the Plaintiffs and Ruhumutoonissa had obtained decrees on the strength of them; and that they had been admitted as genuine in other suits, by persons whose interests would be injured by them. He held, moreover, that, independently of the Kabins, upon the assumption that the decree-holder had illegally recovered the Plaintiffs' money in excess of, and contrary to the decretal order, she was bound to refund it, and he pointed out that the conduct of the Plaintiffs, in depositing the money in Court, although not the only means of regaining their rights, was a [75] natural step, and such as a prudent owner might reasonably be expected to adopt, under the circumstances. The second and third issues of fact were considered together, and the Judge arrived at the conclusion, that the fact of the decree-holder having unjustly recovered Rs. 34,363, in excess of her claim, was fully established; and that as Rs. 29,640, a part of that sum, had been deposited in Court by the Plaintiffs, they were entitled to recover that sum with interest. Lastly, he found that Nujuminissa Chowdrain had purchased the decree on her own account, and not in trust for her Husband; and he accordingly decreed that the amount claimed, with interest and costs, should be paid by her to the Plaintiffs, but dismissed the suit, with costs, as against the Husband.

Nujuminissa Chowdrain appealed from this decision to the High Court of Judicature at Fort William. The appeal was heard before Messrs. Raikes and Seton Karr, two of the Judges of that Court, on the 10th of July, 1863, when the decree of the Lower Court was reversed, on a ground not taken in the Court below, namely, that as the rights and interests of the judgment Debtors were alone advertised for sale, the sale, under such circumstances, could not have deprived the Plaintiffs of any right or interest they really had in the property, and that, therefore, the payment of the debt by them was not necessary to protect their interests, but was a voluntary payment, for the recovery of which they had no right of action against the judgment Creditors, and the Court thereupon made a decree dismissing the Plaintiff's suit, with costs, in both Courts.

From this decree Fatima Khatoon and Nuseeba Bebee appealed to the Queen in Council. Nuju-[76]-minissa Chowdrain having died, pending the appeal, the present Respondents were substituted as her heirs.

As the Respondents did not appear, the appeal was heard *ex parte*.

Mr. Cave for the Appellants.—There can be no question that the Appellants and Ruhumutoonissa were entitled under their Kabinnamahs, to their respective shares claimed by them in the Pergunnah, and the Appellants are also now entitled, under the deed of gift of July, 1858, to the share of Ruhumutoonissa, in the Rs. 29,640. 10a. 1p. It is clear, that Nujuminissa Chowdrain had no right to receive under her decree more than Rs. 3565. out of the proceeds of the sale of Donae Dohoo, the same being the whole amount of Nyum Chowdry's interest therein. The effect of that decree, it is submitted, was to give the decree-holders a right, first, to realize the other property left by Nyum Chowdry, and apply the proceeds in satisfaction of the decree; and, secondly, if such proceeds proved insufficient, to obtain payment of the balance out of the sum of Rs. 3565. 0a. 5p., the value of Nyum Chowdry's interest in Donae Dohoo, which sum had, in fact, been applied in payment of debts owing by Kureembuksh Chowdry and Sureetoolah Chowdry. The Court below entirely misconceived, first, the facts established, and, secondly, the true question at issue, and was wrong in deciding that the payment of the sum of Rs. 29,640. 10a. 1 p. into Court was such a voluntary payment, as to render it irrecoverable in the present

suit; and as Nujuminissa Chowdrain had wrongfully received that sum under her decree, the [77] High Court ought to have ordered her to repay the same to the Appellants, with interest.

The Right Hon. Lord Romilly. — This case, when divested of all that which is not material to the question before this Board, may be stated as follows:—The Appellants, two Sisters, who had married individuals of the same family, became entitled, under what we should in this country call a marriage settlement, to dower in the form of a charge on an estate or property which had belonged to a person of the name of Nyum Chowdry. He having died in debt, his heirs or representatives were sued by various persons, and, among others, by those whom the Respondents now represent, to recover some very considerable debts alleged to have been due by him; in which suit they obtained judgment. Under that judgment certain other properties were attached and sold, and the judgment was in part satisfied. If it were necessary to look into the particulars of these numerous and somewhat complicated proceedings, it would probably appear (and that alone would be a ground upon which the Respondents must be held disentitled to retain the money they have received) that this judgment was in effect satisfied; that all that the decree of the Court had entitled the Respondents to take out of the different properties in question had been paid and satisfied in one way or another; and was received by them so as to disentitle them to institute or continue any further proceedings against these properties in respect of the claim now in question. However, they did, in fact, obtain an authority, under one of [78] the many proceedings that have taken place, to sell the estate upon which the dower of the Appellants was charged.

In order to prevent that sale, which would have been mischievous and prejudicial in the highest degree to the rights of the now Appellants, they, upon a proceeding which they instituted, and under the authority of the Court, not voluntarily, but under protest, and because they were compelled to take that step in order to prevent the sale of the estate, paid in sum of between Rs. 59,000 and Rs. 60,000 into Court; and it appears that that payment into Court having taken place in order to prevent a sale of the property, under which the rights of all parties, and, among others, of the Appellants, were expressly reserved, the question arose, and arose in rather a singular form, whether the money should remain in Court, or whether it might not be paid over to the Respondents. Undoubtedly the Appellants' Pleader consented at once that the money should be paid over to them.

The money that had been paid into Court, not voluntarily, but under this species of compulsion, and for the purpose of preventing this injurious sale of the property, was paid over accordingly; the only voluntary act which was done being the consent given by the Appellants, that the money, instead of remaining in Court, should in the meantime, and until the rights of the parties could be settled by the final decree of the Court, be paid over to the Respondents. Afterwards, when all these circumstances came before the Zillah Court, and all the questions were raised which either party thought fit to raise, or had the power to raise, in the then state of the suits, the [79] Appellants obtained a decree, dated the 8th of June, 1860, in their favour against the Respondents, for the sum of Rs. 59,281 and a fraction, being the amount paid by them into Court as before mentioned. Against this decree an appeal was lodged, which was carried before the High Court of Judicature at Fort William in Bengal. The High Court, having considered the whole case, did not in any way enter into the merits of the case itself, or of the decision of the Court below, at least upon the grounds upon which the case had been decided, but took the point for themselves, that by law the payment to the Respondents of the money of the Appellants, under the circumstances in which it was made, constituted a voluntary payment with the full knowledge of the facts, and, therefore, that the money could not be recovered back. If it had been such a payment, no doubt such is the law; but when we look at the circumstances of the petition of the Appellants, dated the 17th of May, 1849, when the money was paid into Court, we find, in the first place, it was not a payment at all. It was originally a mere deposit in Court of the full amount recoverable by the decree-holder. It was deposited, under protest, for the purpose of preventing an injurious sale of the whole property. Then it appears that upon the reading of the petition, the Pleader for the Petitioners was asked, whether his

Clients had any objection to the payment to the decree-holder of the amount which had been so deposited; and the answer was, "I will bring a regular suit for setting aside the summary Order rejecting the claim, but the sale cannot be stayed unless the amount recoverable by the decree-holder is deposited: I, therefore, deposit the amount for the purpose of its being paid to the decree-[80]-holder, and pray that the said sum be paid to the decree-holder and the sale be stayed."

Those were the circumstances under which the money was paid, the payment being clearly no voluntary payment; and the suit having been determined on its merits in favour of the Appellants, they are clearly entitled to recover this money back again. Therefore, the Order that we shall advise Her Majesty to make is, that the decree of the High Court of Judicature, reversing the decree of the Zillah Court, be reversed, and that the decree of the Zillah Court be confirmed; and that the Appellants be held entitled to recover Rs. 59,821 and a fraction, as decreed by the judgment of the 8th of June, 1860. It is satisfactory to feel, as their Lordships have not entered into the merits of the case on the many points argued in the Zillah Court and in the High Court, that substantial justice will be done by the Order which they will now advise Her Majesty to pronounce; for it is perfectly clear, on the one hand, that the Respondents had no right to this money out of that estate at all, they having been satisfied to the extent that the for aer decrees of any Court or Courts entitled them to recovery out of that property; and, on the other hand, it appears perfectly clear, that the Appellants paid this money merely for the purpose of preventing a sale of the property, so that they are, in justice as well as in law, entitled to recover. The Appellants must also be held entitled to the costs of the appeal, and of the reversal of the decree, and to the usual interest, at the current Court rate, upon the sum to which they are so entitled.

[81] SOORENDRONATH ROY,—Appellant: MUSSAMUT HEERAMONEE BURMONEAH,—Respondent * [June 18 and 19, 1868].

On appeal from the High Court of Judicature at Bengal.

The prevalence in any part of India of a special rule of descent in a family, differing from the ordinary course of descent common in the locality among people of the like class or race, stands upon the footing of the usage or custom of the family, which having a legal origin and continuance, regulates the succession [12 Moo. Ind. App. 91].

So close a connection exists in Hindoo Law between religion and succession to property, that the preferable right to perform the Shradh, or funeral oblation to the last owner, is a primary fact to be taken into consideration in determining the rule which is to govern the right of succession [12 Moo. Ind. App. 96].

A Hindoo family migrated many generations ago from Mithila, where the Mitacshara was, and still is, the prevailing law; and settled in Bengal, where the Daya-bhaga prevails, acquiring real and personal property situate there. The family continued joint, retaining their customs, usages, and religious observances, as before their migration, according to the doctrines of the Mitacshara:—Held, on a question of succession, that the Mitacshara, and not the Daya-bhaga, the *lex loci*, was the governing authority to determine the right of succession.

As the presumption is, that the members of a family so emigrated continue such family customs, the *onus* is upon a party who alleges cessation of such customs to prove that fact [12 Moo. Ind. App. 92].

Semble. A family who had so emigrated may retain its religious rites and

* Present: Members of the Judicial Committee.—The Right Hon. the Lord Justice Wood, the Right Hon. the Lord Justice Selwyn, and the Right Hon. Sir James William Colvile. Assessor.—The Right Hon. Sir Lawrence Peel.

observances, and yet acquiesce in a devolution of property, in the common course of descent amongst persons of the same race, in the District in which they have settled [12 Moo. Ind. App. 95, 96].

According to the Mitashara, a first Cousin is entitled to succeed to the estate to the exclusion of his deceased Cousin's childless Widow.

- A Will of a Hindoo, whose family were governed by the Mitashara, made in favour of his first Cousin, who lived in joint estate with him, to the disinherison of his Widow, except a small provision for her maintenance, in the event of her leaving the family home, in the circumstances, and upon the evidence, declared proved and established.

The parties in this case were Hindoos, members of a family who many generations ago emigrated from Mithila, where the Mitashara prevails, and settled [82] in Bengal. The principal point raised by the appeal was, with respect to the right of succession to real and personal estate situate in Bengal, between the representatives of two first Cousins, named Paresnauth and Batooknauth, joint in estate, descendants of their Grandfather, Khoderam Roy, of the Khettry caste, involving the question, whether the succession was to be governed by the Mitashara, the law of the place from whence the family emigrated, which law and religious observances it was alleged had been followed by the family after they resided in Bengal; or, whether the Daya-bhaga, the *lex loci*, was to govern the succession. If the former law prevailed, Paresnauth succeeded as heir to Batooknauth in preference to the Respondent, his childless Widow, who relied on the Daya-bhaga, as regulating her right to succeed to her deceased Husband's estate. The second question related to the validity of a Will made by Batooknauth in favour of Paresnauth, which, subject to a small allowance for maintenance, in the event therein specified, disinherited his Widow, and which testamentary disposition was invalid if the Daya-bhaga prevailed. The Respondent also relied upon a deed, alleged by her to have been executed by her Husband, making her his heiress.

The suit was brought by the Respondent against the Appellant, the son of Paresnauth, then a Minor, by his Guardians, his Grandmother and Mother, to oust him from the possession of a moiety of the family estate, real and personal, the entirety of which he was in possession of; and which moiety formerly belonged to Batooknauth, the Respondent's Husband. The Respondent, in her plaint, grounded her title under a deed, called a Nedurshun Putter, which she alleged had been executed in her favour by her late Husband [83] during his last illness, constituting her his heiress. This deed the Respondent asserted had been wrongfully taken possession of and destroyed by Paresnauth. The Respondent also alleged in the plaint, that her late Husband had at the same time given her a verbal direction or authority to adopt a Son to him, but which she had not acted upon. This deed and the verbal authority were afterwards, in the course of the suit, abandoned by the Respondent; and, consequently, no issue was raised on these allegations. The Respondent also sought by her suit to obtain a decree for the cancellation of the before-mentioned Will, which she alleged had been fabricated and forged by Paresnauth. There was no allegation in the plaint that she was his heiress-at-law, which she would have been if the succession had been governed by the doctrines and rules of the Daya-bhaga.

The Appellant by his Guardians, in his answer, denied the existence of the Nedurshun Putter, as well as the alleged verbal authority to adopt a Son; and insisted on the genuineness of the Will of Batooknauth, as having been duly executed by him, submitting, that even if such Will had not been duly executed, the Respondent, as Widow, would have only been entitled to an allowance for maintenance, which was provided her by the Will, as the property was joint property, and as such, held and enjoyed by the two Cousins whose family had migrated into Bengal from the North West Provinces, from whence they had brought with them, and continued to use at their births, marriages, and funerals, the rites and ceremonies prescribed by the Shastres of those Provinces, and had continued to have them performed by Purohits, or family Priests. That, like [84] Komrouj Brahmins, belonging to the same country, they had never married into Bengallee families, and had continued to have their rights of succession governed by the doctrines of the Mitashara, by

which Law, it was insisted, that an undivided Cousin would succeed in preference to the Widow of a deceased coparcener.

It was contended by the Respondent in the replication, that the Daya-bhaga governed the succession to property in the joint family of her late Husband and the Appellant's late Father; and that, under that Law, she, as a Widow, was entitled to succeed to her Husband's moiety in the joint estate.

It appeared from the evidence, that Paresnauth performed the Shradh of Batooknauth as sole heir to him according to the Mitaeshara Shastres; and that the Will had been proved in the Civil Court of Nuddea, under Act, No. XX. of 1841, and acted upon by Paresnauth, under the Court's certificate, up to the time of his death, which event took place about two years after he was in possession of Batooknauth's moiety of the family estate.

The facts of the case, and the nature and effect of the evidence upon the above issues, are very fully stated in their Lordships' judgment.

The decree of Mr. Littledale, the Judge of Zillah Nuddea, dated the 17th of September, 1859, decided in favour of the Will executed by Batooknauth, which it established; and that Judge held as a sequence, that it was unnecessary to go into the remaining issue, viz.:—whether the question of inheritance was to be determined by the Shastres of Bengal or of the North Western Provinces.

The Respondent appealed from this decree, and [85] pending the appeal to the High Court the Appellant, having come of age, was made a party in the place of his Guardians.

The appeal was heard before Messrs. Trevor, Seton-Carr, and Jackson, three of the Judges of the High Court, who, by their judgment and decree, dated the 12th of September, 1862, held, that it was incumbent, in the first instance, on the Respondent to show her title to sue; and that on her admission as to the origin of the family and their migration from Mithila into Bengal, she was bound to satisfy the Court that the Daya-bhaga was the law which regulated the succession; and that such succession was no longer governed by the Mitaeshara; and that the Court, if the Daya-bhaga was shown to govern, would afterwards consider and decide whether the Will was genuine or a forgery. The Court then decided on the evidence: first, that the family had been for some generations governed by the Bengal Law of succession; and secondly, the Court agreed with the Judge of the Court below in placing no reliance on the evidence of the Respondent's witnesses, which went to prove the Will a forgery; but nevertheless held, looking at the internal probabilities, and on the direct evidence thereto of the subscribing witnesses, that the Will was not duly proved, and by the decree, declared the Respondent, as the Widow and heiress-at-law of Batooknauth, entitled to the moiety of the estate.

The present appeal was brought from this decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—Two questions arise, first, with respect to the Will [86] of Batooknauth, made in favour of Paresnauth, we submit, that the High Court were wrong in their estimate of the evidence, and that the decree of the Zillah Court upon that point ought to have been affirmed by them. The High Court, in substance, affirmed the Zillah Judge's decree, by holding, that the Respondent's witnesses were untrustworthy, and their evidence not to be relied on; the Court, therefore, ought to have given effect to the evidence of the subscribing witnesses in favour of the Will. It is manifest that the Court was not justified in setting aside the positive and direct testimony of those witnesses as to the *factum* of the Will on mere general surmises of what they term "internal probabilities." The Respondent never objected to the validity of the Will in Paresnauth's lifetime, but, on the contrary, acquiesced in his possession of the moiety of the estate her Husband died seized of up to his death, a period of upwards of two years. But, secondly, even if the decree of the High Court was right in deciding against the Will, yet the Court ought to have decided that Paresnauth was Batooknauth's heir-at-law, and entitled to succeed by the Mitaeshara to his moiety of the family estate, subject to a provision for the Appellant's maintenance. The evidence established the fact, that the family continued to observe the ancient usages and the religious ceremonies of their ancestors, and that they had not abandoned them, and the Respondent failed to prove that the family had adopted those prescribed by the Daya-bhaga or other Shastres of Bengal. It was admitted by the pleadings, that the family had originally come from

the North-Western Provinces, and had migrated to and settled in Bengal; the High [87] Court, therefore, ought, upon the authority of *Ratchepetty Dutt Jha v. Rajunder Narain Rae* (2 Moore's Ind. App. Cases, 133), to have held, that the family usage and custom was according to the doctrines of the Hindoo law of the Mithila school; and that the Mitacschara governed the succession in the case, and not the Daya-bhaga relied on by the Respondent.

Mr. Field, Q.C., and Mr. Cave, for the Respondent.—First, as to the rule of succession which is to govern the rights of the parties, we submit, that the Daya-bhaga, the *lex loci*, and not the Mitacschara, relied upon by the Appellant, is alone applicable in determining the rights of the parties to the moiety of the family estate. It is to be observed, that Paresnauth, in the first instance, relied solely on the Will of the Respondent's Husband under which he got possession of his moiety, and the application of the Mitacschara Code as the rule of succession was an afterthought, and was not set up during his lifetime, nor until the answer was filed in this suit. It is admitted, that the estate is situate in Bengal, and that it had been acquired by Khoderam Roy, the common ancestor, whose family some eight generations ago had settled in Bengal; but it was shown by the evidence that, in litigation amongst themselves, the family had treated the Daya-bhaga as the law regulating the succession to the family property. It was admitted in those suits, that they were unable to prove that the family followed the Mitacschara Code, and it is, therefore, to be assumed that their customs and usages were regulated by the Shastres prevalent in Bengal. [88] By the Daya-bhaga the Respondent as Widow is her Husband's heiress-at-law.

Secondly, the Will alleged to have been made by the Appellant's Husband in Paresnauth's favour was not established. The Court held, that, looking into internal probabilities and the evidence given in its support, the Will had not been satisfactorily proved, and set it aside. That Paresnauth obtained a certificate from the Court, under Act, No. XX. of 1841, and was in undisputed possession of Batooknauth's moiety of the estate during his lifetime, a period of more than two years, and no steps taken by the Respondent to assert her rights and dispute the validity of the Will during that period is satisfactorily accounted for by the fact, that she was under fourteen years of age, and lived in Paresnauth's house, as a Purdah Nushen, or secluded woman; that she did not know how to read or write, and was entirely without means to prosecute her rights.

Judgment having been reserved, was now delivered by

The Right Hon. Sir James W. Colville (July 2, 1868).—The suit which is to determine the right of succession between the representatives of each of two joint owners, Paresnauth and Batooknauth, Hindoos, to the succession of one of them, Batooknauth, was brought to recover a moiety of a family estate consisting of landed and of moveable property which had belonged to one Khoderam Roy, the Grandfather of both Paresnauth and Batooknauth. The property of Khoderam Roy descended from him, by inheritance, to his two surviving Grandsons, Paresnauth and Batooknauth, the Sons respectively of his two Sons, Jai [89] Singh Roy and Prag Singh Roy, who had predeceased their Father. These Grandsons, who were first cousins, formed a joint undivided Hindoo family, joint in food, worship, and estate. During their joint lives they resided continually together.

Paresnauth was the Manager. He survived Batooknauth about two and a-half years. Batooknauth left no children. The Plaintiff was his childless Widow. She was very young at the time of her Husband's death; certainly under fourteen years of age, and perhaps younger. She had, however, near relations, members of her own family, competent to the protection of her rights, her Father, and two other persons: and the Sister of Batooknauth had a Son, a minor, in the line of succession to his deceased Uncle under the Law of Bengal, and whose Father was competent to the protection of his rights also. The Widow, if entitled, might have been placed under the protection of the Courts of Wards in the case of any probable invasion of her rights.

Paresnauth, on the 18th Bysach, 1260, that is, thirteen days after the death of Batooknauth, which took place on the 5th Bysach, 1260, corresponding to the 16th April, 1853, propounded and proved before the Civil Court of Nuddea, under Act, No. XX. of 1841, an alleged Will of Batooknauth, the cancellation of which instrument

is also sought by the Plaintiff's suit. By this Will, which bore date the 2nd Bysach, 1260, three days before his death, the whole of Batooknauth's property was given to Paresnauth. It contained a provision for maintenance of the Widow; but in case of her quitting the family Rs. 25 per month only were to be allowed her for her maintenance. The usual notifications were issued [90] by the Court; no person appeared to oppose, witnesses were examined, the Will was proved, and the ordinary certificate obtained, and under that title Paresnauth enjoyed the property unopposed and undisturbed during the remainder of his life, a period of about two and a-half years. The Will was not registered, but two days only elapsed between the date of it and the death of Batooknauth.

Paresnauth left a Will, or testamentary trust deed, by which he appointed his Mother and Wife guardians of his infant Son. It contained a provision for adoption by his Widow in case the infant died, and some directions as to religious rites and usages.

Shortly after Paresnauth's death, the Widow of Batooknauth asserted her title to a moiety of the property jointly owned and enjoyed by her Husband and Paresnauth. Upon her application to the proper authorities to be admitted to her share, she was, in consequence of the certificate before mentioned having been obtained and being in force, directed or advised to proceed by regular suit, and she instituted the suit accordingly out of which this appeal arises. She was the sole Plaintiff, and the Defendants were the Mother and Widow of Paresnauth, as Trustees and Guardians of the infant Son of Paresnauth, who was also named a party. The suit proceeded in that form until the Son attained majority, when he applied for leave, and was permitted to defend in his own person without guardians. He is the Appellant in this appeal. The property being situate wholly in Bengal, and the family having been long resident there, the Plaintiff was certainly entitled to rely on her *prima facie* title, as heiress under the general Hindoo Law as administered in that part of India.

[91] It was incumbent on the Defendants to allege and prove a title displacing this *prima facie* title. They accordingly pleaded their title, which embraced two separate answers of the Plaintiff's title. They alleged that the title to the property was, by reason of the retention by their family of its ancient Law, that of the Mitacshara, to be governed by that authority, under which Paresnauth, and not the Widow, was heir to Batooknauth; and besides this, they alleged that Batooknauth had bequeathed his whole property to Paresnauth. If this last title prevail, it displaces equally a descent *ab intestato*, under either system of law, viz., that of the Mitacshara, or that of the Daya-bhaga.

Some doubt was raised by Mr. Cave, in his argument of this case, as to the original acquisition of this property, whether the whole was acquired by Khoderam Roy, as a large part certainly was, or whether a part was not ancestral property which had descended to him. It is not necessary to inquire into this subject, because the prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place of the property of people of that class or race, stands on the footing of usage or custom of the family. It must have had a legal origin, and have continuance (see *Abraham v. Abraham*, 9 Moore's Ind. App. Cases, pp. 246 and 247); and whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both. A legal foundation for this family usage was laid sufficiently by the evidence. The family came into Bengal from a distant part of India where the Mitacshara prevails. The High Court did not [92] decide more on this issue than that the family had adopted the law of Bengal for some generations: that is consistent with a discontinuance of a former usage. It appears further from the evidence of the Purohit, that his was an hereditary office, as it very frequently is, and that his ancestors, Officers of the priesthood, and of the family, had followed the Mitacshara constantly.

On the evidence, it seems clear, that the family came attended by Priests of their own persuasion; and since Orientals are commonly tenacious of their usages and customs, and more especially of their family and religious observances, therefore, on the ordinary principles of viewing evidence, a continuance of this state of things is presumable, and the *onus* would then lie on the party alleging an interruption or cessation of it to prove such allegation. In this case, therefore, the *onus* of proving

such a cessation seems to have been properly declared by the High Court as incumbent on the Plaintiff, in consequence of the admissions in the pleadings.

The Plaintiff originally advanced a title which she did not maintain throughout her suit. She alleged originally that her Husband had given her authority to adopt a Son, and had constituted her heiress, *ad interim*, by a written instrument, of which she alleged the spoliation and destruction by Paresnauth. Such an authority is not unlikely to be conferred. The Will of Paresnauth himself evidences the strong desire of a Hindoo to be succeeded by a Son. Why the allegation, if untrue was made, or why, if true, it was abandoned, it is difficult to say. It is the great misfortune of Hindoo litigants that their cases often fall, in the earlier stages of litigation, into the hands [93] of incompetent Advisers, who, by the mixture of falsehood with truth, or by the suppression or abandonment of part of a true case, from some mistaken views of policy, or difficulty, create often impediments to its success from which the true story, if revealed, would have been free. If, for instance, it should seem expedient to exaggerate the illness, weakness, or incapacity of an alleged Testator, and to tutor witnesses to such proof, it may be thought politic to drop that part of a case, which necessarily supposes during the same interval a disposing capacity in the Testator: and in Indian cases it is scarcely safe or just to make against the suitor himself the ordinary presumptions from the conduct of a suit, which would be made in our own Courts under the like circumstances.

It has, therefore, been very properly urged in the able arguments on behalf of the Plaintiff, that her youth, ignorance, sex, and dependent state must all be weighed, and have due importance given to them, when her supposed acquiescence in the title of Paresnauth is urged against her. As respects herself, personally, the force of these arguments may be admitted so far as they regard acquiescence alone; but her ignorance of Paresnauth's proceedings and claim to the whole succession which she alleges, cannot so readily be conceded, and the weight of presumptive proof arising from the conduct both of herself and of other persons competent to the protection of her interests, cannot be excluded from the consideration of their Lordships when deciding whether such ignorance is established in any of them.

The Plaintiff denied in her replication each title pleaded by the Defendants. The Will she alleged [94] to be a forgery, and insisted that the Daya-bhaga was the authority to be applied to the question of her title to the succession.

The issues of fact, which are stated in the Appellant's case, comprise these two points, the only ones before their Lordships on appeal:—

First, whether Batooknauth executed a Will, dated 2nd Bysach, 1260, in favour of Paresnauth, or not.

Secondly, whether the question of inheritance in this suit is determinable by the Shastres of Bengal, or of the Western Provinces.

The Judge of the Court at Nuddea found the first issue, that on the Will, in favour of the Defendants. He expressed no opinion on the second, which, in consequence of his finding on the first, he judged to be then an immaterial issue. On appeal to the High Court, that Court consisting of three Judges, Mr. Trevor, Mr. Seton-Karr, and Mr. Jackson, found unanimously the issues in favour of the Plaintiff, the now Respondent, and reversed the decree of the Civil Court.

In the view which that Court of appeal took, it was necessary to decide both issues; for a decision on the Will alone, unless it had established the Will, would not have decided the case. In the view taken of the Will, in the Civil Court of Nuddea, the contention as to which law, whether the Mitacshara or the Daya-bhaga, should prevail was a needless one, except as it tended to disprove the Will by showing it to be an inofficious disposition.

If, however, the evidence afford ground enough for believing, that the ancient family usage, whether legally obsolete or not, might yet be operative enough in the mind of a male member of his family to lead [95] him to prefer the sole ownership of a male, his conjoint owner and co-heir, with whom he had been associated in the enjoyment, and with whom the entire management had been, to what he might consider the risk of female ownership, then no sound argument derived from the mere presumed inofficiousness of the disposition, according to the general law, could be used to weaken adequate evidence as to the *factum* of the Will. In the opinion of their Lordships, it would be a rash conclusion, on the state of the evi-

dence in this cause, to suppose that a preference of the law of Bengal was likely to be operative in the mind of the Testator, and without a belief in the probable existence of such a preference, where is the foundation for treating the Will as inofficious?

It is not necessary for their Lordships to decide the second issue in the view which they take of this case, which is substantially the same as that taken by the Civil Court of Nuddea. It is, however, necessary for them to review the evidence on this issue to some extent, in order to support the opinion already expressed by their Lordships as to the probability of a continuing attachment by the Testator, Batooknauth, to his original family usages.

From the admissions in the pleading, referred to by the High Court in their judgment, and from the evidence, it may be safely concluded that this family came from a part of India where the Mitacshara was and is the prevailing authority: that it came not unattended by Ministers of religion, and that it originally continued in Bengal its ancient law. As, at the time of that migration, the Mahomedan was the governing power, and as the Hindoos were rather connived at than sanctioned by the governing power [96] in the exercise of their religion, their law was in the nature of a personal usage or custom, and it is probable that migratory families or tribes amongst Hindoos would retain their own usages.

There seems to be no reasonable ground for doubting that the office of Priest was hereditary, and derived to the existing family Priest by successors in the mode stated by the Purohit, whose evidence was rather laid aside by the High Court, on the ground that he might be swayed by interest, than rejected by it as untrustworthy. An adherence to family usages is a strong Oriental habit; it is in most places not a weak one, and since, generally, the love of them increases with their long prevalence, it requires no effort to believe that the retention of religious usages and customs spoken to by the Defendant's witnesses did prevail in that particular branch of the family, to which point, indeed, the Purohit's evidence in a most important particular, that of the performance of the Shradh of Batooknauth, is clear and direct, and on that point not contradicted by proof, for though the Plaintiff alleges, she does not prove that she performed her Husband's Shradh.

This, indeed, is not decisive of the question as to the devolution of property in the family by right of succession, since a family might retain its religious rights, and yet acquiesce in a devolution of property in the common course of descent of property in that district, amongst persons of the same race. But still there is in the Hindo law so close a connection between their religion and their succession to property, that the preferable right to perform the Shradh is commonly viewed as governing also the question of [97] the preferable right to succession of property; and as a general rule they would be expected to be found in union. Now, it is proved by the Purohit, the proper witness to be adduced for the purpose, that Paresnauth performed the Shradh of Batooknauth, and that proof is not opposed by counter proof.

It is a fact, which, unexplained, bears strongly on the question of the right to the succession being under the Mitacshara. The High Court considered the evidence to be nearly balanced, so far as the evidence, exclusive of the judicial proceedings hereafter to be referred to went: but it is to be observed, that the High Court, without any sufficient reason assigned, set aside the evidence of the Purohit, which, if it be regarded as the uncontradicted evidence of the appropriate and ordinarily adequate witness to the performance of a Shradh, by establishing the performance of the ceremony by Paresnauth, should have inclined the scale in favour of that side, especially when it is remembered that a presumption existed in favour of the continuance of the ancient family custom.

Their Lordships are relieved from the necessity of considering, whether the High Court did, or did not, attach undue weight to the proofs on which they mainly rested their judgment on this point: since the question now to be considered by their Lordships is only, whether the Will was inofficious. The High Court proceeded on the ground, that the judicial proceedings which they rely on, and state in their judgment, and which are set forth in the Respondent's case, show that the family had for some generations recognized the law prevalent in Bengal as that of their succession. The High Court [98] had no explanation given to it of these pro-

ceedings. It certainly lay on the Defendants to give that explanation. Possibly Paresnauth might have been able to show that no actual enjoyment according to such title by record had ever obtained in his branch of his family; and might have shown that he, as a party to the suit, had not advised or suggested that form of procedure and joinder of parties, and was not conscious of the effect of it, as evidence to rebut the continuance of a family custom; but whatever weight may attach to such suggestions when made and established by proofs, it is not the duty of a Court to suppose them. It suffices to say, that the decision on this issue of the High Court on the evidence in the cause, may be correct; yet, their Lordships cannot derive from such evidence, viewed in connection with the other evidence in the cause, that belief which would justify them in treating the Will as *prima facie* improbable, because inofficious, and inofficious because regardless of the ordinary preferences of Hindoos of the Bengal Schools.

Their Lordships proceed now to the consideration of the evidence as to the *factum* of the Will itself. It must be remembered that Paresnauth is dead, and that imputations are cast on him after his death, which he might have been able, and which his representatives in this suit may be unable, to reject, at least with equal success. Therefore, a Court of Justice should be careful to see that no inference be raised against the title which he asserted, and proved, and under which he obtained and retained possession during his life unopposed, unless it be such as the evidence in the cause clearly warrants. The evidence as to the *factum* itself in the judgment of both [99] Courts appeared satisfactory. It is declared by the High Court to have been "precise enough on the main points of execution and signature, and to exhibit no signal discrepancies." In an ordinary case, even on proof of a Hindoo Will, such evidence would be deemed adequate; and it must be remembered, that this Will was very soon after its execution publicly exhibited in Court, and submitted to some investigation and proof, and was proved; and that, though proved *ex parte*, yet such proof followed on the notifications which ordinarily must be taken to give due notice of a claim under a Will.

If, then, no discrepancy of any material character be found between the proof which was given on the application for a certificate in 1853, and that given on the trial of the cause in 1859, the witnesses being native witnesses, and speaking again to the same facts after so long an interval, the absence of such discrepancy, and the precision of the statements as to the execution and signature, are some arguments in themselves in support of the truth of that to which those of the witnesses who were examined on both trials depose. One discrepancy, however, is noticed in the Respondent's case on which much stress was laid by Mr. Cave in his able argument for the Respondent.

The witnesses at the earlier judicial investigation described the Will as having been immediately dictated by the Testator to Denonauth, the Writer; whereas at the trial of this cause, they depose that Tanuckanauth made the draft from the dictation of the Testator, and that Denonauth made a fair copy from it. This discrepancy certainly exists, but it is one which might be found in many a case free from [100] suspicion. It may have proceeded from mere inaccuracy of recollection; and sometimes in native statements an intermediate agency is passed over, and an action ascribed to an immediate source, which in truth proceeded from a derivative one. The reason assigned by the Respondent's Counsel for this variation of story is little probable. Had the witnesses for the Will recollected the evidence which they gave on the first trial, they, if false witnesses, would have adhered to it. They are not likely on the trial to have made intentionally their evidence conformable to that of the Respondent's witnesses who were examined before them, for no draft was produced at all; nothing was shown to which they were likely to desire to make their account conformable. The transaction to which they deposed, and that to which the Plaintiff's witnesses were deposing, were utterly irreconcilable, and no motive could have existed for injuring their own story by taking up a part of that of the rival witnesses. Their Lordships, therefore, concur in the view taken of the evidence as to the *factum* of the Will by both Courts, that it was in itself adequate to the proof of an ordinary Will. Was the internal evidence against it, and was the internal improbability of the Will sufficient to discredit it?

No inheritance improbability can be stated as to this Will, or its provisions.

unless by assuming either that the law of the Mitacshara was known to the Testator to be clearly applicable, or that a preference in the female line of descent was likely to be influential in his name. Their Lordships, therefore, put aside these speculations and apply themselves to the consideration of the evidence in the cause. The grounds [101] upon which the judgment of the High Court proceeds as to the Will are, that the witnesses to it are not such as they would have expected to find attesting his Will; that the handwriting of the Testator seems too firm for one suffering from such a sickness; and that if the Mitacshara prevailed, the Will would be needless; that Rs. 25 per month was an absurdly small allowance for the Widow; that there was no hint of any disagreement between him and his Wife; and they conclude by observations derived from these matters as to the improbability of the case. But to these reasons it may be answered, that the Rs. 25 which are given only in case of the Widow leaving the family house, may not have been meant to measure her maintenance whilst resident; that it may have been designed *in poenam* to enforce residence in the family house; that there was much conflict of evidence, and may have been room to doubt whether the Mitacshara did or did not prevail in the family as the authoritative exposition of their law; that there had been that compliance with the rules of procedure in the Courts of the District, and such apparent admissions on record, inconsistent with the prevalence of the Mitacshara as an authority, which might, unless explained, altogether destroy a custom by breaking in upon its continuance; and that these things might suggest to his own mind, or the minds of those about the Testator, the wisdom of not relying on the usage alone; that the Testator's imputed neglect of the pecuniary interests of his Widow is no greater than that which belongs to any follower of the Mitacshara school, who, having the power to separate from an united family, and so to qualify his Widow as an heiress, prefers to let the law [102] of his class take its course. And, as to the strength of the signature; that two days and part of a third intervened between the execution of the Will and the death; and though weakened by illness, the Testator may have rallied his strength to the performance of that short act of signature. As to the character of the witnesses; that the family Priest was an attesting witness to the Will, and that such an attesting witness might well be supposed, by those at least who placed confidence in him, to be sufficient to save the Will from the objection of being attested only by persons unconnected with the family, or too low to give support to such an instrument, whilst the known aversion of persons of respectable position to be connected with cases likely to be the subject of litigation may be one reason why attesting witnesses to Hindoo Wills are seldom found to be of a class from which it would be most desirable to select them.

The case of the Defendants certainly derives some support from the failure of the case made as to the forgery of the Will.

Though the youth and dependent state of the Plaintiff himself may be admitted to afford very cogent reasons for not pressing against her those presumptions of acquiescence which similar conduct in a competent adult would give rise to, yet presumptions from the conduct of others cannot, as it has been said, be excluded from the consideration of this case, when the probabilities on either side are weighed.

During the whole of Paresnauth's life, no attempt was made by any one to question the validity of this Will. Is this consistent with a belief in the family that the Widow was the heiress of her Husband? It is not alleged that he shared the proceeds with the [103] Widow. Could it have been unknown generally to the family and inmates of the house, and those most conversant with the family business, that he was dealing with the property as sole beneficial owner? According to the case of the Widow, she immediately on her Husband's death became entitled to the usufruct for her life of a considerable estate. Could that be a matter of slight moment to her immediate family? Would there not have been a considerable difference in the estimation of her by others as an heiress, instead of being one entitled merely to a moderate maintenance out of the wealth of another? Yet, according to the statement of herself, two and a half years of silence and uncomplaining, non-participation in profits, ensue, not only on her own part but also on the part of her Father and others who, knowing her youth and incompetence to the management of business, would be naturally expected to be on the alert to watch

over her interests, and to share, in some degree, it may be, in the fruits of her succession. The will was proved in the ordinary mode; there is no proof of any alteration in the ordinary mode of notification, which must be viewed as ordinarily adequate to give knowledge where knowledge is proper to be given. The notification is said to have been on the house and on the property, yet the whole of the Plaintiff's own family, including herself, is in ignorance until after the lapse of two and a half years from the date of an ordinarily sufficing notification.

Is it reasonable to suppose that Paresnauth could stifle all inquiry, and keep secret from the family, that he had proved a Will publicly, inofficious as it is alleged, and disinheriting a Wife, an expectant [104] heiress, between whom and her Husband the ordinary friendly relations existed? Such an entire state of ignorance, so improbable, and of such long duration, it is most difficult to suppose possible. We find it asserted strongly for the Plaintiff, but, unfortunately, her case is not free from statements, some of which, as to the violence designed against her, seem to be most improbable, one of which, the instrument with the power of adoption, has been abandoned, and another, viz., the proof of the forgery, discredited. She herself, young and inexperienced, is probably not in any way answerable for the management of her own case; but the case, as pleaded, relative to the forgery of the Will, is discredited by both Courts, and contains such improbable statements as fully to justify their rejection of it. Again, the statement of the Plaintiff as to the instrument which accompanied the permission to adopt a Son, which she alleges that she received, though not improbable in itself, bears still the semblance of an invented story. Her conduct in this matter is not in the least degree consistent with probability nor with duty. If that instrument was prepared, why was it suffered to remain unacted on? If destroyed, as she alleges, by Paresnauth, why should that destruction have prevented proofs of its existence and of the spoliation? Was it not her duty to make the adoption, according to her so urgently recommended, that the permission provided for five acts of adoption in succession on failure of each preceding one? If, then, the Court finds itself compelled to discredit these allegations, what rational ground has it for reposing confidence even on the story of her own continued ignorance, during the lifetime of Paresnauth, of any title [105] adverse to her own? In a suit not instituted by Paresnauth, but which was instituted hostilely to him, to set aside a certain Putnee tenure, which suit affords not the slightest ground for a supposition that there was any collusion with him in it, he is found pleading the Will, and she repeating that title praying, therefore, to be dismissed from that suit. *Prima facie*, at least, credit must be given to that pleading, that it proceeds from one who was qualified to represent her. Is the contrary proved? Is any one called to show how that answer came to be filed? Paresnauth is dead; and, after his death, is it to be presumed that he put her answer, without her authority, on record; that is, that he committed a fraud on the Court, and continued a fraud on her? A Court should not impute fraud; and, after the death of Paresnauth, nothing should be supposed to his prejudice for which there is not a legal foundation.

Their Lordships, therefore, on a review of the grounds on which the High Court has held this Will not proved, are compelled to say, that they think that Court laid no foundation for treating the Will as inofficious in itself, for disregarding the evidence of the Purohit, or for ascribing the answer of the Widow to the deceased Paresnauth. The Will had been proved, though *ex parte*; it had been acted on very recently after the Testator's death, and possession held for a considerable time under it. There appears to have been no desire on the part of Paresnauth to escape from the publicity and responsibility attending the proof of such a document. In fact, it was not drawn into question so long as Paresnauth himself lived. That apparent acquiescence is attempted to be ascribed to a general and enduring [106] ignorance, which is in itself eminently improbable. The Will is met by distinct allegations of fraud and forgery, the witnesses to which are discredited by both Courts. Besides this, the case of the Plaintiff does, in the several parts of it before commented on, bear the appearance not simply of exaggeration, but of conscious untruth. Whatever might have been the result of this case, had these presumptions in support of the case for the Will been wanting, the ordinary support which the failure of an opposing case lends to the case which it impeaches, with the presumptions arising against the opposing case from the introduction into it of

matters too grossly improbable for belief, and not the subject of innocent mistake, must be applied, on a review of the whole evidence in the cause, to support the *factum* of this Will. Their Lordships think, therefore, that the decision of the High Court must be reversed with costs, and that the decision of the Civil Court of Nuddea should be restored and affirmed, and that the Appellants should have the costs of this appeal; and they will humbly certify their opinion to Her Majesty to the above effect.

[107] NOGENDER CHUNDER GHOSE and MOHUMDER CHUNDER GHOSE, -
Appellants; MAHOMED ENSUFF and Others.—Respondents * [Feb. 24,
1868].

On Petition from the High Court of Judicature at Bengal.

Pending proceedings before the High Court on an application for a review of judgment, that Court altered the then prevailing practice of permitting an appeal within six months from the date of the judgment allowing or refusing a review. In such circumstances, the six months prescribed by the Order in Council of the 16th of April, 1838, from the date of the decree having expired, special leave to appeal from the original decree and the Order refusing a review was allowed.

This was an application for special leave to appeal from a decree of the High Court, and a judgment or Order made on review of judgment, under the following circumstances:—

The petition set forth, that in the year 1861 the Petitioners, Nogender Chunder Ghose and Mohunder Chunder Ghose, instituted a suit to establish their rights as Zemindars to certain alluvial lands which had been taken possession of by the Defendants on a claim of right thereto as proprietors of other land in the vicinity: that a plea of limitation was put in by the Defendants in bar of the suit, and a decree made by the Judge of the Zillah Chittagong, in favour of the Defendants, which decree having been appealed from by the Petitioners to the High Court of Judi-^[108]cature in Bengal was reversed, and an Order made remanding the case to the Zillah Court for re-trial on the merits: that the suit was accordingly re-tried by the Judge, who, on the merits decreed in favour of the Petitioners, giving them possession of the alluvial lands: that the Defendants being dissatisfied with this last-mentioned decree, appealed against the same to the High Court: that the hearing of the appeal took place before a divisional Bench of the Court, on the 1st of December, 1865, when a decree was made, reversing the decree of the Zillah Judge, and dismissing the Petitioner's suit: that the Petitioners, within the ninety days prescribed for that purpose, filed a petition in the High Court, praying for a review of the decree of that Court, instead of filing a petition in the Court for leave to appeal to Her Majesty in Council against the decree, the Petitioners being advised that, according to the prevailing practice of the Court, they would have six months to file such a petition of appeal, should it become necessary, from the date on which the Order on the petition of review might be pronounced, such practice having been established by a decision of the High Court, made on the 8th of July, 1864; that the petition for review came on for hearing before Mr. Seton Karr, on the 17th of May, 1866, who, by his Order of that date, directed the case to be re-argued on one of the points taken. That accordingly, a re-hearing of the appeal on a review of judgment came on before Messrs. Seton Karr and Kemp, two of the Puisne Judges of the Court, on the 1st of April, 1867, when the Court, by its decree affirmed the former decree of the High Court of the 1st of December, 1865; that on the unsuccessful result ^[109] of the re-hearing on review being communicated to the Petitioners,

* Present: Members of the Judicial Committee.—The Right Hon. Sir William Erle, The Right Hon. Sir James William Colvile, and the Right Hon. Sir Robert Phillimore. Assessor,—The Right Hon. Sir Lawrence Peel.

they directed a petition to be filed in the High Court for leave to appeal to Her Majesty in Council: that the Petitioners were then informed, that the practice had been altered by a decision of the High Court on the 11th of September, 1866, and passed while the above proceedings on review were pending: that the Petitioners presented a petition to the High Court, stating the principal facts above mentioned, and the change of practice, and further stating, that inasmuch as a period of six months allowed by law for filing Privy Council appeals against the decision of the Court had expired, from the original judgment of the 1st of December, 1865, and as the above delay could not in the least be attributed to the Petitioners, who had acted on the full belief that their appeal to England would be in time under the former precedents of the Court, and as it would be very hard and unjust to bind parties by subsequent decision, over which they had no control, and whose effects they could not possibly foresee: therefore, under these peculiar circumstances, the Petitioners prayed to be allowed to file their appeal to England. That the petition came on for hearing before Mr. Jackson, one of the Puisne Judges of the High Court, on the 29th of June, 1867, when he recorded the following minute or Order:—"I am unable to grant this application. The Petitioner must apply to the Privy Council direct"; that the Petitioners had, under the above circumstances, been obliged to present their petition to Her Majesty in order that justice might not miscarry, and that the Petitioners might not be prejudiced by losing their [110] right of appeal by reason of the alteration in the practice of the High Court; and the Petitioners submitted, that they ought to be allowed to appeal against the decree of the High Court of the 1st of December, 1865, the time intervening having been occupied by the proceedings in the review of judgment, as the Petitioners would have obtained leave of the High Court so to appeal on the termination of such proceedings as a matter of course, if the then established practice of the Court had continued, inasmuch as the decision changing the practice was not passed until after the expiration of six months, calculated from the date of the decree, so that the Petitioners had no opportunity of presenting their petition for leave within that period; and the Petitioners submitted that, the judgment and Decree of the High Court, dated the 1st of April, 1867, was a full and complete hearing of the appeal, on a review of judgment previously granted, and that although it in terms affirmed the former decree of the 1st of December, 1865, yet it ought to have been considered and treated as the final judgment or decree of the High Court made in the appeal, and from such a judgment or decree Her Majesty's Charter, establishing and constituting the High Court, ordained that any person or persons might appeal to Her Majesty's Privy Council, provided that leave be applied for to the High Court within six months from the date of such judgment or Decree, and that with that proviso the Petitioners had substantially complied by filing in the High Court, and within such prescribed time, their petition: and they prayed for special leave to appeal against the decree of the High Court bearing date the 1st of December, 1865, and also [111] against the other judgment or decree affirming the same and bearing date the 1st of April, 1867.

Mr. Leith, for the Petitioners.—The six months allowed by Order in Council of the 16th of April, 1838, for appealing from the decree of the 1st of December, 1865, expired pending the proceedings for review. There is no question of the right of the Petitioners to appeal from the decree of the High Court, but for the alteration in the practice by the decision of the 11th of September, 1866, which took the Petitioners by surprise and operated, in the circumstances, as a denial of justice. This change in the practice of the Court took place after the expiration of the six months from the date of the decree. The Court, I submit, was wrong in refusing leave to appeal from the judgment on review, and such decision was in opposition to decided cases. Thus in *Nezeer Ali Khan v. Rajah Ojoodharam Khan* (1 Cal. W.R., 14 (Miss. Appeals)), it was held, that an Order of the High Court refusing an application for a review was a final Order from which an appeal lies. So in the *Maharajah of Burdwan's case* (2 Rev. Civil and Com. Rep., 260), it was laid down, that where an application for a review is admitted, the decision upon the re-hearing is a final decree from which an appeal will lie, and which dates from that time.

The Right Hon. Sir James W. Colvile.—Their Lordships think, that in the cir-

circumstances disclosed in the petition, special leave to appeal from the decree of the High Court of the 1st of December, [112] 1865, and the judgment or Order of the 1st of April, 1867, ought to be allowed. In the cases referred to, the Court have laid it down, that if there is a decision upon a review of judgment, that decision is to be considered the final decree.

PESTONJEE NUSSURWANJEE.—*Appellant*: MANOCKJEE & CO..

Respondents * [July 2, 3, 1868].

On Appeal from the High Court of Judicature at Madras.

Jurisdiction of the Courts in India, under the 326th section of the Code of Civil Procedure, Act, No. VIII. of 1859, to direct agreement of parties to arbitration to be made a rule of Court.

According to the true construction of the 326th section of the Civil Procedure Code, when parties have agreed to submit the matter to arbitration of one or more Arbitrators, no party to the agreement can revoke the submission to such arbitration, unless for good cause: a mere arbitrary revocation of the authority will not be permitted [12 Moo. Ind. App. 130].

A. and B., two partners, agreed to submit certain differences to arbitration. The Arbitrators entered into consideration of the matters referred to them, and gave a preliminary decision, which the parties to the arbitration submitted to and acted on, as, however, the Arbitrators could not agree upon all the points referred to them, they were requested by A. to make their Award within ten days, or to appoint an Umpire. Some delay took place in the appointment of the Umpire, when A. sent notice to withdraw from the arbitration and cancel the agreement, upon which B. applied by petition to the Court, under the 326th section of the Civil Procedure Code, to make the submission to arbitration a rule of Court, which was ordered. Held, that it was not in the power of A. at his mere will and pleasure to revoke the authority of the Arbitrators, in whose appointment he had concurred, and had acquiesced and acted upon their preliminary Award.

This appeal was brought from three Orders of the High Court of Judicature at Madras. The first Order was dated the 15th of January, 1866, and dismissed an appeal from three Orders of the Civil Court of Calicut, dated the 22nd and 23rd of Sep-[113]-tember, and 20th of October, 1865, respectively, which directed that an agreement to submit matters in dispute to arbitration should be filed and enforced under the provisions of section 326 of the Civil Procedure Code of India, Act, No. VIII. of 1859 (*a*). The second Order bore date the 7th of January, 1867, and

* Present: Members of the Judicial Committee.—The Master of the Rolls (the Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Lord Chief Baron (the Right Hon. Sir Fitz-Roy Kelly). Assessor,—The Right Hon. Sir Lawrence Peel.

(*a*) Sec. 326 is in these terms:—"When any persons shall by an instrument in writing agree, that any differences between them, or any of them, shall be referred to the arbitration of any person or persons named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which it relates, application may be made by the parties thereto, or any of them, that the agreement be filed in such Court. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the Applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified, why the agreement should not be filed. . . . If no sufficient cause be shown against the agreement, the agreement shall be filed and an Order of reference to arbitration shall be made thereon. The several provisions of this chapter, so far as they are not inconsistent with the terms of any agreement so filed, shall be applicable to all proceedings under an Order of reference made by the Court, and to the Award of arbitration, and to the enforcement of such Award."

dismissed an application for leave to appeal against a decree of the Civil Court of Calicut, dated the 9th of February, 1866, affirming an Award in favour of [114] Respondents. The third Order appealed from was also dated the 7th of January, 1867, and dismissed an application for leave to appeal against an Order of the Civil Court of Calicut, dated the 6th of October, 1865, confirming the appointment of an Umpire.

The question on the appeal was, whether the Civil Court of Calicut had jurisdiction, under section 326 of the Civil Procedure Code of India, to file the agreement to refer to arbitration after the Appellant had withdrawn his submission.

The circumstances of the case were these:—

The Appellant and the Respondents were, with others, co-partners in the transactions of the farms of the Talook Calicut and of other Talooks in the Malabar district. This partnership, however, was closed by paying out the other co-partners, and a new partnership for the same concern entered into in 1863, between the Appellant and the Respondents. Shortly afterwards, disputes having arisen in regard to the co-partnership transaction of the farms in question, a Karar, or agreement, dated the 10th of June, 1864, was entered into by the Appellant and Respondents, to refer certain differences touching a sum of Rs. 44,000, alleged to be due to the Respondents in respect of the Abkari farm at Calicut, and other transactions to arbitration under section 327 of the Civil Procedure Code.

The original Arbitrators appointed were Mr. Pierce and Mr. Bates; but Mr. Pierce going to England, Mr. Punnett was appointed an Arbitrator in his place.

The Arbitrators entered into consideration of the matters referred to them, and on the 15th of July, 1864, gave a preliminary decision dissolving the partnership which had subsisted between the Appellant [115] and the Respondents, but reserved to themselves, as Arbitrators, the power to give a final decision as to the terms of dissolution after full examination of the accounts. This decision was acted on by the Appellant and the Respondents, and the partnership dissolved, the business of the partnership being from that date carried on by the Appellant alone.

On the 13th of May, 1865, the Arbitrators passed a resolution, that the Respondents should purchase the outstandings of the Ponany farm, amounting to Rs. 5073. 5a. at 50 per cent. of their nominal value with Rs. 2536. 10a. 6p. The Arbitrators further gave minutes (Mr. Punnett on the 6th of July and on the 25th of August, 1865, and Mr. Bates on the 5th of August and 7th of September, 1865) of proceedings expressing their respective opinions in writing on the different disputed items, but came to no final decision.

On the 24th of July, 1865, the Appellant wrote a Letter to the Arbitrators, requiring them to make their Award within ten days, or to appoint an Umpire. The Arbitrators did not make a final Award within that time, and shortly after the receipt of this Letter appointed Mr. Schlunk as Umpire.

On the 5th of August, 1865, the Appellant sent a notice to the Respondents whereby he purported to cancel and withdraw from the agreement, and on the same day sent a notice to the Arbitrators to the same effect.

In consequence, the Respondents, on the 23rd of August 1865, filed a plaint in the Civil Court of Calicut, to have the agreement for submission, dated the 10th of June, 1864, filed under section 326 of the Civil Procedure Code. Notice was given to the Appellant [116] to show cause why the agreement should not be filed, and cause was shown by him.

On the 22nd of September, 1865, the Civil Court ordered the agreement for submission to arbitration to be filed under section 326, of the Civil Procedure Code, and that the Appellant should be assessed with the costs of the application in the Arbitrator's Award. The reasons for this decision were, first, that the Arbitrators had made two decisions on matters progressing towards the final Award, and that the parties had agreed to, and taken immediate action on, those decisions; and, secondly, that the Appellant had no right to cancel the agreement, under the circumstances; and on the 23rd of September, 1865, the Civil Court made an Order, directing the Arbitrators to make their award, and empowering them to appoint an Umpire.

On the 6th of October, 1865, the Civil Court made an Order, affirming the nomination of Mr. Schlunk as Umpire, and on the 17th of the same month the Umpire made his Award.

The Appellant appealed to the High Court at Madras from the above Orders of the 22nd and 23rd of September, 1865, and the 20th of October, 1865, on the following grounds:—First, that all such Orders were *ultra vires* and of no legal force; second, that the Civil Judge had no jurisdiction to file the agreement upon which the appointment of the Arbitrators and the Umpire was constituted; third, that there was, in fact, no subsisting agreement at the date when the Civil Judge filed such agreement; fourth, that the Order of reference, made on the 22nd of September, 1865, was altogether illegal, made without any authority, and the Order and all pro-[117]-ceedings thereunder were of no legal force or effect whatever; and lastly, that the appointment of the Arbitrators and the Umpire was illegal, made without any authority, and of no legal force or effect whatever.

On the 15th of June, 1866, the High Court dismissed the appeal.

The following reasons were recorded by the Court, consisting of Mr. Justice Holloway and Mr. Justice Innes, for dismissing the appeal:—“The Appellant having asked and obtained permission to appeal to Her Majesty in Council from the Order of this Court, dated the 15th of January, 1866, we are now required by the Letters Patent to record the reasons for the Order made by us, dismissing the appeal. The decision of this Court was simply, that no appeal lay from the Order of the Civil Judge of Calicut, directing that an agreement to submit matters in dispute to arbitration should be filed under the provisions of section 326 of the Civil Procedure Code. It is quite clear, that the section itself gives no appeal, and it was not attempted to show that any other part of the Code had done so. The appeal was put solely upon the ground, that the Civil Judge had, in filing the agreement to submit, acted altogether without jurisdiction, because, previously to the filing, the present Appellant had withdrawn from the submission. The language of section 326 shows, that the Judge had jurisdiction to hear and determine the sufficiency of the cause shown against the agreement, and if no sufficient cause was shown against the agreement, he was bound to file it, and make an Order of reference to arbitration. After the filing, the other provisions of the chapter, so far as they are not incon-[118]-sistent with the terms of the agreement, became applicable, and the matter would proceed naturally to a final judgment. These sections give the amplest power to enlarge the time for making the Award, to nominate other Arbitrators, to correct and remit the Award, and to set it aside on the grounds of corruption or misconduct. It is manifest, therefore, that the section under which the Civil Judge acted gave him jurisdiction, and there being no part of the chapter or of the Code giving an appeal against such an Order, we were bound to dismiss the appeal. As the matter, however, was of very general importance, we proceed to consider, whether the fact that one of the parties had chosen to withdraw his submission was such a cause against the agreement as should have prevented the Civil Judge from filing the agreement. The section provides for two cases, one, in which all the parties join in the application, and the other, in which they do not. In the latter case, the only one with which we are at present concerned, the applicant is to be treated as the Plaintiff, and the other parties as the Defendants in a suit. Notice is to be given to them to show, within a time specified, why the agreement should not be filed, and it proceeds:—‘If no sufficient cause be shown against the agreement, the agreement shall be filed, and an Order of reference to arbitration be made thereon.’ Taking these words alone, it could scarcely be contended, the sufficient cause is shown against any agreement, by one of the parties to it saying, that he has since altered his mind. What, moreover, could be the purpose of the Legislature in providing for the showing of cause, and the determination of the sufficiency or insufficiency of that cause, if any one of the parties could put an end to [119] the matter by simply saying, ‘I have altered my mind. It is true, that I entered into the agreement, I have nothing of fraud surprise, or invalidity to allege against it, but I have since altered my mind.’ We should, therefore, have no hesitation in saying, if the matter were before us on appeal, that one of the parties having altered his mind is not a sufficient cause against an ordinary agreement, and we can see no possible ground

in legal principle for saying, that it is sufficient cause against an agreement to refer matters to arbitration. It was said in the argument, that by the withdrawal of one of the parties, the agreement was absolutely at an end, and that there was nothing to file. This has very often been rather loosely said in the English Courts; but the case of *Livingston v. Ralls* (5 El. and B., 132) has effectually disposed of that doctrine. All the learned Judges there decided, that an action will lie upon the breach of an agreement to refer prospective differences to arbitration, and Mr. Justice Coleridge took occasion to express strong doubts as to the correctness of the opinion frequently expressed, that nominal damages only could be recovered. This decision, unquestionably in accordance with principle, shows that there is no pretence for saying, that by English law the agreement becomes, by the withdrawal of one of the parties, a mere nullity. There is no doubt whatever, that an English Court of Equity will not decree the specific performance of an agreement to refer. *The South Wales Railway Company v. Wythes* (5 De G. Mac. and Gor., 887) contains a re-assertion of this principle, frequently stated by Lord Eldon. Both Courts of Law and Equity have refused to allow their Jurisdiction to be stayed on account of such agreements. *Street* [120] *v. Rigby* (6 Ves., 814), overruling Lord Kenyon's decision in *Halfhide v. Fenning* (2 Bro., C. C. 336), is the first case in which this was distinctly decided in equity. *Thompson v. Charnack* (8 T. R., 139) is the leading case at law. Without saying anything upon the policy of these decisions, it may perhaps be doubted, whether they would have been arrived at, if the point had come for the first time before the majority of the Judges and the Law Lords who decided *Scott v. Avery* (5 H.L. Cases, 811). In England, the Legislature has, by various Statutes, sought to render such agreements to refer effectual; and Mr. Baron Martin, in the very recent case of *Mills v. Bayley* (2 Hurls and Colt, 36, 41), took occasion to express his regret that the Legislature did not in all cases prohibit the revocation of agreements to refer. Perhaps the reasons given by Lord Coke in *Vynior's case* (8 Co. Rep., 81 b.), will not be found very satisfactory in point of logic for permitting the revocation. In truth, however, it is difficult to see what the Courts of law could have done. They did not specifically perform any contract, and the proceeding by attachment, both at Law and Equity, proceeded upon the ground of a contempt of the Court of which the agreement to submit had been made a rule. It is of course difficult on principle to see why a withdrawal should have been allowed after the submission had been made a rule of Court. The question of how the agreement shall be enforced is of course a question of procedure. The Courts of Equity in England have always considered specific performance a peculiar and discretionary remedy, and the mere refusal on their part to specifically perform a contract to submit disputes to arbitration, is no authority whatever for [121] putting upon section 326 and the other sections of this chapter, the construction, that nothing more is to be done under them after the dissent of one of the parties from his own agreement. It seems to us that such dissent is no better cause against this sort of agreement than it is against any other, and if there had been an appeal we should, unquestionably, have decided that the Civil Judge was right in filing the agreement. The Indian Legislature, in the provisions of this chapter, seems to have been guided by the same policy as the English, since the time of William III., but has carried out that policy to its logical conclusion."

This was the principal decree appealed from.

The Appellant afterwards filed a petition in the Civil Court at Calicut, alleging the invalidity of the Award, and praying that it might be set aside on the ground of misconduct of the Arbitrators. The Court rejected the petition as not being presented within the time required by section 324 of the Code. After other applications to the Court, the appeal from the Orders before mentioned were allowed, and now came on for hearing.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—In law, the Appellant was competent to revoke the submission to arbitration, and did in fact revoke the same by notice to the Arbitrators; and, therefore, the subsequent decree or Order of the Zillah Judge, ordering that the agreement containing the submission should be filed in Court, or making the same in effect a rule of Court, was erroneous, and, consequently, all the subsequent proceedings of the Court [122] based thereon were illegal, null, and void. The Order of reference to arbitration made by the Court,

under section 326 of the Civil Procedure Code (Act. No. VIII. of 1859), being founded thereon, was also null and void. The Appellant, by his notice, of the 24th of June, 1865, limited the time to ten days, within which the Arbitrators were to make their Award, and their powers and functions ceased absolutely on the expiration of the time, consequently the subsequent act in appointing an Umpire was invalid. *In re Salkeld and Slater* (12 Ad. and El., 767). If the appointment was valid, the proceedings are irregular, as the Umpire should have opened the matter up from the beginning. At Common Law, revocation can be made at the instance of either party. Russell on Awards, p. 143 [3rd Ed.], even after the submission has been made a rule of Court, *Milne v. Gratrix* (7 East., 607); *King v. Joseph* (5 Taunt., 452). The Common Law principles as to revocation are illustrated in Vynior's case (8 Co. Rep., 81, b.), which is the law at the present day, unless modified by Statutes. The 9th and 10th Will. III., c. 15, provides, first, for making the submission to arbitration a rule of Court; and, second, by inserting a clause in the submission agreeing thereto. The 3rd and 4th Will. IV., c. 42, sec. 39, enacts, that such agreement shall not be revocable without leave of the Court; so by the 17th and 18th Vict., c. 125, sec. 17. In *Mills v. Bailey* (2 H. and C., 36), which was an action on an Award, and the Defendant pleaded that before it was made, he had revoked the Arbitrator's authority: the Court held the plea good and the submission revocable, so far as related to one [123] of the matters referred. The decree of the Zillah Judge, dated the 9th of February, 1866, adopting and incorporating the terms of the Award, purporting to have been made under and in pursuance of section 326 of the Civil Procedure Code, is illegal; first, because the original Order of the Judge of the 22nd of September, 1865, failed to give jurisdiction and power to the Judge to order the reference, and to make such decree; and, secondly, because not only was the Umpire not duly appointed to act between the parties to the reference, but his Award was invalid. Lastly, the decree of the High Court of the 15th of January, 1866, was erroneous in dismissing the appeal, on the ground that no appeal lay to the High Court from the Order of the Zillah Judge, made on the 22nd of September, 1865, under section 326 of the Code.

Mr. Coleridge, Q.C., and Mr. Mackeson, Q.C., for the Respondents.—Under the Civil Procedure Code, no appeal lay from the Order of the Civil Court of Calicut, directing the agreement to refer to arbitration the matter in dispute, to be filed under the provisions of section 326 of the Code. The Civil Judge had jurisdiction under that section to order the agreement to be filed, and to enforce the same, notwithstanding the Appellant desired to withdraw his submission, Civil Procedure Code, secs. 325-332. This case materially differs from *Sheonath v. Ramnath* (10 Moore's Ind. App. Cases, 413), where it was held, that the Court could not, under the provisions of the 312 and 314 sections of the Act, No. VIII. of [124] 1859, as in force in Oude, refer the decision of an issue raised in a suit to Arbitrators nominated by the Court against the protest of one of the parties. Here the submission was at the instance of the parties themselves. But a stronger ground is, that the Appellant having availed himself of the preliminary decision of the Arbitrators, and acted on it, cannot afterwards repudiate their authority, or the agreement to refer. An agreement to refer to arbitration cannot be treated as a nullity by the withdrawal of one of the parties. Neither can a party partially revoke a submission, after an intermediate Award, as in this case; *Harcourt v. Ramshotom* (1 J. and W., 505, 511); and a Court of Equity, if there has been part performance, would enforce the agreement, *Cooke v. Cooke* (Law Rep. 4 Eq., 77). The Statute, 3rd and 4th Will. IV., c. 42, does not extend to India, but even if it did, that Statute leaves it with the Court to revoke the submission. The rule of English law, as expounded by the Court below, is that the Court will not allow a party to revoke, Vynior's case (8 Co. Rep., 81, b.); *Livington v. Ralli* (5 El. and B., 132); *Pope v. Lord Duncannon* (9 Sim., 177). Statutes, 9th and 10th of Will. III., c. 15, sec. 10, and the 17th and 18th Vict., c. 125.

Sir R. Palmer, Q.C., in reply.—In *Cooke v. Cooke* (Law Rep. 4 Eq., 77) the Vice-Chancellor Wood held, that where in a reference under the Arbitration Act, 9th and 10th of Will. III., c. 15, an Award has been made, the jurisdiction in the matters of the Award of every superior Court, except that before [125] which the reference is

pending, is excluded. A Court of Equity would not specifically enforce such an agreement, *Vickers v. Vickers* (Law Rep. 4 Eq., 529).

Their Lordships' judgment having been reserved, was now pronounced by

The Right Hon. Lord Romilly (July 17, 1868).—This is an appeal from three Orders of the High Court of Judicature at Madras. The question, in substance, is, whether the Award of Mr. Schlunk settling matters in difference between the Appellant and the Respondent is valid and binding on the parties. The facts which raise the question may be stated very shortly.

On the 29th of October, 1863, the Appellant and Respondent entered into a partnership in certain farms, of taxes imposed on spirituous liquors within certain Districts in the Presidency of Madras. The Appellant was to supply the capital required, and the Respondent was to manage the business. Certain differences arose between them: and they agreed that Arbitrators should be appointed to settle these differences. Accordingly, this was done by an agreement in writing for submission to arbitration, bearing date the 10th of June, 1864. Originally, Mr. Pierce and Mr. Bates were appointed Arbitrators, but Mr. Pierce refusing to act, Mr. Punnett was appointed in his place. The terms of the agreement are to this effect:

"Know all men by these presents, that we the undersigned, Pestonjee Nesserwanjee of the firm of Framjee Nesserwanjee and Co., and D. Manockjee and Co., do make, constitute, and appoint R. H. Pierce, [126] Esq., and W. Bates, Esq., Gentlemen, as Arbitrators, chosen by our mutual consent, to inquire into certain controversies and differences existing between us in regard to our copartnery in the transactions of the Abkary Farms of the Calicut, Kurumbranad, Palghaut, and Ponany Taluqs, and Mamur and Payenjanur Amshoons, of the Ernad Taluq, rented from Government, giving, and by these presents granting, unto the abovesaid R. H. Pierce, Esq., and W. Bates, Esq., full power to substitute or appoint one or more Arbitrator or Arbitrators, as well as, if necessary, an Umpire; and further, to call for and examine the Books and papers of the said copartnership, as also any party or parties connected with the farms and others, and otherwise to take all and every lawful means to arrive at a fair and impartial decision, to which we hereby mutually agree and bind ourselves to abide fully and entirely."

It contains the following Memorandum at the foot:—"N.B.—We the undersigned, Pestonjee Nusserwanjee, of the firm of Framjee Nusserwanjee and Co., and D. Manockjee and Co., have executed this power under and in conformity with the provisions of section 327 of Act, VIII. of 1859; and we do hereby accordingly agree and bind ourselves to abide by the decision which the within-mentioned duly empowered Arbitrators may give under the aforesaid Act."

On the 15th of July, 1864, the Arbitrators made an intermediate award, dissolving the partnership, and giving the business to the Appellant. On the same day a notice, signed by both parties, was publicly given of this fact, and which stated, that all debts due to them by the Abkary Farm were to [127] be received and paid by Framjee Nusserwanjee and Co., and that the Respondent had no longer any interest therein.

On the 3rd of October, 1864, the Appellant wrote to the Arbitrators, complaining of the conduct of the Respondents relative to the making up of the accounts.

On the 13th of May, 1865, the Arbitrators came to a resolution, which was a second intermediate award, directing that the farm outstandings due from the Ponany Chowghaut, and Betatanad divisions should be taken by the Defendant at 50 per cent discount; it is in these words:—"Resolved, that the farm outstandings, due from the Ponany Chowghaut and Betatanad divisions, as they stood in the farm Books on the 30th of June, 1864, as per balance-sheet, be taken over by Messrs. Dhunjeebhoy Manockjee and Co., or their nominee, at 50 per cent discount, they receiving credit for all sums since recovered, less any regular expenses, and paying the amount as may be hereafter decided by us."

On the 6th of July, 1865, Mr. Punnett, one of the Arbitrators, published a long written opinion on the subject of the points remaining to be disposed of by the Arbitrators under the submission to arbitration.

On the 24th of July, the Appellant wrote to the Arbitrators, and requested them

to make their award in ten days, or that, if they were unable to do so, they would nominate an Umpire.

This was not done, and, on the 5th of August, 1865, the Solicitor of the Appellant wrote a Letter to the Solicitor of the Respondents, purporting to cancel the award; and he also sent in similar Letters [128] to the Arbitrators. On the same day Mr. Bates, the other Arbitrator, gave his written opinion on the remaining points referred to therein, stating, in substance, his differences from Mr. Punnett.

On the 12th of August, 1865, a further notice was given by the Appellant, requiring the papers to be delivered up to him. Two more written opinions were given, one by Mr. Punnett, and another by Mr. Bates, the last on the 7th of September, 1865; and Mr. Schlunk (who was afterwards appointed Umpire, but who seems to have been already selected for that purpose by the Arbitrators), on the 12th of September, 1865, made some written observations founded upon the written opinions of Mr. Punnett and Mr. Bates, the two Arbitrators.

On the 22nd of September, 1865, the Civil Court ordered the submission to arbitration to be filed under the provisions of 326th section of Civil Procedure Code of India.

The Appellant insists, that this was wrong, and that the decision of the Court below ought to be reversed, and that the submission to arbitration could not properly have been filed under the section 326 of the Civil Procedure Code, as no agreement to file it had been made, contending that it was open to him to revoke the submission to arbitration at any time.

On the 22nd of September, the day on which this decision was pronounced, Mr. Schlunk was appointed Umpire by the Arbitrators, by writing signed by them at the foot of the submission to arbitration. This appointment was confirmed by the Civil Court on the 6th of October, 1868, and, on the 17th of the same month Mr. Schlunk made his final award [129] in favour of the Respondents. The Order of the Civil Judge, of the 22nd of September, was appealed from and confirmed by the Order of the High Court of Judicature on the 15th of January, 1866. The Appellant then presented a petition to set aside the Award on the ground of irregularity and misconduct, which was dismissed as being too late; and the final Award of Mr. Schlunk was confirmed and carried into execution by the Decree of the Civil Judge on the 9th of October, 1866. The Appellant petitioned for leave to appeal from the decision, which petition was dismissed by an Order of the High Court on the 7th of January, 1867. On the same day, the High Court of Judicature at Madras, affirmed the decision of the Civil Judge of the 6th of October, 1865, confirming the appointment of Mr. Schlunk as Umpire. The present appeal is brought from all these three decisions of the High Court of Judicature.

The first question is, whether the Civil Court of Calicut had jurisdiction under section 326 of the Code of Civil Procedure in India, to direct the submission to arbitration to be filed. Their Lordships are of opinion, that upon a proper construction of the sections of that Code relating to this subject, the Civil Court had that jurisdiction. The Code, which is one of procedure, and the Act enacting it, must be construed with reference to the constitution of those Courts, and the abiding direction to them to proceed in all cases, according to equity and good conscience.

The 326th section is to this effect:—[His Lordship read it, see *ante*, [12 Moo. Ind. App.] p. 113, and proceeded].

Although this section is not expressly referred to in the submission to arbitration, still their Lordships [130] are of opinion, that the submission to arbitration was under and subject to the sections contained in the Code relative to this subject. Their Lordships are of opinion, that this submission to arbitration was entered into subject to the provisions of this Code, and that the Memorandum at the foot thereof is introduced for that purpose, and that unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them, that it was to be subject to the Act, and that this special notice of section 327, as to the enforcement of the decision of the Arbitrators, was introduced only *ex majori cautela* for the purpose of expressing what, without such expression, would nevertheless have been implied.

Their Lordships are of opinion, that according to the proper construction of this Code, as previously explained, when persons have agreed to submit the matter in

difference between them to the arbitration of one or more certain specified persons, no party to such an agreement can revoke the submission to arbitration unless for good cause, and that a more arbitrary revocation of the authority is not permitted.

Their Lordships do not think it necessary to refer to the English law on this subject further than to point out, that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer, and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration: and to put such agreement for arbitration [131] on the same footing as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract.

Their Lordships are, therefore, of opinion, that it was not in the power of the Appellant simply, at his own mere will and pleasure, to revoke the authority of the Arbitrators in whose appointment he had concurred.

It remains to be considered, whether the circumstances of this case justified the Appellant in doing so, and sending the letter of the 5th of August, 1865.

This is founded solely on the delay.

On the 24th of July, 1865, the Appellant wrote to the Arbitrators, and required that in ten days from that date they should make their Award, or in the event of not doing so, should nominate and appoint an Umpire, and this not having been done after waiting for ten clear days, he sent the notice of the 5th of August, 1865. If nothing whatever had occurred since the appointment of the Arbitrators in June, 1864, and all matters between the Appellant and the Respondents had remained in exactly the same position that they were in at the date of the submission to arbitration, their Lordships are disposed to think, that this delay of the Arbitrators would have justified the course which the Appellant adopted. But in truth the facts disclose a very different course of proceeding. In July, 1864, the Arbitrators made their Award in a very important part of the matter in difference. They dissolved the part-[132]-nership, and delivered up the business to the Appellant, who has, since that time, carried it on alone, and had done so for a year prior to the letter of the 24th of July, 1865.

A second decision of the Arbitrators relative to the Pomany farms was made in May, 1865, and acquiesced in by both parties, the Appellant and the Respondents.

A notice to the Arbitrators to make their award and to appoint an Umpire in ten days, does not appear to their Lordships to be sufficient time given to entitle the Appellant to stop all further proceedings, and to cancel all further proceedings.

It is to be observed, that a most important part of the matters referred, namely, the determination of the person who was to have the business in future, had already and speedily been determined. After the two decisions of the Arbitrators there appears to have been little that remained to be done, except to determine matters of account between the parties. What the intricacy or difficulty of settling them was does not appear, and on a question of time this is a matter of importance. It might well be, that the time occupied for that purpose was not excessive. On this point, even if it could be availing, their Lordships have no evidence. It might also well be, that ten days might be usefully and properly employed by the Arbitrators in an endeavour to remove the points of disagreement between them, and only when this was found to be impossible, that it would become necessary to refer the matter to an Umpire. On the 6th of July, 1865, Mr. Punnett stated his views in a long written opinion. Mr. Bates also stated his in a similar docu-[133]-ment on the 5th of August in that year. This was answered by Mr. Punnett on the 25th of August, and on the 7th of September, Mr. Bates replied. Before this Mr. Schlunk had been selected, though not appointed, to act as Umpire, his appointment having been delayed, as it seems, in consequence of the civil proceedings instituted in the Civil Court on the 23rd of August, 1865.

Mr. Schlunk took and considered the expressed opinion of the two Arbitrators, and made observation thereon on the 12th of September, 1865. The decision of the Civil Court asserting the jurisdiction of the Civil Procedure Code over this matter

was pronounced on the 22nd of September, 1865. On the same day, Mr. Schlunk was appointed Umpire, and he made his Award between the parties on the 17th of October following. No error is pointed out in the Award itself; a complaint is made, that Mr. Schlunk did not open up the whole matter from the beginning. It is said that he appointed no meeting, that he heard no Counsel, that he took no evidence; their Lordships are of opinion, that it was not necessary for him to do so. The parties had agreed to the arbitration of Mr. Punnett and Mr. Bates, subject to the decision of an Umpire on the points where they differed. They agreed on some important points: they expressed their decision in the first Award of the 15th July, 1854, and in the second Award of the 13th of May, 1865. They differed as to other points. They expressed this difference in writing, and they appointed Mr. Schlunk to be the Umpire to decide these points between them. This he did after, as it appears, weighing and considering the facts and arguments adduced [134] by both the Arbitrators in the documents laid before him.

Their Lordships are of opinion, that the course so adopted was correct, and that the Courts below have acted rightly in upholding the decision of the Umpire. Their Lordships do not mean to lay down, that in cases of these description, where no time is originally fixed within which the Award was to be made, it would not be open to either party to hasten the proceedings by giving notice to the Arbitrators, that the Award must be made, and an Umpire appointed within a reasonable time. But it is to be observed, that here the time which elapsed from the period when the Appellant gave the notice of the 24th of July, 1865, was actively employed. It was obviously of no use to appoint an Umpire until the points on which the Arbitrators differed were clearly defined. This was done by four papers:—First, the opinion of Mr. Punnett; second, the opinion of Mr. Bates, delivered on the same day that the notice to cancel the submission was given; third, the further opinion of Mr. Punnett, on the 25th of August, 1865; and fourth, the final opinion of Mr. Bates, on the 7th of September, 1865, and these were adjudicated upon by Mr. Schlunk, the Umpire, in his Award made on the 17th of October, 1865, but delayed apparently by reason of the civil proceedings and the necessity of obtaining the sanction of the Court to the confirmation of the Order appointing him Umpire.

If the object of the Appellant was to accelerate the proceedings by his notice of the 24th of July, 1865, he certainly succeeded in doing so; but their Lordships are of opinion, that he cannot recede from the [135] submission by reason of that notice, followed by the notice of the 5th of August, 1865, when, in fact, he has for above a year enjoyed the fruits of the Award on various points, and when it is impossible to restore the parties to the position they were in, if all the acts of the Arbitrators were to be considered null and void.

On the whole, therefore, their Lordships, without thinking it necessary to relate in detail the proceedings in the Courts in India, approve of the decisions there pronounced, viz., the Order of the 22nd of September, 1865, of the Civil Court, directing the submission to be filed; the Order of the Civil Judge of the 6th of October, 1865, confirming the appointment of the Umpire; the Order of the High Court of the 15th of January, 1866, dismissing the appeal of the present Appellant from these Orders; and the final decree of the Civil Judge of the 8th of February, 1866, confirming the Award of Mr. Schlunk, and directing the same to be carried into execution; and also the Order of the High Court of Judicature of Madras of the 7th of January, 1867, dismissing the petition of the Appellant: and consequently they will humbly recommend to Her Majesty, that this appeal be dismissed, with costs.

[136] SREE ECKOWRIE SING and Others.—*Appellants*: HEERALOLL SEAL and Others.—*Respondents* * [Dec. 7, 8, and 9, 1868].

On appeal from the High Court of Judicature at Bengal.

Ejectment to recover land as alluvial.

Land washed away and reformed in the bed of a tidal river, the ownership of which was not proved to be in the riparian proprietors of its banks (the predecessors in title to the Plaintiffs and Defendants). Held: that the forming of a chur in such a stream, after a considerable interval and frequent floods, is not *prima facie* to be ascribed to a loss from any particular portion of the adjacent lands of the riparian proprietors, nor is the land forming such chur, which had been removed by a sudden avulsion reclaimable, unless there is evidence of identity [12 Moo. Ind. App. 140].

A detached chur, independent of usage, in such a river, belongs to neither riparian proprietor; and the fact that it was subtended by the land of one is not *per se* enough to entitle him to it [12 Moo. Ind. App. 141].

The title by accretion to a new formation of alluvion land is not generally founded on equity of compensation, but on a gradual accretion by adherence to some particular land. The land so gained follows the title of that to which it adheres [12 Moo. Ind. App. 140].

The question involved in this appeal was the right to a large tract of alluvial land formed in the river Roopnarain in the Zillah of Midnapore, containing in area 1000 beegahs, under cultivation, which was claimed by the Appellants as parcel of certain Mouzahs belonging to them. The land had been, for a long time previous to the suit being brought, in the possession of the Respondents.

The land in dispute, sometimes called a chur (alluvial) land, and described also as sheekusteepur-wastee, or land carried away by the river and re-formed as alluvial land, was alleged by the Appellants as having been formerly part of their Mouzahs [137] which had been washed away by the river, and formed the chur which adjoined the Mouzahs of the Respondents, who claimed such land as part of their Mouzahs.

The suit was instituted in the Zillah Court of Midnapore, and was in the nature of an action of ejectment brought by the Appellants as Putnee Talookdars against the Respondents, and one Rampersaud Jana, described as Durputnee Talookdar, or under-tenant of their deceased Father, to recover the land described in the plaint as alluvial, the boundaries of which were set forth in a map annexed to the plaint, as having been washed away from their Mouzahs, which it was insisted by them in the plaint was to be considered as an increment thereto under Ben. Reg. XI. of 1825.

The Zillah Judge, in the first instance, referred it to an Ameen, to make a local investigation, who, having made an inspection on the spot, and examined witnesses in the presence of both parties, and made a plan of the locality, reported in favour of the Appellant's claim.

Upon this report, and after taking evidence, the Principal Sudder Ameen of Zillah Midnapore (Mr. A. Davidson) made his decree, dated the 30th of August, 1861, whereby he held, that under cl. 1, sec. 4, of Ben. Reg. XI. of 1825, the Plaintiffs were entitled to the chur in dispute, with the exception of a portion, which adjoined the Defendants' land, and decreed possession, with mesne profits.

The Defendants appealed therefrom to the High Court at Calcutta on two specific grounds, first, that the Plaintiffs had produced no reliable evidence, that in the year 1239, B.E., or previous to that date, the [138] Plaintiffs, or their representatives, were, as they alleged, in possession of the disputed alluvial land; and, secondly, that they had failed to prove, that the Mouzahs, named by them existed previous to 1239, B.E., on the site in dispute.

The High Court, consisting of Messrs. H. V. Bayley and E. Jackson, by their

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Robert Phillimore. Assessor.—The Right Hon. Sir Lawrence Peel.

decree, dated the 8th of December, 1863, were of opinion, that the Plaintiffs had not sufficiently or satisfactorily proved their case, and on that ground reversed the judgment of the Principal Sudder Ameen. Hence this appeal.

Mr. Field, Q.C., and Mr. Pontifex, for the Appellants; and Sir R. Palmer, Q.C., and Mr. Leith, for the Respondents, Heeraloll Seal, Chooneeloll Seal, and Punnaloll Seal.

On the part of the Appellants it was contended, that the evidence established, that the Mouzahs in respect of which they claimed the alluvial land in question, belonged to them, having been granted to their ancestors as Putneedars in the year 1811. That in the year 1831-32, the land, part of their Mouzahs, became submerged by the tidal river Roopnarain, and continued so submerged until about the year 1842, when it began to re-form into a chur. That in the year 1848 it became capable of cultivation; that at that time the Appellants were infants, incapable of protecting their rights; and that being owners of the Mouzahs to which these alluvial lands became attached by accretion, they were entitled to the same under Ben. Reg. XI. of 1825, sec. 4, cl. 1.

On the other hand, the Respondents submitted, [139] first, that the *onus* of proving the Appellants' title to the alluvial land, and their right to oust the Respondents, who were purchasers for value without notice of the Appellants' claim, lay on the Appellants, and put them on strict proof of title, and that they had failed to give any reliable evidence of identity of the land in support of their title to the chur; secondly, that the land ought, after its long undisturbed possession, to be presumed to belong to the Respondents; and, lastly that they had shown by their evidence, that the alluvial land was an increment to their Mouzahs, and consequently they were entitled to the same under the provisions of Ben. Reg. XI. of 1825, sec. 4, cl. 1.

Judgment was reserved, and now delivered by

The Right Hon Lord Chelmsford (Dec. 14, 1868).—This suit is brought to recover about 1000 beegahs of land, claimed as alluvial, and contained within the boundaries given in a map annexed to the plaint. The Plaintiffs must succeed or fail on their title to the land as alluvial. It is not competent for them now, the cause having been decided on this title, to raise at the hearing of their appeal a different case, viz., one simply of original ownership of the site of the lands re-formed. Had that been the case alleged, some defence might have been made, founded on the nature of a boundary river, the ownership of its soil, the character, sudden or gradual, of the original loss of land, and the effect of change from such causes in the land itself on the ownership in the soil; which defence, as is apparent from the frame of Ben. Reg. XI. of 1825, would admit of variation with varying circumstances of inundations, identification, and [140] accretion. The cause was tried before the Principal Sudder Ameen, who decided in the Plaintiffs' favour. On appeal to the High Court, that decision was reversed, and from that decree of reversal the present appeal has been preferred. The High Court simply decided, that the proofs adduced by the Plaintiffs were insufficient to justify a decree in their favour.

Had this been a case of ordinary claim to lands, wherein a Plaintiff might advance, prove, and recover on a *prima facie* title, calling for some answer of title in a Defendant, and entitling him to a decree in default of such an answer being made and proved, the propriety of the decision of the High Court might have been assailed with more prospect of success. But this is a case of a claim to land washed away and re-formed in the bed of a navigable river, the ownership of the soil of which is not commonly in the riparian proprietors of its banks, and which is not proved in this case to have belonged to the predecessor in title of either disputant. The re-forming of land in such a stream, after a considerable interval and frequent floods, is not *prima facie* to be ascribed to a loss from any particular portion of territory, nor is the land which has been removed by a sudden avulsion reclaimable unless the circumstances supply evidence of identity, which is wanting in the case before us. This re-formed land is not ascribed to avulsion, and several years elapsed between the loss of the Plaintiffs' land and the appearance of this chur. The title by accretion to a new formation generally, is not founded on equity of compensation, but on a gradual accretion by adherence to some particular

land which may be termed the nucleus of accretion. The land gained will then follow the title [141] to that parcel to which it adheres. It is obvious, therefore, that such a title is not established by mere proof of general inclusive boundaries of land, at a time long preceding the actual formation of the chur, since the lands that have such a fluctuating boundary as a tidal river, and which are themselves subject to loss and gain of quantity by acts independent of the owners' concurrence, and which may pass from side to side of the river boundary, have not the ordinary element of fixedness which belongs to immoveable estate, in the common course of things. A detached chur, independent of usage, in such a stream would belong to neither riparian proprietor; and the circumstance that it was subtended by the land of one would not be enough to entitle him to it. The decision of this case in the Court below seems to have proceeded on the mere presumptions which would have regulated the decision of a question of parcel or no parcel in an ordinary boundary dispute; for no evidence whatever was given by the Plaintiffs of the nature of the original formation of the chur, where it first appeared, to what it first adhered, and the case even now affords no ground for concluding anything with reasonable certainty, as to the original title to it.

The Defendants, it was conceded by their able Counsel, might be unable to sustain a title to the chur, as Plaintiffs; but it was urged with force and reason, that by reason of their long enjoyment and being innocent purchasers for value, they were entitled to put every Claimant to strict proof of title. They are purchasers for value without notice of any prior or superior claim. Acquisitions of the nature of this chur are often doubtful in their origin; they must depend much on oral testimony, which time is [142] constantly destroying or impairing, and it is often hard to say who is the person to whom the law would ascribe the legal ownership of them. The mere cultivation of them, like that of waste or jungle lands, carries with it no *prima facie* character of usurpation or wrong. An undisputed possession and cultivation, even though for a few years only, would the more readily induce a purchase, and a purchaser *bona fide* and without notice might with perfect honesty, and even with the favourable construction by a Court of Justice of his acts, defend his possession by insisting on strict legal proof of an adverse title.

The High Court appears to have acted upon this principle, though the Judges have ascribed too long a possession to the Defendants, and may have erred in their view of portions of the evidence. The grounds of their decisions seem to their Lordships correct: the *ratio decidendi* is not a mistaken one, though it is supported in part by mistaken reasons. They have acted, in requiring adequate documentary proof in a conflict of oral proof, in accordance with the course adopted by the Judicial Committee itself on this point, in a somewhat similar case, *Mussamat Imam Bindi v. Hurgovind Ghose* (4 Moore's Ind. App. Cases, p. 403). They were dissatisfied with the documentary proof exhibited; they have said, that better might have been brought forward had the case of the Plaintiffs been well founded. Their Lordships are not prepared to dissent from either expression of opinion. To admit documents, not strictly evidence at all, to prop up oral evidence too weak to be relied upon, is not a course which their Lordships would be inclined to approve; and none of the chittahs which [143] have been laid aside by the High Court are shown to have been admissible in evidence according to the laws of evidence regulating the decisions of those Courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from, or statements in documents not legally admissible in proof against them. The document put in evidence and relied on by the Appellants appears to be only a copy of a chittah of resumed land, and it is introduced by no evidence preparing the way for its reception. Whatever might be the value of the chittahs in general in questions between the Zemindar and his tenants or Ryots, to receive them as evidence of boundary, against a rival proprietor, without further account, introduction, or verification, would, if it obtained as a practice,—and each relaxation is apt to become a precedent for another,—tend further to encourage the manufacture of evidence in a place already too prone to the fabrication of it. Their Lordships, therefore, are unable to ascribe any error to the way in which the High Court has dealt with the documentary evidence in this cause.

It has not unfrequently happened, that their Lordships, in a conflict of decisions on questions of fact between the Judge who heard the evidence and the Court which reviewed it, have followed the finding of him who saw the witnesses and heard them give their evidence; but in this case the Judge below appears not to have sufficiently regarded the nature of the claim and the proof it should receive. He appears further to have acted mainly on the report of the Ameen, and that report, like the judgment which was founded upon it, appears to their Lordships to proceed upon a mistaken view of the issue between [144] the parties and of the burthen of proof which the Plaintiffs in this suit had to support. The conclusions of both are founded more upon the want of proof to support the title alleged by the Defendants than upon proof of that title which it was necessary for the Plaintiffs to establish in order to disturb the possession of the Defendants.

The map of the Ameen itself shows, that there were lands of other owners than the Plaintiffs so situated: that they might have been, in the course of things, a nucleus to the increment, and, therefore, an inquiry into its origin and direction was one that ought not to have been neglected. The case itself is one turning on views of evidence on which their Lordships would be reluctant to differ from the opinion of a Court more likely to know than their Lordships can be, what weight of proof would satisfy there the just expectations of a Court of Justice.

Their Lordships, therefore, agreeing with the High Court in their disregard of the chittahs, and with their conclusion that the case was not sufficiently proved, will humbly recommend to Her Majesty, that the appeal be dismissed with costs.

[See *Sham Chand Bysack v. Kishen Prosand Surma*, 1872, 14 Moo. Ind App. 602.]

[145] RAJAH BURDACANT ROY,—*Appellant*; BABOO CHUNDER COOMAR ROY and Others,—*Respondents* * [Dec. 10, 1868].

On appeal from the High Court of Judicature at Bengal.

As a rule, the Judicial Committee will not disturb the concurrent Judgments of the Courts below on a question of facts, if the facts as found are decisive of the real issue between the parties [12 Moo. Ind. App. 153].

In circumstances, from the frame of the issue upon a question of title to land, decrees of the Court below, reversed, without prejudice to a new suit being brought by the Plaintiff upon a different issue.

In a case of disputed boundaries, where one of the Claimants is in possession by virtue of a Magistrate's Order, under Act, No. IV. of 1840, it lies on the party seeking to oust him, to show a better title to the land claimed than that of the party in possession [12 Moo. Ind. App. 145, 146].

The question in this appeal was one of boundaries. The object of the suit being to recover possession of 1125 beegahs of land, with mesne profits, and, as subsidiary thereto, to set aside an Order of the Judge of the Sessions Court of Zillah Jessore, made under Act, No. IV. of 1840, and also a miscellaneous Order of the Magistrate of that Zillah under which possession of the lands in dispute had been given to the Appellant.

The facts of the case were as follows:—

The zemindary of Pergunnah Dattea, or Hosseinpoor, was in the year 1828-9 the joint zemindary of Nilcomul Paul Chowdhry and Bungseedhur Paul Chowdhry, from whom it descended to one Joychunder Paul Chowdhry, and was subsequently sold under a decree of the late Supreme Court at Calcutta, and purchased by the Respondent.

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Robert Phillimore. Assessor,—The Right Hon. Sir Lawrence Peel.

Within the zemindary is the mouzah of Jhanpa, and to the north of the lands of the village lie the lands of the village of Mullickpore, part of the Appellant's zemindary of Syedpore. The boundary line of the villages is a high ganthee (bank), which forms the northern bank or dyke of the Bawoor (lake) of Jhanpa aforesaid, which, as it appeared, joins three sides of the village, and which on the northern side had gradually silted up, and formed joallee (marsh land favourable for growing rice). Connected with and on the Jhanpa side of the Bawoor, and running parallel with it, is the bed of an old canal, also partially filled up, called the Jhennoedoha. The land which lay between the Jhennoedoha and the ganthee called the jolibila of Jhanpa, had, as alleged by the first and principal Respondent, been the property of the successive Zemindars of the village of Jhanpa from time immemorial, and had been gradually taken up into cultivation by the inhabitants of that village.

On the 24th of January, 1829, one Bunomalee Ghose, an inhabitant of Solekhada, within the zemindary of Syedpore, presented a petition to the Collector of the Zillah Jessore, in which he alleged, that a former Zemindar of Pergunnah Dattea had granted to an ancestor of the Petitioner the jungle and waste of the jolibila of mouzah Jhanpa, which was cultivated by him; that the land afterwards fell back into jungle, and was inundated, and consequently was not included in the estimate of la-[147]-khiraj land; that the jolibila was at the date of the petition cultivated by the Ryots of Nilcomul Paul Chowdhry, and Bungseedhur Paul Chowdhry and others, at that time the Zemindars of mouzah Jhanpa; that when a Lakhirajdar failed to make an estimate of his lakhiraj land, the land became liable to assessment by the Government, and the Petitioner prayed that the land might be resumed by the Government and leased to him.

The last-mentioned Zemindars filed a petition of objection, in which they stated, that the land in dispute was their rent-paying land, and not lakhiraj, and that the allegations in the petition that the land was lakhiraj were false.

In consequence of this petition, a suit was instituted by the Government, on the 23rd of April, 1829, against the Zemindars before the Collector of Zillah Jessore, under Ben. Reg. II. of 1819, in which the Government claimed a right to resume the land as lakhiraj land, not estimated as such in the return made by the Lakhirajdars. The Defendants, by their answer, stated that the land in dispute formed a part of mouzah Jhanpa, appertaining to their zemindary, and that the malguazary of the same was paid with the revenue of their other land in the zemindary.

Various proceedings in this suit took place, and on the 22nd of April, 1835, the Collector made an Order, that the land be released from the claim of the Government, and the suit be dismissed.

It appeared that in March, 1834, criminal proceedings had been instituted before the Magistrate of the Zillah Jessore by Ryots of the Appellant against one Ramcoomar Sircar, Ganthedar of Nilcomul Paul [148] Chowdhry, charging him with having cut and carried away paddy from land situate in the jolibila, on the allegation, that the land appertained to the zemindary of the Appellant, and that they held it at a jumma; whilst Ramcoomar Sircar stated, that it belonged to the zemindary of Nilcomul Paul Chowdhry. The magistrate considering, that the dispute between the parties related to the right to the land, ordered Ramcoomar Sircar to be released, and that a suit should be instituted in accordance with Ben. Reg. XV. of 1824. A suit was accordingly instituted in the Fouzdary Court, on behalf of the Appellant, against Nilcomul Paul Chowdhry and others, which was afterwards struck off the file of the Court in consequence of the failure of the Plaintiff to proceed with the same.

Subsequently the zemindary, including the mouzah Jhanpa, came into the possession of Joychunder Paul Chowdhry as Zemindar. The Appellant then instituted, on the 12th of December, 1851, a suit under Act. No. IV. of 1840, before the Magistrate of Zillah Jessore, claiming from 600 to 700 beegahs of the jolibila, alleging it to appertain to his zemindary of Syedpoor, and specifying certain boundaries. This suit was brought against Ramcoomar Sircar, as Defendant.

The case came on for hearing before Mr. F. N. Beaufort, the Magistrate of the Zillah, on the 22nd of December, 1851, when he dismissed the Plaintiff's claim, and directed that if any person should thereafter make a claim by a separate suit, the same should be tried in accordance with sec. 2 of Act, No. IV. of 1840. In his judgment he said, "As the Court had four or five times proceeded to the [149] land in

dispute, and had inspected and seen that the shore on the north of the Bawoor was high; whereas the land to the south had gradually lessened in height, and was being absorbed, and, under these circumstances, nothing appears to show the disputed land had come into the possession of the Plaintiff's tenants at Mullickpore, and at the present time it is necessary only to inquire as to who was in possession, and not to try the question of right, and nothing has been proved by the documents filed and the witnesses produced by the Plaintiff, to show that the Plaintiff was in possession; consequently it is not necessary to give the Plaintiff any time to produce other documents."

The Appellant appealed therefrom to the Judge of the Sessions Court of the Zillah, Mr. R. M. Skinner, who set aside the last-mentioned Order, and remanded the case for a re-hearing.

The case was re-heard before Mr. C. S. Belli, the then Magistrate of the Zillah, when the suit was dismissed. The Appellant appealed against the same in the Sessions Court, and Ramcoomar Sircar instituted a cross appeal.

The two appeals came on for hearing before the Session Judge, Mr. R. M. Skinner, on the 16th of August, 1852, when he reversed the above decision of the Magistrate, and dismissed the appeal of Ramcoomar Sircar, on the ground that the Bawoor Jhanpa was within the zemindary Syedpoor, then in the possession of the Appellant, and that his possession should be upheld.

Under an Order made thereon the Appellant took possession of 700 beegahs, or thereabouts, of the land so decreed to him, and subsequently one [150] Kaleedoss Dhur, and Shamasoonderee Dossia instituted a suit against the Appellant, alleging, that the Husband of Shamasoonderee Dossia had received a pottah from him in the year 1844; and that on the 23rd of May 1856, they had obtained a decree in their favour in respect of 200 beegahs of the last-mentioned quantity of land, and that the Appellant thereafter held possession of the same through them as his alleged tenants. Gobinchunder Sircar, the Son of Ramcoomar Sircar, Gantheedar, and others, had formerly held possession of the land, of which the Appellant obtained possession as aforesaid, and they were in possession of 425 beegahs of land adjoining the same, under a lease from the Respondent, according to certain described boundaries. Kaleedas Dhur, and Shamasoonderee Dossia after obtaining possession of the 200 beegahs of land, attempted to cut and carry away the crops from a portion of the 425 beegahs, and a petition was accordingly presented to the Deputy Magistrate of the Zillah, by Gobinchunder Sircar, the prayer of which was, that the boundaries of the villages of Jhanpa and Mullickpore might be adjusted according to one measurement to be made by the Thackbust (survey) department. An Order was thereupon issued to the Darogah of the Singha Thannah adjacent to Jhanpa, directing him to mark out the boundaries according to certain instructions contained in the Order. In accordance with the report of the Darogah, the aforesaid Jhennoedoha was fixed by the Magistrate as the boundary of the two villages, and the 425 beegahs were severed from the zemindary of the Respondent, and added to that of the Appellant. This Order was, on the 12th of September, 1857, [151] confirmed on appeal by the Judge of the Sessions Court of the Zillah.

In consequence, the Respondent, Baboo Chunder Coomar Roy, who had purchased the zemindary on the 13th of May, 1856, brought a regular suit on the 23rd of September, 1858, in the Civil Court of Zillah Jessore, against the Appellant and others his tenants, to recover possession of 1125 beegahs of land, with the wasilat of the same, estimated at Rs. 9000, and for a decree to reverse the several Orders of the Magistrates before mentioned. The plaint, after setting forth the principal facts before stated, alleged that, with respect to the boundaries, the land appertained to the mouzah Jhanpa, situate within, and belonging to, the zemindary of the Respondent, and had always been in the possession of the former proprietors of the zemindary; that it was not a part of the mouzah Mullickpore in the zemindary of the Appellant, and prayed that the Court would set aside the Orders above mentioned, and would give possession to the Respondent of the disputed land in accordance with certain boundaries therein specified, and the plaint set forth the mesne profits and interest from the date of the purchase made by the Respondent of the zemindary.

A separate answer was put in by the Appellant, the principal Defendant, in which pleas in bar were pleaded, to the effect, first, that the Son and heir of the Gantheedar,

Rameoomar Sircar, then deceased, with others, should have been joined as Plaintiffs in the suit : secondly, that the plaint was defective under sec. III. Ben. Reg. IV. of 1793, by reason of the mode of calculation of mesne profits as stated in the plaint, being unexplained ; and, thirdly, that the suit [152] was barred by sec. XIV. of Ben. Reg. III. of 1793. The answer then alleged facts contradictory of the statements made by the Respondent in the plaint, that the lands and the Bawoor Joalee on both sides of the Bawoor, the lands in front of the Bawoor, and the Bawoor itself were all included in the mouzah of Mullickpore, within the zemindary of the Appellant. The other Defendants put in answers supporting the Appellant's case.

In compliance with sec. X. Ben. Reg. XXVI. of 1814, the following issues were recorded, first, whether the land belonged to Plaintiff's zemindary, and was held by him through his Ryots, till he was dispossessed by the Order under Act, No. IV. of 1840, or whether it belonged to the Defendant's Zemindary of Syedpore ; and secondly, whether the Plaintiff was entitled to the restitution of the land in reversal of the Orders of the Magistrates and survey authorities.

Evidence was gone into at great length on both sides.

The hearing of the suit took place on the 3rd of September, 1860, before Mr. S. C. Belli, the Judge of the Civil Court of Zillah Jessore, who, by his judgment of that date, decided, that the Respondent was entitled to recover possession of the land up to the ridge or bank on the north side of the Bheel and according to certain other boundaries described by him, and it was directed that an Ameen should be appointed to mark and fix the boundaries.

The Appellant appealed from this judgment to the High Court of Judicature.

The hearing of the appeal took place on the 23rd of April, 1863, before Messrs. H. V. Bayley, [153] and G. Campbell, two of the Judges of the High Court, when they affirmed the judgment of the Lower Court, and dismissed the appeal with costs.

The appeal was from this decree of affirmance.

The principal question raised by the appeal was, whether the land appertained to mouzah Jhanpa, a village situated within the zemindary of the Respondent, as an accretion to the lands of that village, by the gradual dereliction of the water of the Bheel or lake Jhanpa, or whether, as contended by the Appellant, the lands appertained to mouzah Mullickpore, part of his zemindary of Syedpore, on the further side of the lake.

Mr. Forsyth, Q.C., and Mr. Pontifex, for the Appellant, and Mr. Leith, for the Respondent, Baboo Chunder Coomar Roy.

Their Lordships' judgment was delivered by

The Right Hon. Lord Chelmsford.—Their Lordships would not have departed from their usual course of not disturbing the concurrent judgments of the Courts below on a question of fact, if the facts as found were in truth decisive of the real issue between the parties.

That issue is, whether the lands in dispute belong to the zemindary of the Appellant, or to the zemindary of the Respondents.

The Appellant is in possession under a Magistrate's Order ; and it, therefore, lay upon the principal [154] Respondent, who was the Plaintiff in the suit, to oust him from that possession by showing a better title to the property claimed. It is an admitted fact, that at the date of the perpetual Settlement both estates were settled for with the Defendants' ancestor either as one zemindary or as two separate revenue-paying estates. It is also clear, that the Bheel from which these lands have been gained was part of the zemindary. The resumption suit proves that no right to reassess lands which might be gained from the Bheel remained in the Government.

In 1796 the two properties were severed by means, as it is said, of a sale for arrears of revenue, and Pergunnah Dattea, which includes the village of Jhanpa, was acquired by the Paul Chowdrys through whom the Plaintiff claims.

It is also an admitted fact, that the Julkur and every right which could be exercised by the Zemindar while the land was covered with water (what the Judge calls the " aqueous assets ") remained in the Appellant or those whom he represents. In these circumstances, it lay upon the Respondents to show that the effect of the revenue sale was to transfer to them, as part of the village of Jhanpa, any soil which might be recovered from the Bheel. It has been argued at the Bar, that this alleged title

of the Respondents must be inferred from the conformation of the ground or the name of the village. But if any presumption, however slight, can be drawn from these circumstances, they seem to their Lordships to be more than rebutted by the admitted fact, that after the sale the Julkur of the Bheel remained in the Appellant's ancestor. It has been argued, that [155] the right in the Julkur may be distinct from the right in the soil, and this no doubt is true. But here both had been admittedly in the Appellant's ancestor, and it lay upon the Respondents to show when and how they were severed.

The facts found by the two Courts below bear only upon the latter part of the first issue, settled in the cause, viz., whether the Plaintiff was in possession of the lands through their tenants, and had been ousted by the Order in the suit under Act, No. IV. of 1840. That finding does not touch the material part of the issue, viz., whether the land in dispute appertains to the Plaintiffs' mouzah Jhanpa. Even if it were proved, that some jolibila land was annexed to the village, and passed as part of it at the time of the sale, it does not follow that the land which has since been recovered from the Bheel (and great part of the land in question has been admitted to have been so reclaimed since the date of the sale) would so pass. Yet the argument at the Bar went the full length of contending, that the whole site of the Bheel, if cleared of water and made capable of cultivation, would fall into and become part of the Respondents' village, Jhanpa, though whilst it was covered with water it remained under the dominion of the Appellant. For such a contention their Lordships can see no ground. The decision of the Fouzdary Courts, as to the point of possession, was final. The question in this suit was, whether the Plaintiff, by showing a better title than the Defendants, could recover possession from them. In their Lordships' judgment the original title to this land was in the Appellant's ancestors, and it has not been shown that [156] they ever lost it. It is possible, though not very probable, that if there had been fuller evidence of the original Settlement of these properties, and of what passed by the revenue sale, this might have been done. Their Lordships, therefore, in the peculiar circumstances of this case, though they think that the appeal ought to be allowed and the present suit dismissed with costs, and will make their humble recommendation to Her Majesty accordingly, will also recommend, that Her Majesty's Order be made without prejudice to the right of the Respondents to bring, if they shall be so advised, a new suit for the recovery of the lands in question, upon the ground that the title to these lands passed to the Paul Chowdhrys, from whom the Respondents derive their title by the revenue sale.

[157] SHAH MUKHUN LALL, and Others.—*Appellants*: BABOO SREE KISHEN SINGH and Others,—*Respondents* * [Dec. 10, 11, and 12, 1868].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Construction of Ben. Reg. XV. of 1793, as to usurious interest.

A Mortgage, Lease, and Agreement, held to constitute one mortgage security, the three instruments being entered into as a device to avoid the usury laws within the meaning of section 9 of Ben. Reg. XV. of 1793. Held also, that the Mortgagors were entitled to redeem at any time, before the expiration of the term created by the Lease, on payment of what might be due on the mortgage security for principal and interest at twelve per cent. and costs.

In a suit by Mortgagors under an usufructory mortgage to establish their right to redeem; for cancellation of the mortgage deed, possession of the lands, and payment of the surplus:—Held, that the *onus* lies on the Plaintiffs to show that the Mortgagees in possession were paid in full by perception of the profits [12 Moo. Ind. App. 192].

* Present: Members of the Judicial Committee—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Robert Phillimore. Assessor: The Right Hon. Sir Lawrence Peel.

Semble: Ben. Reg. XV. of 1793, sec. II.; with respect to the non-production of accounts of receipts by Mortgagees in possession, is still in force, and unrepealed by Act, No. XXVIII. of 1855 [12 Moo. Ind. App. 194].

In an appeal from the Sudder Court, the Appellants, by the leave of that Court, appealed separately to the Queen in Council. On reversal of the Sudder Court's decree, it appearing that the two Appellants had a common interest, only one set of costs of appeal were allowed in moieties to the separate Appellants, as upon one appeal.

It is not too late, on an appeal from a final decree, to raise a question as to interest decided in an Interlocutory decree not appealed from [12 Moo. Ind. App. 184, 185].

There were two appeals in this case, brought from a decree of the late Sudder Dewanny Adawlut at Calcutta, reversing a decree of the Judge of Zillah Sarun.

The suit in which these appeals were made was [158] thrice brought on appeal before the Sudder Court, and twice remanded to the Zillah Court for re-trial. The suit related to what had been decided to be a mortgage transaction, which decision had not been appealed from, and as the case upon appeal stood, the Respondents' contention was that the Appellants, as Mortgagees in possession, had or ought to have realized more than the principal and interest secured by the mortgage. The Appellants denied that they had realized even sufficient to keep down the interest, but they did not file the accounts required by Ben. Reg. XV. of 1793, Sec. II. By the decree appealed from, it was decided, that there was sufficient *prima facie* evidence adduced by the Respondents, the Mortgageors, to show that the loan had been fully liquidated.

The circumstances of the case were as follows:—

On the 18th of May, 1837, Baboo Juggutputtee Singh and Baboo Koylas Puttee Singh, the ancestors and predecessors in title of the Respondents, and who are hereafter referred to as "the Singhs," executed a deed of lease, or ticca, nominally to Roy Ram Kishen Doss, a Gamastah of the ancestors and predecessors in title of the Appellants, the Mortgagees, of thirty-nine mouzahs and a six share of Dochurk Kistobunmah in Zillah Sarun, for a term of twenty years, at a fixed annual jumma of S. Rs. 24,858. 10a., and by the terms of the deed it was specially provided that: "Besides the fixed rents, whatever profits may accrue, the same will be the remuneration of the Ticcadar, and we (the Singhs) are not, nor will be, entitled to demand anything save the rents." No consideration was expressed by the deed to have been given for the grant of the lease.

[159] On the 5th of June, 1837, the Singhs, in consideration of the sum of S. Rs. 1,50,000, borrowed by them from the Banking house of the Appellants' predecessors, executed a deed of mortgage for a term of twenty years of the same property as was comprised in the lease to Roy Ram Kishen Doss. The mortgage deed stated the revenue payable to Government in respect of the property to be S. Rs. 11,358. 10a.; the interest payable on the principal moneys borrowed was to be at the rate of 12 annas per cent per mensem. The deed then recited a lease to Roy Ram Kishen Doss for the term and at the rent aforesaid, and contained the following provisions:—"We (the Singhs) have assigned to the Mortgagees the rental of this ticca tenure due by the Ticcadar for liquidation of interest on the money received on mortgage, and for paying the Government revenue, agreeably to the conditions of the deed of assignment (hereafter stated) on the Ticcadar. The money due by the Ticcadar as fixed rental of his tenure on account of these mouzahs mortgaged, is Rs. 24,858. 10a. Having annually realized the said amount from the Ticcadar, agreeably to the deed of assignment executed by us, you (the Mortgageors) will, therefore, discharge Rs. 11,358. 10a., the public dues, and credit the balance, Rs. 13,500, to the liquidation of the interest on the mortgage debt. And it is competent to the Mortgagees, after the expiry of the term of the ticca lease, to settle the said mouzah either with that very Ticcadar, or with any other person, or to reduce the same under their own possession, and dispose of the lands by any kind of settlement, such as bhaolee (where crops are shared between Landlord and Tenant), or nukdee (where the rents are paid in cash). If by [160] such settlement and disposal of the lands, anything more than the amount for which we (the Singhs)

had settled the lands be obtained, we or our heirs have no claim, and will not claim anything beyond carrying to credits the fixed rental of the Ticcadar. If we claim excess profits on account of the said mortgaged lands, then, agreeably to this very deed, such a claim shall be deemed false in Civil or Criminal Courts. We further agree, that within the term of this deed of mortgage we will not redeem the property, or cancel the deed of mortgage. At the expiry of the term of the mortgage deed, we having paid up in one sum the whole of the mortgaged debt at the end of the year, whatever year that may be, together with any arrears of rents on account of the lands, shall redeem the mortgage, and having removed the names of the Mortgagees from the register of the Collector, will take back the property."

On the 6th of June, 1837, kutkina or sub-leases of the property comprised in the lease and mortgage were granted by Roy Ram Kishen Doss to under-lessees, and under such sub-leases an aggregate jumma of Rs. 35,067 was reserved, leaving a profit jumma to Roy Ram Kishen Doss of about Rs. 10,500. A considerable amount of the rents reserved by the sub-leases was further secured by the Singhs to Roy Ram Kishen Doss by an Ikrarnamah, dated the 29th of August, 1837, mortgaging other property.

On the 7th of June, 1837, the Singhs signed a letter of assignment, directing Roy Ram Kishen Doss to pay the rent reserved by his lease to the Mortgagees.

On the 28th of September, 1847, the Singhs instituted a redemption suit against the Mortgagees [161] and Roy Ram Kishen Doss, and by their plaint alleged that, needing advances to pay off various Creditors, they had, prior to the preparation of the ticca lease, applied to Roy Ram Kishen Doss, the Gomastah or Manager of the Mortgagees' Bank, to lend them the money, and that they delivered to him the rent-rolls of the property, afterwards mortgaged, showing an income of Rs. 35,067. That thereupon Roy Ram Kishen Doss, as Agent of the Appellants' predecessors, caused the above ticca lease, mortgage deed, kutkina or sub-leases, Ikrarnamah, and Letter of assignment, to be executed by the Singhs. That although the several instruments were expressed to be executed at different dates, the transaction was, in fact, a single transaction; and the execution of the mortgage and lease in different names, and on apparently different dates, was merely a contrivance to evade the Usury laws, and to enable the Mortgagees to recover or appropriate an amount of interest beyond the legal rate. That the whole amount of principal and interest properly recoverable by the Mortgagees had been paid off from the usufruct of the mortgaged property, and that at the date of the plaint there was, in fact, a balance due to the Singhs. The plaint contained a statement of the accounts showing that the sum of Rs. 613. 8. was the balance due to the Singhs, and concluded by praying, that the deeds might be cancelled, and that the Mortgagees might be directed to pay the balance due from them.

The Mortgagees, by their answer, denied that any connection existed between them and Roy Ram Kishen Doss, or between the mortgage deed and the ticca lease; and alleged that, so far from the prin-[162]-cipal and interest secured by the mortgage having been paid off, the whole principal moneys, together with an arrear of interest, was still due.

Roy Ram Kishen Doss by his answer admitted possession of the property, but denied that any connection existed between him and the Mortgagees. He did not at that time allege, that he had not realized and received the full amount of the annual jumma of S. Rs. 24,858. 10a. reserved by the lease granted to him; but, on the contrary, insisted that by the terms of his lease he was personally entitled to any profits he might make beyond that sum.

Evidence was entered into by both parties. By the Singhs to prove that the mortgage and lease were one transaction, and a mere contrivance for exacting illegal interest, and by the Mortgagees and Roy Ram Kishen Doss to prove, that there was no connection between the mortgage and ticca lease.

On the 26th of August, 1850, the Principal Sudder Ameen of Zillah Sarun (Mirza Sudeek Khan) gave judgment on the issue so raised, and decided that the mortgage and ticca lease were separate transactions, and dismissed the claim of the Singhs with costs.

Against that decision the Singhs appealed, and on the 14th of July, 1852, three of the Judges of the Sudder Dewanny Adawlut, Messrs. Colvin, Mills, and Mytton,

gave judgment on the appeal, and decided that the ticca lease to Roy Ram Kishen Doss, and the rehunama (mortgage) to the banking-house of Shaw Behari Lall Rughooburdial were to be considered as one transaction, in the light of a simple usufructuary mortgage so contrived as to evade the Usury laws. Their reasons were, that the ticca lease was distinctly [163] granted to the Agent of the Mortgagees, and the whole of the documents connected with the arrangement were evidently designed for the purpose of leaving the Plaintiffs in possession of the property, under the form of sureties of nominal Kutkinadars, they paying a rent of Rs. 35,067, the balance (after paying the Government revenue) of which was for the benefit of the Mortgagees. That the Plaintiffs had not come into Court to ask that the principal should be declared forfeited in consequence of infraction of the law of usury; but they had simply stated, that from the usufruct the Defendants had realized more than the principal and stipulated interest, and, therefore, prayed that the property mortgaged might be restored to them. That the Respondents' Pleader had given up the plea of multifariousness, which indeed could only doubtfully apply to the case. The Court thought it sufficient, with respect to the property sued for as pledged under the ikrar of August, 1837, to treat that part of the suit as null. As regarded the other mouzahs involved in the transaction of the 18th of May and the 5th of June, 1837, the Court was of opinion that, under section 10 of Ben. Reg. XV., of 1793, the Mortgageors had a right of re-entry, provided that the principal sum, Rs. 1,50,000 with the simple interest thereon, had been realized from the usufruct of the property, of which the profits of the ticca farm were to be considered a portion, and that, although the period of the deeds might not have expired. That the law was distinct and unmistakable, that all such mortgages were to be considered cancelled, and redeemed whenever the principal sum and interest shall have been realized. That for the Respondents it had been contended, that if other [164] conditions of the deed were to be set aside to his prejudice, that one limiting the interest to 12 annas per cent per mensem, should also be set aside in his favour, and the full legal interest allowed. The Court found, however, that the law would not admit of that; section 5. Ben. Reg. XV., of 1793, ruling that no higher interest than that stipulated between the parties was to be decreed. That for the above reasons, in reversal of the decision of the Principal Sudder Ameen, they remanded the suit of the Plaintiffs, *quoad* the property covered by the ticca lease and rehunama (mortgage), and directed an account to be taken as to the sums realized by the Ticcadars, or Mortgagees, up to date of suit; and if they amounted on that date to the principal sum lent, Rs. 1,50,000, with interest thereon at the rate of 12 annas per mensem, they directed that possession should be given to the Plaintiffs; and that any sum beyond that, and not over and above the excess sued for, and any collections made subsequently to that date of recovery of possession, with the ordinary interest thereon to date of payment, should be refunded, and made good to them. The wasilat on the other villages pledged in the ikrar of August, 1837, were not to be included in the account above directed to be taken.

None of the Defendants appealed against this decision of the Sudder Court.

After the suit was remanded by this decision, the Judge of Zillah Sarun transferred it to the file of his own Court.

By a proceeding, dated the 17th of December, 1853, and recorded under sec. 10 of Ben. Reg. XXVI., of 1814, the Zillah Judge of Sarun fixed the issue to [165] be tried as follows: "What sum has been really realized by the Mortgagees from the estate?" and that it was necessary, for this purpose, that the accounts should be rendered by the Defendant in the manner laid down in sec. 11, of Ben. Reg. XV., of 1793.

By another proceeding of the same Court, of the 18th of April, 1854, the Pleaders of the Mortgagees were asked if they would file the papers of the gross collections from the Ryots of all the mouzahs, and they answered that they could not, whereupon the Judge ordered that an Ameen should be appointed to ascertain the mesne profits and gross collections of the mouzahs.

The Ameen appointed to take the accounts accordingly proceeded to the property, and having instituted inquiries, settled the accounts as required, which showed that

an amount in excess of the principal and interest had been obtained by the Mortgagees.

On the 6th of September, 1855, the suit came on again for hearing before the Zillah Judge, Mr. H. Atherton, who stated that, after consideration of the statements of each party, a careful attention to the circumstances of the case satisfied him, that the Ameen's papers showed a far greater sum than was ever likely to have been realized, or than was proved in any way to have been realized; and he stated himself to be convinced that the Mortgagees were deceived when they made the advance to the Plaintiffs on the terms of nine per cent per annum. The Judge then formed a calculation on materials which were not before the Court, and in respect of which there was no evidence, and ultimately decided that Rs. 51,306 12a. 6p. principal were due to the [166] Mortgagees at the date of suit, and dismissed the claim of the Singhs with costs.

Against this decision cross appeals were preferred to the Sudder Dewanny Adawlut. The ground of the Singhs' appeal being, that the account and calculation of the Zillah Judge was wrong, and that under the provisions of sec. 11, Ben. Reg. XV., of 1793, the parties in possession of the usufruct should have been first compelled to produce and verify their own accounts. The other parties urged, as a ground of their appeal, the mode in which the accounts were taken; that the suit was not admissible until the term of the lease had expired, and that the transactions of the lease and mortgage were distinct.

On the 26th of October, 1857, the Sudder Court, consisting of Messrs. Patton, Sconce, and Torrens, gave judgment on the appeals; and after disposing of a preliminary question, the judgment proceeded as follows:—"We, therefore, enter at once on the question relating to the accounts, including the objection taken by the (Plaintiff) Appellant, in No. 311, that the Mortgagees in possession had not rendered any account, as required by law. We observe, that this failure on their part should most properly be considered a default, to the consequences of which they might have been held strictly liable, had it not been, as shown by the Judge's proceedings in the deputation of an Ameen, and in other respects, that under the direction of the Judge, the Defendants understood that the production and verification of their accounts was not of necessity required of them. The first step, certainly, for the Judge, in a case of the kind, was to enforce this from the Defendants, and without their compliance he should not have had recourse to [167] the deputation of an Ameen. Notwithstanding this error in the Judge's proceedings, taking into consideration the very long time during which the suit has been pending, the Court has directed its attention to the detailed objections which are preferred to the accounts drawn up by the Judge, with a view, if possible, of making corrections, and passing final orders, without the necessity of again remanding the case. We find, however, that the primary error of no accounts having been verified by the parties in possession renders this course impracticable. When the Judge had last the accounts before him for decision, he had several very conflicting statements to consider:—First, that of the Plaintiffs, which gave the net profits of the Mortgagees at the full amount of the debt, with interest, leaving a surplus balance due to themselves. Second, the statements of the Defendants, which gave the collections brought to credit for liquidation of the debt only at Rs. 128,478. 10a. 3p., all of which sum was swallowed up in payment of interest; and, lastly, the accounts prepared by the Ameen after the local inquiry which the Judge had himself directed, but which he found it necessary to set aside, as well as the other statements. The mode of adjustment which he adopts, as given in his own words, was as follows:—"It being absolutely impossible to ascertain the exact amount collected from the Ryots, I have, during the years in which the mouzahs were let in farm, except during the first year (*i.e.*, when the kutkinas stood) added 10 per cent to the farming jumma; and taking this sum as representing the collections from the Ryots by the Farmers, after payment of collection expenses at 10 per cent during the first year, S. Rs. 35,067, less the jumma [168] of Tolah Purvez Khan, for as this settlement broke down the first year, it cannot be supposed the Farmers gained anything by it, or did more than pay their expenses. I estimate the Farming profits at 20 per cent, including the collection expenses; and deducting 10 per cent for these and the management charges, the 10 per cent added

to the foregoing jumma gives, I believe, a sum for which the Mortgagees must be considered liable; and I am persuaded they cannot be answerable for more, nor do I believe as much would have been realized if the mouzahs had been retained in khas management after the first year. The years, however, during which the mouzahs were not in farm are very few in number, and this satisfies me khas management was not considered by the Mortgagees to be most profitable. Had it been so, the mouzahs after the first year would not have been given in farm at all. The amount of collections I have fixed with reference to the Ameen's and Put-waree's papers, and the farming jummas obtained for the same mouzahs. The Mortgagees do not appear to have made fraudulent settlements with their own people. The Judge then throws out sums charged in the Ameen's accounts to the Defendants, collected on account of value of trees, as well as sums for which they had claimed credit of law expenses, etc., etc. The objections urged to this mode of adjustment by the Judge are various, the (Plaintiffs) Appellants, in case No. 311, objecting that certain kabooleats filed by the other party, and admitted by the Judge, to show the farming jummas after the first year, had not been attested, and the (Defendants) Appellants objecting that the kutkina jumma to its full amount had not been realized in the [169] first year, and that they had been charged with the jumma of Tolah Purvez Khan, and other mouzahs not in their possession. On the whole, we conceive the best course is to return the case to the Judge, with instructions that he call on the Bankers to duly file and attest their own account-books, which show the actual receipts by them on account of this mehal under the mortgage; that these accounts be taken together with those of Roy Ram Kishen Doss, showing the collections from the mehal, some of which papers he appears already to have filed, though they have been unnoticed by the Judge, and left unauthenticated and unattested. The kabooleats which Roy Ram Kishen Doss has filed to show the farming jummas under him after the kutkina leases first granted had fallen, should also be inquired into and attested, all with reference to the provisions of section 11, Ben. Reg. XV., of 1793; and in conducting this inquiry and verifying the accounts the Judge can apply the provisions of sec. 5, Act, No. XIX. of 1853."

Mr. Sconce added an additional note as to the manner in which the accounts should, in his opinion, be taken.

There was no appeal from this decree, the effect of which was, that the Defendants to the suit admitted their liability as Mortgagees in possession to file and prove, as provided by sec. 11, Ben. Reg. XV., of 1793, the accounts showing the actual collection made and expenses incurred during the period to which the suit related.

Upon the suit going back to the Zillah Court after such second remand, all the parties beneficially interested in the principal moneys and interest secured by the mortgage showed a very strong disinclination to [170] be sworn to the accounts. And it was alleged that Roy Ram Kishen Doss was at Benares, and by reason of his extreme old age he was desirous of staying there. The Judge of the Civil Court, by a proceeding, dated the 26th of June, 1859, excused the personal attendance of the parties beneficially interested, but declared that the presence of Roy Ram Kishen Doss was absolutely necessary. But Roy Ram Kishen Doss having obtained a medical certificate, the Civil Court ultimately directed a commission to issue for his examination, and transmitted formal interrogatories, together with the Books of the Banking house, for the purpose of such examination. Such a course of procedure precluded any cross-examination of the witness. The examination consisted of the answers to three questions. In his deposition, Roy Ram Kishen Doss identified twenty Books as showing the accounts of collections made during the period to which the suit related. The Books so sent did not appear to have been withdrawn from the precincts of the Court of Benares, yet Roy Ram Kishen Doss deposed to having fully examined the Books, and to having made up an abstract showing the results of the accounts therein contained. By his own admission he had not seen the Books before for a period of more than five years. He did not allege, that the entries in the Books had been made by him or under his superintendence. By his evidence it appeared that, not only was no part of the principal moneys secured by mortgage discharged, but that, in addition, at least Rs. 7000

were due in respect of the principal, and Rs. 13,900 were due as interest. On behalf of the Mortgagees, nine witnesses employed in their Banking business at Chuprah were called to prove [171] the correctness of the entries in the twenty Books produced. Some of these witnesses could not read or write, and none of the witnesses were in a position to depose to the alleged entries in the Books, which included the receipts under the mortgage. No witnesses were called to prove the actual receipts and disbursements.

On the 20th of May, 1859, the Zillah Judge, Mr. H. Atherton, for the third time pronounced judgment in the suit. Such judgment was as follows:—"The account of the sums which I considered the Mortgagees should be held to have realized was prepared in consequence of the Court's decision of the 23rd of December, 1852, having determined that the sums actually realized from the Ryots should be ascertained where a middleman had been created between the Mortgagees and the Ryots; and in the case in which that rule was made no fraud was established as the ground of its necessity. I, therefore, considered that it was necessary to hold the Mortgagees answerable for the account of settlements made by them with the Farmers, and such further profits as the Farmers might themselves have obtained. The Mortgagees from the first, object that many of the farming leases made by them broke down, and that they never realized the sums agreed to be paid by the Farmers; but it seemed to me, that they should be held answerable for the arrangements made by themselves, and that they should be held to have received the sums engaged for. The Mortgagees have now given in their Books and accounts, proved by those who have had the management of their affairs, and declared to be correct; and these show, as the Mortgagees have all along declared, that the sums [172] realized from the mortgaged villages do not, after deducting expenses of management and payment of the Government *malguzary*, equal the amount of interest due on the advance made to the Plaintiffs; and the question is, Can these books and accounts be accepted? The Plaintiffs in argument do not deny, that the Mortgagees gave pottahs to the parties whose *kabooleats* are produced; but they say, that the leases were fraudulent; there is, however, no proof of this—nothing to show clearly, that during the time embraced by the suit the Mortgagees actually realized more than their accounts show—though balances could, of course, be recovered afterwards; and suits, it is alleged, have since been going on against some of the Farmers holding under the Mortgagees. But the actual receipts to the date of suit have now, by the Court's orders, to be considered, and under all circumstances of the case, I think the collections according to the Defendants' account Books should, to a certain extent, be admitted. As I explained in my former decision, it is impossible to determine with anything like accuracy what sums may have been actually realized from the Ryots in any particular village, by the parties entitled to collect them, during a series of years; but there are in this case *data* on which a fair opinion may be formed as to the Mortgagees' receipts, and I think the Plaintiffs may, with strict fairness, be bound by their own Mortgage Bond, since it is well known that whenever a property is mortgaged by a Zemindar, and the deed does not expressly state that during a certain period principal and interest are to be realized from the proceeds, the Zemindar, on receipt of an advance, makes over property of such value that the yearly proceeds, as nearly [173] as can be calculated, equal the interest of the advance. Now the Plaintiffs, by their Mortgage Bond, agreed, at the end of the twenty years, to repay the advance in one sum, and the stipulated *jumma* was just enough to cover the interest of the loan, and the Government revenue, payable by the Mortgagees. The Plaintiffs, as shown in my former decision, acted with bad faith in representing the *Mofussil* assets of the villages at Rs. 35,067, and having so acted, may, I think, be held to have made over to the Mortgagees property the proceeds of which would about equal the interest on the advance; and in this case I think, as the actual receipts, according to the account-books, do not show an excess beyond the amount due for interest, the Mortgagees must be held not to have received more during the years of which the suit applies, but I would hold Plaintiffs free of all claim on account of the balance of interest, Rs. 13,914, said by the Defendants to be due to them up to date of suit. The Plaintiffs cannot show by receipts of the Mortgagees that, during the period under review, sums have

been realized by them which are not entered in their accounts; and in such a case as this no less satisfactory proof can be admitted as invalidating the accounts declared to be correct by those who have prepared them. The Principals themselves have, it is asserted, and such assertion is not denied, never acted directly in this matter. They reside at Cawnpore, Lucknow, and Muttra, and their Banking business at different places is managed by their Agents, whose accounts they accept and declare to be true to the best of their belief. Holding, then, that it is not proved, that the Defendants, during the time embraced by the suit, have realized any portion of the principal. [174] I dismiss the claim, with the Defendants' costs, and interest till realization."

From this decision the Singhs appealed to the Sudder Dewanny Adawlut, and on the 28th of June, 1862, three of the Judges of that Court, consisting of Messrs. Trevor, Kemp, and Seton-Karr, gave judgment on the appeal as follows:— "We are unanimously of opinion, that the accounts filed in this case are not such accounts as the law requires to be furnished by a Mortgagee. The law, sec. XI., Ben. Reg. XV., of 1793, in clear and unmistakable terms, requires the Mortgagee to deliver accounts of the 'gross receipts,' and of his expenditure. 'Gross receipts' we hold to mean, the gross sums paid by the tenantry of the estate mortgaged. It is the positive duty of a Mortgagee to file full and complete accounts, and such accounts must be attested by the Mortgagee; the attestation of an Agent or Servant is wholly insufficient. The Mortgagees have not been able to show us any invincible disability on their part to perform the mandatory requirements of the law. The banking Books filed by the Mortgagees were not filed with the answer, but eleven years after the institution of the suit; and even admitting that these accounts are above suspicion, they are not the accounts which the law requires a Mortgagee to furnish. It is true, that Roy Ram Kishen Doss, the Gomastah of the Mortgagees, has deposed to the truth and correctness of these accounts; but, as stated above, if such accounts are not the accounts which the law expects, then the attestation of the Servant of the Mortgagees is worth nothing. An attempt has been made by the Pleader of the Mortgagees to shift the responsibility of furnishing the accounts required by [175] the law upon Roy Ram Kishen Doss. It has been urged, that the Bankers had nothing to do with the ticca lease, or with the Mofussil management of the mortgaged properties, and that they have filed all the accounts in their power. We, however, find that this Court, in 1852, ruled that the mortgage and ticca lease were not separate transactions, but one transaction, entered into with a view of evading the usury laws. We, therefore, must hold the Mortgagees, and not their Servant, Roy Ram Kishen Doss, to be the parties responsible for the due fulfilment of the requirements of the law; and as they have withheld the accounts of the gross Mofussil receipts and expenditure, which accounts, if filed, would be the best and only legal evidence, the presumption is, that the production of these accounts would not bear out their plea of non-liquidation of the loan with interest from the usufruct of the mortgaged properties. We, therefore, proceed to estimate, in the best mode available, from the evidence adduced by the Plaintiffs, what amount has been realized on account of principal and interest by the Mortgagees. The Plaintiffs (the Mortgagors) have filed a detailed account of the sums received on account of principal and interest by the Mortgagees. This account embraces a period from 1245 Fusly to 1254 Fusly. The sums recovered on account of principal and interest for each year of account are exhibited, and the result is, that the whole sum advanced, or Rs. 1,50,000, with interest at the rate of 12 annas per mensem, or 9 per cent per annum, had been more than recovered from the usufruct of the mortgaged properties. The Pleaders of the Respondents (Appellants) admit the ticca lease and the kutkina lease, and these documents show the [176] gross assets of the mortgaged properties, together with the sum available after payment of the Government revenue for the gradual liquidation of the sum advanced, with the stipulated interest. The general correctness of these accounts has not been impugned by the pleaders of the Respondents (Appellants); but it was argued, that if the mortgage and ticca lease transactions are to be held one, and not separate, and entered into to evade the usury laws, the condition to limiting the interest to 9 per cent per annum should be set aside, and the full legal interest be allowed; that if the calculation of interest be made at the rate of 12 per cent, instead of 9 per

cent, the balance would be against the Mortgagors. This point, however, was decided by the Court in 1852; further, section 5, Ben. Reg. XV., of 1793, rules that no higher interest than that stipulated between the parties is to be decreed. Holding, for the above reason, that the Mortgagees have wholly failed to comply with the requirements of the law, and that there has been sufficient *prima facie* and un-rebutted evidence adduced on the part of the Plaintiffs (the Mortgagors) to show that the loan, with interest, has been fully liquidated; we, in reversal of the decision of the Judge, decree to the Plaintiff re-entry over such of the mortgaged estates as have not passed into the hands of the Appellants in Nos. 431 and 432, with costs of both Courts."

Subsequently Baboo Juggutputtee Singh, one of the original Plaintiffs in the suit, died, and the Respondents, Baboo Sree Kishen Singh, Baboo Baichoo Singh, and Baboo Joogul Kishore Singh, were substituted as parties in his place, Shah Rughoobur Dyal, one of the original Defendants, also died; and [177] his Son, then Shah Fequeer Chand, was substituted in his place; and Roy Ram Kishen Doss also died, and his Widow, Doorga Dubi, was substituted as a party in his place.

The Appellants presented to the Sudder Dewanny Adawlut the ordinary petition for leave to appeal to England, and the other Defendants, Shah Mukhun Lall and Fuqueer Chand, also presented a separate petition to that Court for the same purpose, and leave to appeal was respectively granted. The representative of Roy Ram Kishen Doss did not appeal.

As the interest of the Appellants in the matters in question were similar, though not identical, the appeals were heard together.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants, Shah Mukhun Lall and Shah Fuqueer Chand. Our contention is, that the *onus* of proving the liquidation of the whole of the mortgage debt and interest lay on the Plaintiffs in order to entitle them to a decree for the redemption of the mortgage and possession, which they failed to do, *Forbes v. Ameeroonissa Begum* (10 Moore's Ind. App. Cases, 340). It appears, however, on the contrary, from the accounts filed and the evidence, that a large balance, in respect of the mortgage debt, was still remaining due when the suit was commenced. The mortgage accounts filed by the Defendants, as heirs of the Mortgagees, and by their Agent and Trustee, Roy Ram Kishen Doss, were the proper accounts; and they were duly verified with reference to the circumstances of the case. The Interlocutory decree of the late Sudder Court of the 26th of October [178] 1857, remanding the suit, and directing the Mortgagees to verify their accounts, was founded in error. It is true no appeal was taken from that decree with respect to the operation of the 11th section of the Ben. Reg. XV. of 1793, and the Act, No. XIX. of 1853, sec. 5, yet it is not now too late on an appeal from the final decree to impeach that decree, *Jones v. Gough* (3 Moore's P.C. Cases (N.S.), 1); *Forbes v. Ameeroonissa Begum* (10 Moore's Ind. App. Cases, 340); *Maharajah Moheshur Sing v. The Bengal Government* (7 Moore's Ind. App. Cases, 283). The accounts were rendered under the Act, No. XIX. of 1853. Even if the final decree of the Sudder Court appealed from was right in deciding that the mortgage accounts were neither proper accounts nor properly verified, which we deny, yet the decree was wrong in not remanding the suit to the Zillah Court, in order that the proper accounts might be filed and verified, instead of decreeing, as it did, in favour of the Plaintiffs for redemption of the mortgage and possession of the mortgaged lands.

Mr. Charles G. Smith appeared for the other Appellants, Shah Koondun Lall and Shah Phoondun Lall, but was not heard.

Mr. Kay, Q.C., and Mr. Pontifex, for the Respondents.—As the original transaction of mortgage has been held by the Courts below to have been merely a contrivance to enable the Mortgagees to extract from the Mortgagors more than the legal rate of interest, it was an infraction of the law of usury, and, therefore, void under the provisions of Ben. Reg. XV. of [179] 1793, sec. 9; *Wise v. Kishenkoomar Bous* (4 Moore's Ind. App. Cases, 201, 218); and consequently, the Appellants are not legally entitled to require payment from the Respondents either of principal or interest. The allegations in the plaint, and the evidence adduced by the Singhs, showed that the mortgage loan, with interest, had been fully liquidated; and, therefore, it having been proved that the mortgaged property was let at an annual rent of Rs. 35,067, at the commencement of the mortgage transaction, the *onus* was on the

Appellants to show that such was not the aggregate rent during the whole period of their possession, *Farbes v. Amecroonissa Begum* (10 Moore's Ind. App. Cases, 340, 358); the onus is on the Mortgagees in possession to prove that the principal and interest is not paid by perception of the profits, *Blackwell v. Bowes* (Sel. Cases in Ch., 1725); and in the absence of proper accounts, which the Mortgagees were bound to file, Ben. Reg. XV. of 1793, sec. 11; *Gould v. Tancred* (2 Atk., 533); which could be the only legal evidence against the Respondents, having failed to show that the aggregate rents during such period did not amount to Rs. 35,067, the accounts stated by the Respondents must be accepted. In a loan transaction of such magnitude, it is not credible that the lenders would not, previously to advancing the mortgage money, have inquired into the income derivable from the property mortgaged, or that in one of the instruments connected with the transaction they would have permitted such income to be stated at that sum, without having satisfied themselves that such amount was capable of being realized. In such a transaction originally fraudulent, and under the [180] circumstances connected therewith, it cannot be supposed that the Mortgagees did not keep full and correct accounts of the gross receipts from, and the expenditure and outgoings incurred in respect to, the property mortgaged. The neglect of the Appellants to file such accounts makes the presumption inevitable that such accounts, if they had been filed, would have supported the case made by the Respondents.

Sir R. Palmer, Q.C., in reply.

Judgment having been reserved, was now delivered by

The Right Hon. Lord Chelmsford (Jan. 18, 1869).—This is an appeal in a mortgage suit instituted more than twenty years ago. The original Plaintiffs, the Mortgagors, named Singhs, sued in the Court of the Sudder Ameen of the Zillah Sarun, the representatives of the original Mortgagees named Lall, who were eminent Bankers, having coties in various parts of India, and also one Roy Ram Kishen Doss, the Gomastah of the firm, to cancel on redemption three several instruments, viz., the Mortgage deed, lease, and agreement named in the plaint, and which will hereafter be more particularly described. These instruments the Plaintiffs alleged to constitute one mortgage security of the Bankers, the Lall Defendants. All the Defendants asserted, however, as to two of these instruments, viz., the lease and the agreement, a different title and interest, conferring a separate interest, as distinct from the Bankers, on their Gomastah, the last Defendant.

The lease bore date the 16th of May, 1837; it was for twenty years, and reserved a rent of S. Rs. 24,858 10a., payable to the Singhs by the Gomastah. The mortgage deed bore date the 5th of June, in the same year, and pledged the same property also for twenty years to the Bankers, to secure a loan of S. Rs. 150,000 from them to the Singhs. The interest reserved was nine per cent. Ostensibly, the Mortgagees were entitled to the rent alone, the surplus of which, after deducting the Government revenue, left a balance of Rs. 13,500; exactly the sum calculable as interest on the loan at nine per cent. Roy Ram Kishen Doss granted, as apparently a subsidiary arrangement, sub-leases to certain Kutkinadars, nominees of the Mortgagors, at rents aggregating S. Rs. 35,067; and the Mortgagors guaranteed to him those receipts of rent. Ostensibly, therefore, the several instruments evidenced a mortgage transaction, providing only for interest alone from the usufruct, leaving the principal debt to be paid otherwise in full, and a beneficial lease in the Gomastah yielding an annual profit of Rs. 10,200. All the Defendants insisted that the ostensible was also the real character of the instruments.

The Ikrarnamah was executed by the Mortgagors, the Singhs, to the Gomastah on the 29th of August, in the same year, as a security to cover certain losses incurred or anticipated from adverse claims, for the due payment of their rents by the sublessees, the Kutkinadars, and for a further advance of Rs. 7000, bearing an interest of twelve per cent. The Plaintiffs sought also to recover possession, alleging the Mortgagees, the Lall Defendants, whom they treated as Mortgagees in possession, to be satisfied from the usufruct, and further claimed as mesne profits a small alleged surplus from the same source.

This claim, then, of the Mortgagors to redeem before the twenty years were past, was denied in [182] respect of all that the lease covered, which was the whole that the mortgage deed included. The suit further raised these questions: at what rate

of interest, whether nine per cent. or a higher rate, the Plaintiffs were entitled at any time to redeem; whether the loan was at usurious interest; and whether the several instruments were a device or means, within section 9 of Ben. Reg. XV. of 1793, to conceal usury, and so evade the Usury laws.

The suit, therefore, involved issues of title, and not simply one of payment on an admitted title to redeem under a contract, raising no question as to the terms of redemption.

The suit was heard in the Sudder Ameen's Court, which decided in the Defendants' favour on all the issues. From that decision there was an appeal to the Sudder Dewanny Adawlut, which decided that the three instruments formed one mortgage security, as alleged in the plaint, and were a device to conceal usury, that the contract was usurious, but that as the plaint was for redemption, the Mortgage was redeemable on payment of the principal and nine per cent., the interest expressed to be payable in the Mortgage deed; and the Court, reversing the finding, sent the case back to be tried in the Court below on the inquiries which it directed, and which were limited in effect to satisfaction of the Mortgage at the date of suit. The cause was then transferred from the Ameen's Court to that of the Zillah Judge, who, before he proceeded to try the question submitted to him, called for the accounts of the gross receipts and disbursements directed by Regulation XV. of 1793, sec. 11. The Defendants, who subsequently renewed the dispute as to the unity of the [183] title, declared themselves unable to give the accounts demanded of them. The Judge then deputed an Ameen to take an account of, and report as to the receipts. The Ameen reported, and found that the Defendants were overpaid, to a much larger amount than the Plaintiffs' own case declared them to be. The Court rejected that report, went itself into the inquiry, found the Plaintiffs still indebted on the account, and dismissed the suit. From that decision there was again an appeal to the Sudder Court, which reversed that decision, directed that the accounts should be produced, and further, directed certain additional inquiries to be made, the precise character of which need not here be stated. The cause was again heard, after much preliminary litigation as to the nature of the accounts required, and the proper mode of verifying them.

The Court again decreed in favour of the Defendants, declaring a considerable sum, exceeding Rs. 50,000 to be still due, and on that ground dismissed the Plaintiffs' suit with costs, without any declaration as to title. From this decision the Plaintiffs, and also the Defendants, appealed to the Sudder Court, the Defendants raising anew their contention as to the rate of interest, that twelve per cent. should be declared to be the due rate. The Sudder decided the case in favour of the Plaintiffs, and decreed their claim in full, except as to the wasilat, and from that last decision the present appeal is brought.

The accounts received in the Court below were declared by the Sudder Court not to be the proper accounts, and that Court considered itself entitled to presume, from the non-production of the right [184] accounts, that they, if produced, would show the mortgage satisfied. The statement of the rental and the accounts annexed to the plaint formed the basis of the decision, the correctness of which, as to the amount of income in the time of the Mortgagor's possession, they considered to be *prima facie* established. The accounts actually rendered were the Banking Books of the Defendant's Banking firm, containing a statement of their receipts; and the accounts of the Gomastah of the Bankers, who was, in truth, the person, as Manager, best acquainted with the transactions, and a Trustee, as it was found in effect, for the Mortgagees. He was examined under a commission, and deposed to the correctness of the accounts which he gave in. The existence of any other accounts did not appear.

As the Regulation required the Mortgagees to swear to the accounts, the Court considered the attestation by the Gomastah insufficient. On this last appeal to the Sudder, the question of the rate of interest was again raised by the Defendants in their objection to the appeal; the Judges said they had already decided the question, and again declared that they abided by their decision, thinking it correct. They expressed no opinion whether they were excluded by their procedure from reconsidering the matter on a new appeal to them. It is not at all material to the decision of this case to determine, whether they could or could not have entered into that question, in any way, had they thought their previous opinion on the point

erroneous. Their Lordships think, that the question as to the interest is open on this appeal, though the Plaintiffs might have appealed, and did not, from the Interlocutory [185] decree on the point. This point is governed and settled by the cases of *Forbes v. Ameroonissa Begum* (10 Moore's Ind. App. Cases, 340) and *Maharajah Moheshur Sing v. The Bengal Government* (7 Moore's Ind. App. Cases, 283).

The first question to be determined by their Lordships is, whether the decision of the Sudder Dewanny Adawlut, that the interest must be calculated at nine per cent. only, is correct. It is clear, that if the Mortgagees had been suing the Mortgageor on the mortgage deed for the debt, they could have recovered no higher rate of interest than nine per cent., the contract being in writing, and incapable of being varied by parol evidence; but this is by no means decisive of the question; for supposing that the extra profits on the several engagements forming one mortgage security had amounted only in the whole to three per cent., making up twelve per cent. only in all, precisely the same consequence would have ensued: the reserved interest would have been correctly viewed as constituting part only of the profit, and as such would have been all that the parties stipulated for as to that part of the transaction, but it would not have measured the stipulated return for the loan annually. The rules of evidence, and the law of estoppel, forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own salutary protection; one of which is, when one party, for the advancement of justice, is permitted to remove the blind which hides the real transaction; as, for instance, in cases of fraud, illegality, and redemption, in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature [186] for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms, that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships in this Committee to the consideration of Indian appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded, not so much on any positive law, as on the broad and universally applicable principles of justice. The case of *Forbes v. Ameroonissa Begum* (10 Moore's Ind. App. Cases, 356) furnishes one instance of this doctrine having been so applied, where it is said in the judgment of their Lordships,—“The Respondent cannot both repudiate the obligations of the lease, and claim the benefit of it.” Unless, therefore, some positive law has said that in cases similar to the present, the written engagement, though not extending to the whole profit stipulated, must be adhered to against the Defendant, though the Plaintiff may go beyond it, to show the full extent of the profit, and so to be relieved from the consequences of his actual contract, their Lordships must hold, that the bargain disclosed should be performed so far as the law allows; in other words, that twelve per cent. was in this instance the interest to be computed.

The decision of the Judges of the Sudder Dewanny Adawlut on this point, was founded, not on any grounds of equity, but upon their construction of the Law. They considered that they were bound, by the terms of the 5th section of Regulation XV. of 1793, to give no more than the interest stipulated, and that [187] nine per cent. was that rate of interest, thus in reality begging the question in dispute. Their Lordships have, therefore, to consider the real meaning of the words used in that section, which meaning will be best ascertained by an examination of other parts of that Regulation.

In India, amongst the Hindoos, the restriction as to interest by their law was, that interest stopped when it equalled the loan. The interference with the rate of interest is, therefore, a thing of positive law, and cannot be extended beyond the provisions of the Regulation. By the 2nd section of the Regulation in question, a minimum rate of interest, and that a high one, much in excess of twelve per cent., was directed to be decreed; and by the 3rd the maximum rate of interest was reduced to twelve per cent., in the case only of debts exceeding 100 sicca rupees. The rates prescribed by the Regulation in the several cases enumerated, were fixed rates, constituting both a maximum and minimum in the cases aforesaid, which were limited to contracts between, and prior to, named dates. Then, by the 4th section, in causes of action arising on or after the 1st January, 1793, the

Courts were not to decree any interest on any sum whatever, above the rate of twelve per cent. per annum. From that time this was the limit beyond which no claim to interest could be enforced in respect to contracts entered into after that date; and it practically governed other cases where interest could be decreed, irrespective of contract. But inasmuch as the words of the earlier sections standing alone might seem to prescribe a rate of interest irrespective of agreement, and so lead to misapprehension of the meaning of the law, the [188] framers of it, by the 5th section, declared further, that if a lower rate of interest than any of the rates authorized to be awarded shall have been stipulated between the parties, no higher rate of interest than the rate so stipulated is to be decreed. This plainly relates to the real agreement between the parties, constituting an actual legal stipulation; for it constitutes a limitation of the 4th section, as well as of the others. It does not extend to the cases comprised within the 9th section, where a device or means are used to disguise the real contract as to interest, for the provisions are inconsistent. The language of the 5th section would be violated by a construction of the word "stipulated," which would confine it to "expressed." Such a construction would be an extension of a penal enactment to a case not within its language and obvious objects, and that where another section did provide for the case before the Court.

The 6th, 7th, and 9th sections apply in terms to remedies in suits brought to enforce, not to suits brought for relief against a contract. To bring a case within the 8th section, the excess must be specified in the contract itself. The 9th section does not declare the contract itself void, nor direct any pledge to be returned, without redemption. The 10th section furnishes an argument, that such was not the design. But even if this did not appear, a penal law, and especially one of so peculiar a character as that contained in the 9th section of this Regulation, is not one to be extended by construction. This section is one *in penam* against the concealment of the usury; for the open violation of the Regulation entails, under section 8, only a forfeiture of interest. If the 9th [189] section were so extended by construction as to invalidate the contract itself, and make it, and the conveyance also obtained under it, null and void, then, inasmuch as there are no saving words, an innocent purchaser without notice, from the Mortgagee, by assignment of the pledge, would be unable to retain it, even for the just debt and legal interest. Their Lordships, therefore, think that the only section of the Regulation at all applicable to the present suit brought by a Plaintiff to set aside his contract, and have restitution of the pledge on terms of redemption, is the 10th section. If any case were needed to enforce so plain a rule (which, however, has been questioned), that of *Eshenchunder Singh v. Shamachurn Bhuttoo* (11 Moore's Ind. App. Cases, 20) emphatically points out, in the language of Lord Westbury, "the absolute necessity that the determinations in a cause should be founded on a case either to be found in the pleadings, or involved in or consistent with the case thereby made." The present suit is one for redemption, nor for declaring a forfeiture, and must be decided according to the rules applicable to the former suit. If the transaction were simply void, and no estate at all passed, it is obvious that the remedy to recover the land would be a possessory suit, against which limitation would run from the moment of entry. It cannot be treated as a voidable or redeemable estate between Mortgagor and Mortgagee, for one purpose, viz., to escape the limitation law, and as a void estate for another. If the estate in the lands created by the lease can be determined before the expiration of the twenty years, that can only be effected by coming to the Court for equitable relief, and submitting to the usual terms on [190] which such relief is granted. What, then, are these terms? The Court will not, in the interests of justice, permit inconsistency and untruth of statement: will not permit a Plaintiff to say, "I promised to give the Defendant fourteen per cent. on his loan to me," and seek relief against him on that allegation; and permit him also the next instant to say, "the contract is expressed for nine per cent., and I will tie my Opponent down to that term," that lower rate must be deemed to have been stipulated, and so to form the measure of his right to interest. The reply to this will be, "you have told us what the real bargain was, and on this statement you have made your application for relief, which you can obtain only on equitable

grounds." Their Lordships find in the Regulations no positive law forbidding the application of these principles of justice to the case.

The 10th section rather leads to the contrary conclusion, viz., that in a case circumstanced like the present, the Mortgagee may retain his pledge until he has received out of it his debt, with interest at twelve per cent. At the time when this Regulation was passed, the receipt of profits in lieu of interest under a simple usufruct mortgage was common, as indeed appears by the introductory words of the clause. As to mortgages executed before the 28th of March, 1780, the usufruct might be allowed even after the Regulation, in lieu of interest up to that date. Then, after that date, that dividing point of time, and subsequently to it, the character of these mortgages suffered a change. The mortgage possession, instead of enduring by title for the stipulated time, was made liable to abridgment by satisfaction from the usufruct, and a claim to interest [191] arose in some cases where it did not exist before. The perception of the profits in many cases did not constitute receipt of interest, but was in lieu of any. Then, as to all usufructuary mortgages to be made after the dividing time which was before the Regulation, it makes also provision, and subjects alike, all the enumerated mortgages to cancellation and redemption whenever the principal sum, "with the simple interest due upon it," shall have been realized from the usufruct of the property subsequent to the 28th day of March, 1780, or otherwise liquidated by the Mortgagor. It applies, then, to all alike, though the circumstances of them all were not originally similar, subjects them to one provision, and imposes interest, in some cases, where there was no contract for it before. This section, having so provided, drops designedly the words "stipulated" and "specified" which would have been inappropriate in many of the cases, and uses, in more correct language, this expression: "the simple interest due upon it." This simple interest would, of course, in all cases where no interest was named, be twelve per cent.; but where a higher rate was named, against which the usufruct was to be a set-off, that is, a receipt "in lieu" of it, the reduced rate would be twelve per cent., and all interest alike would be "due" by force of the enactment, even where interest did not exist before; therefore, as this is the case of an usufructuary mortgage, by means of which a profit higher than the return of twelve per cent. was to be made, and as relief is sought, viz., to have the pledge restored as cancelled or redeemed by satisfaction of the usufruct, the clause which is most closely applicable to the claim is the 10th section, the [192] terms of which are large enough to embrace, and were designed, in fact, to embrace, some cases where the law itself made the interest "due." The Regulation, then, rather seems to favour than prohibit the restoration of the pledge, on the Court terms, that is, on reduced terms of interest imposed by the law. The real transaction appearing, and no prohibitory law intervening, the Court is left free to do justice in the particular case, and if the spirit of the 10th section regulate the case, it will sanction a redemption at the higher rate, allowing the actual contract so far as the law allows it. For the above reasons their Lordships think the interest should have been calculated at the higher rate of twelve per cent.

This view of the case would suffice to show, on the Plaintiffs' own estimate, that the decree appealed from cannot be maintained, since the allowance of twelve per cent. would, on that account annexed to the plaint, show that the mortgage was not fully satisfied at the date of the institution of the suit. Their Lordships, however, must proceed to consider the other objections urged to the decree, and to view the conduct of the parties through this long protracted litigation with a view to their decision on the subject of costs.

The suit was brought to establish the title to redeem, for cancellation of the instruments, for possession of the lands, and payment of a small estimated surplus. It lay on the Plaintiffs to show that the Mortgagees were paid in full, out of their receipts. It was not also a suit to make the Mortgagees chargeable for non-receipt of profits, which they might have received with common care and attention. A [193] Mortgagee is not an assurer of the continuation of the same rate of profit which his Mortgagor was able to raise. Much depends, in India, on personal qualities. The very change of management and possession may cause a falling-off of receipts. Therefore, an estimate of a preceding rental does not suffice to show actual receipts, yet it is on this fallacious estimate, at the outset, that the calculation of the Plaintiffs, which

they annexed to their plaint, proceeds. Again, the Plaintiffs make no deduction for those parts of the pledged property which turned out to be subject to prior charges, and the calculation of interest proceeded also on a wrong basis. Had these defects, apparent on the face of the plaint, been duly dealt with at the inception of the case, this long litigation might have been, if not ended, limited at least at an earlier stage. It is, on the other hand, to be remembered that the Plaintiffs claimed in their suit to have the character of the mortgage itself ascertained and decreed. In this they have succeeded, against a long, vain, and unfounded opposition, for the case of the Defendants, on this part of the case, when closely investigated, is found inconsistent. It is not credible that the Bankers would take, for so large a loan, a security which, on their present statement, has left them always losers, even of some part of the interest. The property was in the neighbourhood: the Gomastah was a man of business not likely to err so greatly in the valuation of the pledge: therefore, to this part of the claim a groundless defence was made, which has failed, and the suit has established a very important right in the Plaintiffs' favour, though they have proved to be wrong in their estimates of the receipts and the rate [194] of interest. The conduct of the Mortgagees, in not giving in the accounts at an earlier stage, may be ascribed to the nature of their defence, and in no greater degree exposes them, than that defence itself does, to suspicion. If they meant to insist on that right, of course they would not have prepared and kept their account on an inconsistent principle. A great part, therefore, of the obstruction on this subject must be ascribed to this, that they viewed the transaction in its actual, whilst their Opponents and the Court viewed it in its legal, aspect. The case does not afford room for supposing that any extortionate interest was in view, though interest exceeding the legal rate has been stipulated for. The Mortgagees were Bankers, Traders probably, realizing in their business a profit beyond the legal rate of interest, and they may have meant no more than to realize a profit proportionate to the risk, in the calculation of which the danger of loss by litigation cannot be excluded.

The judgment now appealed from mainly proceeds on the non-production of the right accounts under Regulation XV. of 1793. Their Lordships incline to think that provision must, as regards this suit, be taken to be still in force and unrepealed by Act, No. XXVIII. of 1855. It is unnecessary to decide the point, as their Lordships think that, assuming it to be in full force, it has received, in the judgment under review, too strict an interpretation. Assuming it to be in force, what was the duty which it imposed on the Appellants? The duty which they were bound by law, in the character ascribed to them by the decree, which was not questioned by the Appellants on this point, was to keep an account of the [195] gross receipts from the property mortgaged, and also the expenses of management and preservation. Some difficulties might attend a very rigid compliance with this Regulation. Their Lordships desire to enforce, by everything which may fall from them on the subject, the duty, as well as the policy and prudence, of keeping as full, complete, and plain an account of the transactions attending the management and receipts of an estate mortgaged as the nature of the case will admit. It is obvious, however, that the language of the section which applies to the common case, must receive a construction such as may suffice to accommodate its strict salutary provisions to the variable and different natures of estates and possession. The gross receipts must be such as the Mortgagor himself, previous to the mortgage, would have been entitled to, and if he could not, by reason of an intervening lease, call for the account of the collections, neither can his Mortgagee: and also, if, at the time of the mortgage, a valid engagement, not designed to exclude accounting, is made by common consent, qualifying the nature of the usufructuary possession, the account of the receipts must be subject to that modification. The terms of the law are evidently not inflexible terms; and in like manner must be construed the provision as to the attestation of the truth of the accounts, which provision must necessarily be flexible, like the former; for the Mortgagee is to verify only his gross receipts and his expenditure, not the rents, nor the extent of arrears, nor the causes of such arrears: he is not, in fact, directed, then, to make out and verify such an account as might be established against him in a hostile suit, but only his gross receipts and his expenditure. The [196] common rule *qui facit per alium facit*

per se, would apply to him. What is done by his Agent is done by himself, and the accounts of the property managed by the Agent, though prepared by the Agent, are the Principal's accounts. He, though by delegation, must deliver in the accounts, and he must in some mode swear or depose that they are true and authentic. Must it necessarily be by his own personal oath in all cases? How can he do that if he knows nothing at all about them? He may have no belief, and may even suspect them to be false: for he may suppose himself to have been deceived by his Agent. Can the Legislature seriously be supposed to have contemplated anything so immoral as that a man should swear positively to knowledge of that of which he has, and can have, no personal knowledge. If it be urged that he may swear to his knowledge and belief, still that rational permission is a modification and expansion of the terms of the law. The words are without any exception, and in terms apply to Women, Infants, Lunatics, persons out of the Country, and others managing necessarily remote possessions, by Agents whom they must employ, and in whom they may confide. Can the Indian Legislature, which recognized Gomastahs by legislation, be supposed ignorant of their large authority and responsibility? And can it have resolved to make this direction to take an oath imperatively obligatory on every Mortgagee alike in every conceivable case? Their Lordships think otherwise. They think that the language which, like other provisions of the earlier Regulations, is curt and applied to the more common cases, must, to preserve even the spirit of the enactment itself, be construed reasonably, as admitting, in case [197] of necessity, of some delegation also in the person deputed to perform the duty of attesting the accounts. If the general Manager who did all, and knows all, with whom the Mortgagors, with that knowledge, contracted, whose name is used, whose accounts in one sense they are, and who, far more than mere representatives, knowing nothing of their own knowledge of the transactions, satisfies the spirit of the law by swearing to the truth of the accounts, it is such a reasonable compliance with the spirit of the law, at least, that its performance, in a case circumstanced like the present, by a substitute, furnishes no ground whatever for suspecting malpractice or designed evasion of the law, and with that alone their Lordships are concerned in this case, since the mere mode of the verification has no other importance in this case, than as it raises a case of suspicion against the accounts themselves. The mere mode of their verification, under the circumstances of this case, does not raise, in their Lordships' minds, any distrust. The contents of the accounts themselves, however, furnish more grounds for doubting their accuracy. They show the interest alone not covered by the receipts. The Bankers and their Gomastah were experienced men of business. The loan is large. The property was not likely to be unknown to the lenders as to its general productiveness.

No change of circumstances accounting for so great a decline is disclosed, and the decision below of the Judge of the Zillah Court does not justify the conclusion that the whole debt, and some arrears of interest, still remain unsatisfied. Some explanation of this may be afforded by the circumstance that the Mortgagees long insisted on a state of [198] accountability very different from that adjudged: and there does appear to their Lordships reason for thinking the accounts rendered to be so far unsatisfactory as to have justified the Court had it directed a further inquiry: that is, supposing the Plaintiff's prospect of success in his present suit to have been such as might have been prejudiced by the omission to direct that further inquiry.

Their Lordships, however, think that the Sudder Court was not justified in inferring, from the omission to render satisfactory accounts, under the circumstances of this case, that the mortgage had been satisfied when the suit was commenced. Had the state of the accounts, and the dealing as to them, raised a case of presumptive evidence of payment, still the conclusions from the evidence in this case cannot be supported: for the calculation of the Court is not formed on a correct basis, either as to the interest or as to the property: it makes no deduction for losses which the evidence in the cause discloses, arising from the partial loss of the property pledged, and some litigation which ensued thereon: it excludes, also, the evidence which the suit and the inquiries and proceedings subsequently to the Interlocutory decree afford, as does also the failure of the arrangement, through the instrumentality of the Katkinadars, that the collections never really equalled the

gross estimated rental. This evidence, so far as it reached, destroyed, *pro tanto*, the presumptive evidence of the correctness of the estimated receipts. Presumptions, even in *odium spoliatoris*, have known reasonable limits. They must not be conjectures, nor grounded on *data* which the evidence itself shows to be inexact. Had this case [199] been one in which the whole account between these parties could be taken, their Lordships would have remanded the case for further hearing; or, had the Plaintiffs' own case disclosed a probability, even, that a further hearing could decide it in their favour, their Lordships, under its peculiar circumstances, would have been disposed to adopt the same course under some restrictive direction; but there is not the slightest ground for supposing the income of the estate larger than the Plaintiffs' own calculation; and even assuming that to be incapable of reduction, the allowance of twelve per cent. involved the dismissal of his plaint. In general, the dismissal of a suit should carry with it its consequence of liability for the costs, and this case is one brought against Mortgagees. But, in the opinion of their Lordships, the present suit affords several substantial grounds for a departure from that rule. The suit was brought, not simply for possession, on an allegation of satisfaction from the usufruct, but to establish the true relation between the Mortgagors and Mortgagees, the true nature of the case, the disguised usury, and the disputed unity in one mortgage title of the three several instruments before explained. So far it was successful, and it, therefore, cannot be ascribed to a litigious, vexatious spirit; it has established points most important to the future true adjustment of the mortgage accounts, and cannot be said to have been unproductive of future benefit to all concerned. And in respect of the costs of the proceedings had in the Courts below subsequently to the Interlocutory decree of the 14th of July, 1842, their Lordships have to observe, that those proceedings would have been unnecessary had the Appellants [200] then appealed against the Sudder Court's decision as to the rate of interest; and, further, that the unsatisfactory result of the inquiries directed by that decree, and the failure of the Courts below to ascertain by evidence the actual amount of the gross collections, are, in some measure, due to the unsatisfactory character of the accounts rendered by the Appellants.

The appeal of the Judge of the Zillah Court simply dismisses the Plaintiffs' suit, which, in some important parts of it, had succeeded. That judgment, therefore, cannot be restored without alteration. Errors have been committed in this suit, in a nearly equal degree, by both Litigants. Their Lordships think, that the decree of the Sudder Court should be reversed, except so far as it reverses the decision of the Court below, and that it should be declared, that the mortgage, lease, and agreement mentioned in the plaint, and there alleged by the Plaintiffs to constitute one mortgage security, did constitute that one security; that the Mortgagees were the Lall Defendants, and the Defendant, Roy Ram Kishen Doss, was only their Agent, and had no interest in the lease or agreement distinct from that of the Mortgagees, who are accountable, as Mortgagees in possession, to the Plaintiffs in this suit for all moneys received by them in respect of the rents and profits of the mortgaged property by virtue of the said lease. That the three instruments were entered into with a view to evade the usury laws by a device or mean, within the meaning of the 9th section of Regulation XV. of 1793; and that the Plaintiffs were and are entitled to redeem at any time, though before the expiration of the twenty years' term created by the lease, on [201] payment or satisfaction of all that may be due on the mortgage securities for principal money, interest, and costs, such interest to be calculated at twelve per cent.; but that, it appearing that the Plaintiffs have failed to prove that the mortgage debt, with interest and costs, had been satisfied at the time of the institution of the suit, the said suit should be dismissed without costs, and that the decree of the Court below, of dismissal of the Plaintiffs' suit, should be restored, so far only as to include that Order of dismissal, with the declaration and alteration above stated, and that, with a view to the due enforcement of the Order of Her Majesty in Council, the High Court should be directed to remand the cause to the Court below, and to order the decree of dismissal simply to be restored, with the above declaration and alteration. And their Lordships will further advise Her Majesty, that each party should pay their own costs of the appeal to the Sudder Court, hereby partly reversed; and that any costs of such last appeal as may have been decreed and paid, and which are inconsistent with such Order of Her Majesty, should be re-

funded, or otherwise dealt with as justice may require. Their Lordships think, that the Appellants are entitled to the ordinary costs of this appeal; but they are of opinion, that those costs ought not to have been swollen, by the severance, in defence of the four persons representing the original Mortgagees, and the presentation of two distinct appeals. They will direct the Registrar to tax these costs accordingly.

By the Order in Council made on the appeal, it was ordered, that the decree of the late Sudder Dewanny Adawlut at Calcutta, of the 28th June, [202] 1862, be reversed, except so far as it reversed the decision of the Court below, and that it be declared that the mortgage, lease, and agreement mentioned in the plaint, and there alleged by the Plaintiffs to constitute one mortgage security, did constitute that one security, that the Mortgagees were the Lall Defendants, and the Defendant, Roy Ram Kishen Doss, was only their Agent, and had no interest in the lease or agreement distinct from that of the Mortgagees, who are accountable, as Mortgagees in possession, to the Plaintiffs in this suit for all moneys received by them in respect of the rents and profits of the mortgaged property, by virtue of the lease; that the three instruments were entered into with a view to evade the usury laws, by a device or mean, within the meaning of the 9th section of Regulation XV. of 1793, and that the Plaintiffs were, and are, entitled to redeem, at any time, though before the expiration of the twenty years' term created by the Lease, on payment or satisfaction of all that may be due on the mortgage securities for principal money, interest, and costs, such interest to be calculated at twelve per cent.; but that it appearing that the Plaintiffs have failed to prove that the mortgage debt, with interest and costs, had been satisfied at the time of the institution of the suit, the suit is to be dismissed without costs, and the decree of the Zillah Court, of the 20th of May, 1859, for the dismissal of the Plaintiffs' suit, restored, so far only as to include that Order of dismissal, with the declaration and alteration above stated, and with a view to the due enforcement of this Order, Her Majesty is further pleased hereby to direct the High Court to remand the cause to the Court below, and to [203] order the decree of dismissal simply to be restored, with the above declaration and alteration; and that each party are to pay their own costs of the appeal to the Sudder Court, hereby partly reversed; and that any costs of such last appeal as may have been decreed and paid, and which are inconsistent with this Order, are to be refunded, or otherwise dealt with as justice may require.

[See *Rajah Suttosurrun Ghosal v. Moheschunder Mitter*, 1868, 12 Moo. Ind. App. 263; *Wise v. Juggobundhoo Bose*, 1869, 12 Moo. Ind. App. 477.]

MUTTUSAWMY JAGAVERA YETTAPPA NAICKER, Zemindar of Yetteyapooram,
—Appellant; VENCATASWARA YETTAYA,—Respondent * [Dec. 2, 1868].

On appeal from the High Court of Judicature at Madras.

Suit by illegitimate Son of a deceased Zemindar, one of the Soodra class, by a Dasi, or dancing girl, kept in his Zenana as his Concubine, and recognized by him as his Son, against the Zemindar in possession, for maintenance out of the income of the Zemindary. The Civil Court recognized the Plaintiff's title, and directed the payment of Rs. 2500 for maintenance out of the private property of the late Zemindar. The High Court, on appeal sustained the Court's decree, but did not determine, whether the maintenance was a charge on the zemindary, or on the private estate of the late Zemindar:—Held, on appeal:—

First, that, as the Son was recognized by his natural Father, it was not

* Present:—Members of the Judicial Committee—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Wood, and the Right Hon. the Lord Justice Selwyn. Assessor.—The Right Hon. Sir Lawrence Peel.

essential to his title to maintenance that he should have been born in the house of his Father, or of a Concubine possessing a peculiar *status* therein; but,

Secondly, in the absence of evidence that there was private property of the late Zemindar which descended to the Defendant, and of any declaration, in the decree of the High Court, that the zemindary was chargeable with such maintenance, the Judicial Committee remitted the cause, with a declaration of the Plaintiff's *status*, as an illegitimate Son of the late Zemindar, and consequent right to maintenance; leaving it for the High Court to determine, whether the decree should be varied, by directing maintenance to be paid out of the income of the zemindary, or whether it should direct any further inquiry, in order to ascertain, whether there was any other property of the late Zemindar upon which it could be charged [12 Moo. Ind. App. 215].

This was an appeal from a decree of the High Court of Madras, which affirmed a decree of the Civil Court of Tinnevely, awarding to the Respondent, as the illegitimate Son of the Appellant's [204] eldest Brother, Kumara Naicker, a former Zemindar, an annual maintenance of Rs. 2500 a year from certain villages, forming the private property of the present Zemindar's family.

The questions raised on the appeal were, first, whether Respondent was the illegitimate Son of Kumara Naicker, the former Zemindar? and, secondly, if so, whether he was entitled to maintenance, and the amount thereof, and out of the zemindary, or what other property, if any, of Kumara Naicker?

The circumstances of the case were these:—

The Appellant's Father, the then Zemindar of Yetteyapooram, died in the year 1840, leaving three sons, Kumara, Vencataswara, and the Appellant, Muttusawmy. The family is of the Soodra caste. The eldest Son was, on the death of his Father, installed with pattam of the zemindary.

The Respondent claimed to be an illegitimate Son of Appellant's eldest Brother, Kumara Naicker. The Respondent's Mother, Arudai Jangam was a Dasi, or dancing girl, formerly attached to a Pagoda [205] at Kalugumalai, within the zemindary. The Respondent's case was, that he was born after his Mother was taken as a Concubine into the Zenana of the Palace; but the Appellant contended, that when she first came into the Zenana of Kumara Naicker, she brought the Respondent, then about a year old, with her, and that the Respondent was born at Kumulagai, whilst his Mother was a dancing girl in the Pagoda. There was no question that Respondent's Mother afterwards resided in the Zenana at Yetteyapooram as the Concubine of Kumara Naicker.

In his lifetime Kumara Naicker made a Pooroopu Manyam grant of a village called Pudupatti, part of the zemindary, to the Respondent's Mother and her male issue, and the income of the village was enjoyed by the Respondent's Mother till the death of Kumara Naicker, which event took place in May, 1853. As Kumara Naicker died without legitimate issue, Vencataswara Naicker, his next Brother, succeeded to, and entered into possession of, the zemindary, when he resumed possession of the village of Pudupatti as part of the zemindary.

In consequence a suit, No. 1 of 1858, was brought by the Respondent and his Mother against Vencataswara Naicker, claiming the village under the Manyam grant, but it was decided against them, on the ground of informality of the registration. The Respondent, in that suit, described himself as the Son of the late Zemindar, and urged that the Manyam grant was valid, as being to the heirs of the zemindary; but the fact that the Respondent and his Mother were the heirs, was denied by the then Zemindar. The suit terminated by a decree of the [206] Sudder Court, dated the 22nd of September, 1860, in favour of the Appellant, who, by the death of his Brother, Vencataswara Naicker, in 1859, had succeeded as Zemindar.

On the 7th of September, 1863, the Respondent brought the present suit, in the Court of the Principal Sudder Ameen of Tinnevely, against the Appellant, claiming to be a Son of the Appellant's eldest Brother, Kumara Naicker, and stating that the Appellant's second Brother, the late Zemindar, on the death of the Respondent's Father, took possession of the ornaments, etc., worn by the Plaintiff

and his Mother, as well as of the Melarammanai, etc., belonging to them, and the whole of the property in it, and turned out the Plaintiff and his Mother, in 1854, and praying that a decree might be passed awarding to the Plaintiff and his heirs, on account of their maintenance, a sum of Rs. 8400 per annum, at Rs. 700 a month, to be annually paid from the income of the zemindary.

The Appellant, by his answer, denied that the Plaintiff was the Son of his eldest Brother, stating that he was born of a dancing girl, while she was attached to the Pagoda of Kalugumalai; that the Plaintiff's Mother had obtained from the Defendant's eldest Brother property, valued at a lac of rupees, and after referring to the above suit, submitted that the Plaintiff had never before claimed maintenance, and that his claim for maintenance out of the zemindary was contrary to law.

Issues were framed, first, whether the Plaintiff's Mother was the permanent concubine of the late Zemindar, and secondly, whether the Plaintiff was born to the late Zemindar, Kumara Naicker.

The Plaintiff examined two witnesses. The first [207] witness had been the Vakeel employed by Plaintiff's Grandmother in certain criminal proceedings instituted by her in 1854 against the late Zemindar, Vencataswara, the second Brother, which had ended in a compromise, effected by a Razinamah, in which instrument the Respondent was described as the Son of the late Zemindar, Kumara Naicker, and Nephew of the then Zemindar, Vencataswara Naicker, his paternal junior Uncle.—He was called to prove that the Respondent's Mother had been taken into the Zenana of Kumara Naicker; he spoke also of ceremonies having been performed by the Zemindar at the birth of the Respondent. The second witness proved, that the Plaintiff's Mother brought a child with her when the Zemindar took her into keeping, and that Plaintiff was that child. The documentary evidence consisted of the Razinamah, above mentioned, and the Order for carrying it out, wherein the Respondent was described as the natural son of the Appellant's elder Brother.

The Defendant examined five witnesses, all of whom were connected with the Pagoda of Kalugumalai, among whom were the Priest, Teacher, monegar, and a dancing girl. They stated, that the Plaintiff's Mother was a Dasi, or dancing girl, in the Pagoda till her seventeenth or eighteenth year, before she was the Zemindar's Concubine; that she had a male child whilst she was a dancing girl; that the child was two years old when she went to Yetteyapooram.

On the 11th of November, 1863, the Official Principal Sudder Ameen (A. P. Sreenivasa) dismissed the suit with costs. The reasons given by the Court, were that the relationship of the Plaintiff to the late Kumara Naicker was sought to be established by only one witness, whose evidence was mere hearsay, whilst the Respondent's second witness had proved, to the satisfaction of the Court, that the Plaintiff had been born before his Mother was taken as Concubine by the late Zemindar; that the alleged admission of the relationship by a former Zemindar, in the Razinamah in the criminal proceedings, in which the relationship was not in issue, was to be looked upon with extreme jealousy; and that, in the suit, No. 1, of 1858, the Zemindar had denied the heirship of the Plaintiff, and even if he had not denied it in that suit, that the *factum* of the Manyam grant and its legality were alone then being inquired into.

The Respondent appealed to the Civil Court of Tinnevely, on the ground that his first witness's evidence was sufficient; that his relationship to the Zemindar had been admitted by the Razinamah and Order of the Magistrate, and not objected to in the pleading in the suit, No. 1, of 1858, and that it appeared from the Manyam grant that he was not born until after the date of that document, *i.e.*, the 25th of December, 1840. The Plaintiff filed further documentary proofs.

The Civil Court of Tinnevely (W. Hodgson, Esq., Acting Civil Judge), on the 31st of March, 1864, reversed the decree of the Principal Sudder Ameen, and awarded to the Plaintiff, as the illegitimate son of Kumara Naicker, a maintenance of Rs. 2500, to be paid annually by the Appellant from the villages forming the private property of the present Zemindar's family. The reasons given by the Civil Court were:—That the late Vencataswara Naicker had, in the suit, No. 1, of 1858, admitted that Respondent's Mother was the Concubine of the former Zemindar, [209] Kumara Naicker; that although the Manyam grant by him was to the Plaintiff's Mother for her and her male issue, it must be implied that he contemplated a pro-

vision for her male issue by himself, to the exclusion of all other Claimants; that the evidence of the Respondent's second witness was improbable, from the impossibility of a girl of ten or twelve years becoming a Mother; that the hearsay evidence of the Plaintiff's first witness was admissible and credible; that the Plaintiff was proved to have been born in January, 1841; that the relationship had been admitted by the Razinamah, in the criminal proceedings, in 1854, against Vencataswara Naicker; that in the suit of 1858, Vencataswara Naicker had not distinctly denied that the Plaintiff was the son of Kumara Naicker, and, referring to the annual produce of the village comprised in the Manyam grant as Rs. 2726. 1. 5., and considering the position of the present holder of the estate, as paying an annual revenue to Government of a lac of rupees, he awarded Rs. 2500 to be paid annually to the Plaintiff by the Appellant, from the villages forming the private property of the Zemindar's family.

Against this decree the Appellant brought a special appeal to the High Court, assigning the following reasons:—That the Respondent had no claim for maintenance upon the Appellant; that his maintenance could not be a charge upon the estate; that the Appellant's plea that the Plaintiff's Mother had received a lac of rupees from the Plaintiff's alleged Father had not been taken into consideration by the Court; that the Respondent was only entitled to mere subsistence, and that the income awarded was, as a matter of law, excessive.

[210] The High Court, consisting of Mr. Justice Frere and Mr. Justice Holloway, by a decree, dated the 3rd of January, 1865, confirmed the decree appealed from. The reasons given by the High Court were, first, that there was no appearance of any other property than that of the zemindary, and that the fastening of a life-rent upon that was illegal; secondly, that the Concubine of whom the Plaintiff was born was not a Slave girl, and that the right to maintenance was confined to those born of the "familia" of the deceased; and, thirdly, that, in point of law, the amount awarded was excessive, and the Court held, that the judgment of the Civil Judge having indicated the possession of private property by the Zemindar, that objection was inapplicable, and stated that the question really was, whether this Son, not being the child of a female slave, was entitled to maintenance, and that, although it had been argued that, being the son of a Soodra, he was, perhaps, entitled to the inheritance, although illegitimate, and the Court, after referring to W. H. Macnaghten's "Hindu Law," Vol. I. p. 18, came to the conclusion that, as the illegitimate Son of a Soodra, he was entitled to maintenance; and that, although he might have been entitled to the inheritance, on the ground that illegitimate Sons of Soodras were entitled to inherit, yet, having lost the inheritance, he was entitled to maintenance; and as the amount of maintenance was not a question of law, the special appeal was dismissed with costs (see case reported, 2 High Court of Madras Cases, 293).

The present Appellant presented a petition for review of judgment, under section 376 of the Civil [211] Procedure Code, which, by an Order of the High Court, dated the 27th of March, 1865, was refused with costs.

The Appellant did not apply to the High Court for leave to appeal to England, as that Court had held, that they were bound by the amount of the judgment, but presented a petition to Her Majesty in Council, praying for special leave to appeal against the decree of the Civil Court of Tinnevely, dated the 31st of March, 1864, and of the High Court of the 3rd of January, 1865.

Special leave to appeal having been granted (see 10 Moore's Ind. App. Cases, 313), the appeal came on for hearing.

Sir R. Palmer, Q.C., and Mr. W. W. Mackeson, Q.C., for the Appellant.—There is no evidence that the Respondent was the illegitimate Son or the heir of the late Zemindar, Kumara Naicker. Even if the fact of his being such illegitimate Son were established, he could have no right to a maintenance to be charged on the zemindary, which is indivisible. Neither could he claim by hereditary right, as in the case of a Son of a female slave. It is clear he could not succeed to the inheritance of his putative Father: *Chuturga Run Mardun Syn v. Sahab Purlubad Syn* (7 Moore's Ind. App. Cases, 18, 49). The right to maintenance can only attach to the private property of the late Zemindar, and there is no proof that he possessed any private property, or that any private estate descended to the Appellant.

Illegiti-[212]mate children, not born of the "familia," but of a Dasi, or dancing girl, a woman of a caste cohabiting with different men, are not entitled to maintenance. They are not the class of illegitimate children who are said to be entitled to maintenance by reason of the Mother being the Mistress of their Father, the Mitashara, c. 1, sec. XII., cl. 3; W. H. Macnaghten's *Princ. of "Hindu Law,"* Vol. I. p. 18. Even if the Respondent were so entitled, the sum awarded by the Court for maintenance was excessive. It is in evidence that he and his Mother received, and were in possession of, large property from the late Zemindar, Kumara Naicker; which would operate as a bar to his right to maintenance. But, lastly, we submit, that the decree cannot stand, as the High Court has left untouched the question, whether the right of maintenance attaches to the zemindary, or whether upon the private property, if any, the Appellant succeeded to on his Brother's death.

Mr. Field, Q.C., and Mr. Leith, for the Respondent.—By the Hindoo Law the Respondent was entitled to maintenance. If he had been the issue of a slave girl he would have been entitled as heir, W. H. Macnaghten's *"Princ. of Hindu Law,"* Vol. I., p. 18. It was decided by the Zillah Judge, that he was the illegitimate son of Kumara Naicker, who was a Hindoo of the Soodra class. It is immaterial whether his Mother, who is admitted to have been the Concubine of Kumara Naicker, was or was not a slave girl. There was not sufficient evidence to support the allegation, that the Respondent had been otherwise provided by his deceased Father, [213] Kumara Naicker, during his lifetime. [Sir James W. Colville.—We find the second record issue in your favour; you will confine yourself to the point, whether the charge for maintenance is to attach on the private property of the Appellant or the zemindary he succeeded to.] The allegation in the plaint is, that the charge is upon the income of the zemindary. There is no distinction in law between a zemindary and other property, as regards the maintenance of an illegitimate Son, the same being a charge alike on both, and we submit the Appellant succeeded as heir to Kumara Naicker subject to the legal charges on the zemindary, including, therefore, of course, the maintenance of the Respondent. The High Court was right in holding that the amount of maintenance decreed by the Zillah Court was not a question of law, but one of discretion, and, therefore, not such as could be the subject of a special appeal.

Their Lordships, at the conclusion of the arguments, expressed their opinion, that the decree appealed from ought to be varied, but reserved their judgment, which was now delivered by

The Right Hon. Sir James W. Colville (Dec. 23, 1868).—The suit out of which this appeal has arisen was brought by the Respondent, claiming to be an illegitimate Son of a former Zemindar of Yetteyapooram, against the Appellant, the present Zemindar, for maintenance out of the income of the zemindary.

The suit was brought in the Court of the Principal Sudder Ameen of Tinnevely, although that Court has no jurisdiction where the matter in dispute is of a value exceeding Rs. 10,000. The Appellant, how-[214]-ever, did not plead to the jurisdiction; and the parties proceeded to try the right in that Court, treating the suit as one for the sum Rs. 8400, the amount claimed for one year's maintenance. The consequences of this procedure were, that an appeal lay from the Court of the Principal Sudder Ameen to the Zillah Judge; that the judgment of the latter upon any issue of fact was final, in India, and could only be brought before the High Court at Madras, by special appeal, on some alleged error upon a point of law or procedure.

The issues in the cause were, first, whether the Plaintiff's Mother was in the exclusive and permanent keeping of the former Zemindar of Yetteyapooram as his Mistress; and, secondly, whether or not the Plaintiff was the illegitimate issue of the said Zemindar by that woman, and, as such, entitled to maintenance.

The Principal Sudder Ameen held, that the Plaintiff (the Respondent) had failed to prove his title, and dismissed the suit with costs. The Civil Judge, on appeal, by his decree of the 31st of March, 1864, determined both the above issues in the Respondent's favour, declared him entitled to maintenance at the rate of Rs. 2500 per annum, and decreed that this amount should be paid annually by the Appellant "from the villages forming the private property of the present Zemindar (the Appellant's) family." This decree was brought by special appeal, upon grounds, some

of which will be hereafter considered, before the High Court of Madras,—which, on the 3rd of January, 1865, dismissed such appeal; and, on the 27th of March in the same year, rejected an application for review of judgment, with costs. [215] The Appellant, having obtained Her Majesty's special leave to appeal, has brought this appeal against the decree of the High Court and that of the Zillah Court of Tinnevely; and all questions in the cause, whether of fact or of law, are, of course, open to him upon it.

Their Lordships, at the close of the argument for the Appellant, intimated that, in their opinion, the second issue had been properly found in favour of the Respondent. They will now state their reasons for coming to that conclusion, and, in so doing, will briefly recapitulate the facts of the case.

The Appellant's Father, the then Zemindar of Yetteyapooram, died in 1840, leaving three Sons, namely, Kumara Naicker, the alleged Father of the Respondent, Vencataswara, and the Appellant. The zemindary, which is impartible, descended in the first instance, to Kumara Naicker alone; and he shortly afterwards, but certainly before the 25th of December, 1840, brought into his zenana, as his Concubine, Avudai Jangam, the Mother of the Respondent. She was the daughter of a Dasi, or Nautch girl, attached to a Pagoda, which seems to be one of the appurtenances of the zemindary, and if she had not then begun to follow, would no doubt, but for her introduction into the Zemindar's zenana, have followed, her Mother's profession, with its ordinary incident, prostitution.

On the 25th of December, 1840, the Zemindar executed in her favour an instrument which will be afterwards considered. He built her a House within the precincts of his Palace, and up to the time of his death, which took place in May, 1853, she continued to be his favourite Mistress. So far the parties were [216] agreed; but whilst the Respondent contends that he is the Son of the Zemindar by Avudai, and born after her introduction into the zenana, the Appellant insists, that at that time, and when her connection with the Zemindar began, she had for some years been a public dancing girl attached to the Pagoda, and that she brought with her into the Palace the Respondent, who was then at least twelve months old, and her child by an uncertain Father.

On the death of Kumara Naicker, his next Brother, Vencataswara, succeeded to the zemindary. He lost little time in turning out Avudai and her Son; for in November, 1854, we find that the latter had brought a criminal charge in the Magistrate's Court against the Zemindar and his retainers for an alleged forcible entry, and the abstraction of jewels of considerable value. This charge ended in the razinamah, or instrument of compromise, and the Magistrate's Order thereon, both bearing date the 6th of November, 1854. In this razinamah, the Respondent is described as the Son of the late Zemindar of Yetteyapooram, and in the body of the instrument Vencataswara is spoken of as "the paternal junior Uncle of the Complainant;" and in the Magistrate's Order the fact of the Complainant being "the natural Son of the first Defendant's elder Brother" is expressly assigned as a reason for admitting the compromise.

Three years after this, and in November, 1857, the Respondent commenced a suit for the recovery of the property which was the subject of the Pooroopu grant of the 25th of December, 1840, from which, with his Mother, he had been ejected by Vencataswara. In his plaint he described himself as the Son of Kumara Naicker, the late Zemindar of Yetteyapooram. The [217] answer of the Zemindar impeached the validity of the grant by his predecessor of a village forming part of the zemindary. The reply of the Respondent on this point was, in effect, that his Mother, being of parallel grade with the Wife of his Father, the Zemindar, he, as the illegitimate son of a Soodra by a Soodra woman, was in the class capable of inheriting the zemindary, and, therefore, that the grant was good. In his rejoinder, Vencataswara said, that "the mere allegation that the second Plaintiff was of parallel grade with the Wife, was sufficient to show that she was not a legal wife, but a woman as represented in the answer; and that no one would think the Plaintiffs were heirs to the zemindary." But he did not then controvert the Respondent's title by a direct denial that he was the Son of Kumara Naicker, the course which, though the fact was not necessarily in issue in that suit, we should have expected the Zemindar to take, had the case touching the Respondent's birth which is now set up by the Appellant been

that which was then received by the family. The earliest assertion of that case of which there is any evidence, is to be found in the answer made in this suit by Venkataswara some time in or about the year 1859, to the ground of appeal filed by the Respondent on his appeal to the Zillah Court against the decree of the Principal Sudder Ameen, dismissing his claim to this village. In one paragraph of that answer it is stated, that "the records show, that the first Plaintiff was born before the second Plaintiff was kept by the late Zemindar, and the statement that they are blood relations is incorrect." In these proceedings, therefore, their Lordships find strong grounds for coming to the conclusion, that the Respondent, for several years after [218] the death of Kumara, continued to be reputed, and admitted to be, the natural Son of that Zemindar.

The decision of the suit for the village which, in the Zillah Court, as well as in that of the Principal Sudder Ameen, and on a special appeal to the Sudder Dewanny Adawlut, was adverse to the Respondent, did not touch the question of his birth. It proceeded entirely on the ground, that the grant having been made without the previous consent of Government, and not having been registered in the Collector's office, was not valid as against the successor to the Zemindary.

The final decision in the last-mentioned suit was in September, 1860, and the present suit was brought in September, 1863, against the Appellant, who, on the death of his Brother during the interval, had succeeded to the zemindary. The oral evidence upon the issue, whether the Respondent was the illegitimate Son of Kumara, was certainly not very strong on either side. But if the case of the Appellant were true, we should have expected that he, a powerful Zemindar, in possession of the estate, with all the family records, and influencing the Zillah family dependants, would have been able to produce better evidence in support of his case than that which he has produced. The testimony of the Brahmins and women attached to the Pagoda, seems to their Lordships to be especially unworthy of credit. It has been argued, that the non-mention of the Respondent in the Pooroopu grant of the 25th of December, 1840, affords an inference that he was not the Son of the Zemindar, nor, at that time, so recognized by him. This may be true, if it be assumed that the child was then in existence; [219] whilst, on the other hand, the mere fact that the Respondent is not mentioned in the deed, taken by itself, might afford an inference in support of the theory, that he was not then born. But if it be assumed that he was, as the Appellant alleges, then in existence, and known not to be the child of the Zemindar, it is highly improbable that the deed should have provided for her male issue generally, without, at least, postponing the Respondent to any male issue to be thereafter born to the Zemindar. And, again, if the deed were, as it has been argued, to have been a gift to the woman in the nature of a settlement made upon taking her from the Pagoda into the exclusive keeping of the Zemindar, there was no absolute necessity for the mention of her Son, if then in existence, whether he was or was not then the Son of the Zemindar. Upon the whole case their Lordships think, that the evidence for the Respondent, confirmed as it was by the *razinama*, and other evidence of recognition by the family after the death of Kumara, outweighed that on the Appellant's side, and justified the finding of the Zillah Judge of the second issue in his favour. They are satisfied that Kumara Naicker in his lifetime recognized the Respondent as his Son; and they see no sufficient grounds for doubting that the Appellant was in fact his natural Son. They would have felt greater difficulty in coming, upon the evidence before them, to a conclusion upon the question, whether the Respondent was born after or before the introduction of his Mother into the *zenana*. The admission, in his reply, as to his Mother's age, is of more weight than any of the evidence to the contrary, and that is consistent with the theory of his birth, at least a year [220] before she became an inmate of the Zemindar's *zenana*; and the receipts for rent in his name, which are dated as early as February, 1841, also tend to support that theory. It appears, however, to their Lordships, that if it be established that the Respondent was the natural Son of this Hindoo Father, and recognized by him as such, it is not essential to his title to maintenance that he should be shown to have been born in the house of his Father, or of a Concubine possessing a peculiar *status* therein. They concur in the judgment of the High Court upon this point, against which little, if anything, has been urged at the Bar.

Their Lordships further think, that, subject to the observations hereafter to be

made, the amount of maintenance awarded by the Zillah Judge is reasonable. And this being so, they would have recommended Her Majesty to dismiss the appeal and confirm the decree below *simpliciter*, but for the point which remains to be considered.

The decree of the Zillah Court directed, that the amount awarded as maintenance be paid annually to the Plaintiff (the present Respondent) by the Defendant (the present Appellant) from the villages forming the private property of the present Zemindar's (the Appellant's) family. The first ground of appeal insisted upon by the Counsel for the Appellant, on the special appeal to the High Court of Madras, is stated to have been, "that there was no appearance of any other property than that of the Zemindary, and the fastening of a life-rent on that was illegal."

The High Court has sought to dispose of this objection by saying, "The fact that the judgment of the Civil Judge indicates the possession of private [221] property by the Zemindar in possession, who has inherited the whole property of the Plaintiff's Father, renders this objection, even if tenable, wholly inapplicable." And it proceeds to remark, that the question, whether maintenance in such a case could be charged on a zemindary, was still an open one.

The objection involved two distinct propositions. First, that there was no proof of property other than the zemindary; and, secondly, that the maintenance could not be charged on the zemindary. And the High Court has avoided the decision of the latter question, by assuming that there was a conclusive finding on the other. It may have thought, that it was bound to make that assumption by the rule which excludes questions of fact from the province of a special appeal. Their Lordships, however, are disposed to think that the question, which is more pointedly raised by the first of the points stated in the application for a review, was one which, on the strictest construction of that rule, the High Court was competent to entertain on a special appeal. But, be that as it may, their Lordships, who are not subject to the rule, are bound to see, whether that part of the decree of the Zillah Judge, which directed the payment of the maintenance from the villages forming the private property of the Zemindar, was warranted by the pleadings and evidence before him. They are of opinion that it was not. The plaint sought for payment of maintenance "out of the income of the zemindary." There is no trace in the printed record of any evidence of the existence of property other than the zemindary, or of the nature of such property, supposing that any does exist. It is obvious that the nature, as well as the [222] existence, of any such property is a material question. The Respondent may have a right to be maintained out of private property which descended from his Father to the present Zemindar; yet he may have none to be maintained out of private property which the Zemindar has acquired in any other way.

If the decree be erroneous as it stands, there remains the question, whether it ought not to be simply varied, by directing payment of the maintenance out of the income of the zemindary. But the High Court has failed to determine the question whether the zemindary is so chargeable; and the parties have declined, in the present state of the record, to argue that question before their Lordships. In this state of things their Lordships, however, unwilling to prolong this litigation, can but remit the cause to India, with a declaration of the Respondent's *status* as an illegitimate son of the Zemindar Kumara Naicker, and of his consequent right to maintenance.

It will be for the High Court to determine, whether the decree should be varied by directing the maintenance to be paid out of the income of the zemindary, or whether it shall direct any further inquiry in order to ascertain whether there is any other property upon which it can be charged. If that Court shall find that it can be properly charged on the income of the zemindary, their Lordships are of opinion that the amount awarded by the Zillah Judge, having regard to the Respondent's *status*, is reasonable and ought to be decreed. But if it cannot be so charged, then, in the absence of information as to the other property, on which it may be chargeable, their Lordships cannot pronounce an opinion as to [223] the reasonableness of its amount, and they must leave that question also to be determined by the High Court on further inquiry. They trust, however, that the Respondent's title to maintenance being now conclusively ascertained, the parties will be wise enough to settle the questions that remain open by private arrangement and without further litigation. The Order which their Lordships will humbly recommend Her Majesty to make is, to reverse the decree of the Zillah

Court of the 31st of March, 1864, and the decree of the High Court of the 3rd of January, 1865, and in lieu thereof to declare, that the Respondent is the illegitimate Son of the former Zemindar, Kumara Naicker, and, as such, is entitled to maintenance; and to remit the cause to the High Court of Madras, in order that such Court may determine whether, regard being had to the above declaration, the Respondent is entitled to receive maintenance out of the income of the zemindary (in which case such maintenance is to be decreed at the rate of Rs. 2500 per annum); and if not so entitled, whether he is entitled, as against the Appellant, to any and what amount of maintenance, and if so, out of what property and fund; and that for the purposes aforesaid the said High Court shall be at liberty to make and direct any further inquiry that to them may seem just. Their Lordships will give no costs of this appeal.

By an Order in Council it was ordered, that the decree of the Civil Court of Tinnevely, of the 31st of March, 1864, and the decree of the High Court of Madras, of the 3rd of January, 1865, be, and the same were thereby respectively reversed, and in lieu [224] thereof that it be declared, that the Respondent is the illegitimate son of the former Zemindar, Kumara Naicker, and as such is entitled to maintenance, and that the cause be remitted to the High Court of Madras, in order that that Court might determine whether, regard being had to the above declaration, the Respondent is entitled to receive maintenance out of the income of the zemindary (in which case such maintenance is to be decreed at the rate of Rs. 2500 per annum); and if not so entitled, whether he is entitled, as against the Appellant, to any and what amount of maintenance, and if so, out of what property and fund: and for the purposes aforesaid the said High Court is to be at liberty to make and direct any further inquiry that to them may seem just.

[225] RAJAH BURODACANT ROY.—*Appellant*: THE COMMISSIONER OF THE SOONDERBUNS,—*Respondent* * [Dec. 14, 15, 16, 1868].

On appeal from the High Court of Judicature at Calcutta.

The Soonderbuns were not included in the Perpetual Settlement, but remained the property of Government [12 Moo. Ind. App. 230].

Construction of cl. 2, sec. 13, of Ben. Reg. III. of 1828, with respect to the determination of the boundaries of the Soonderbuns [12 Moo. Ind. App. 236].

Where boundaries have been determined by the Commissioner under that Regulation, and no appeal therefrom made to the Special Commissioner within three months, such determination is a bar to a suit seeking to open the question of boundaries.

In a question of disputed boundaries, as to the line of demarcation between the permanently assessed mouzahs of a neighbouring Zemindar adjoining upon the Soonderbuns, the Zemindar having taken a lease from Government of part of the lands as within the limits of the Soonderbuns, but afterwards claimed by him as part of his mouzahs, the *onus* is upon him to identify the lands so claimed as not forming part of the Soonderbuns.

This was an appeal against the decision (No. 192 of 1860) of the High Court, consisting of Messrs. J. V. Bayley, and J. Campbell, which reversed a decree of the Judge of Jessore (Mr. S. W. Seton-Karr). [226] passed in favour of a claim preferred by the Appellant to recover possession of 83,277 beegahs of land and wasilat thereof, estimated at Rs. 93,030, as forming part of the Appellant's permanently rent-paying and decennially settled mouzahs, Tildangah and Kumarkhola, part of his settled Zemindary, Pergunnah Sahosh (not situated within the Soonderbuns), and to set

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Fitz-Roy Kelly (The Lord Chief Baron of the Exchequer). Assessor.—The Right Hon. Sir Lawrence Peel.

aside a proceeding of the Commissioner of the Soonderbuns, dated the 16th of December, 1856, and two dowsls and kabooleats, or agreements, entered into by the Appellant with Government for the payment of revenue for those mouzahs.

The points in dispute were, first, the extent of the two mouzahs or chucks, Tildangah and Kumarkhola, and whether they included the whole of the lands bounded on the north by the Bhuddar River, on the west by the Badoorgatchia and Sheebshaha Rivers, on the east by the Bhuddar River and the Pashur and Talashur Rivers, and on the south by the Sheebshaha River, or whether any, and if so what portion of these lands was included within the limits of the Soonderbuns, and, second, whether the Appellant's right was barred by a proceeding of Mr. Commissioner Dampier recorded on the 9th of February, 1829, by which the boundaries of the Soonderbuns were alleged to have been finally fixed so as to include those two mouzahs. The land in dispute was divided by the Dakkee River, which, as alleged by the Appellant, formed the boundary between the two mouzahs, and by the Respondent, to divide Lot 221 of the Soonderbuns from Lot 224.

[227] The facts of the case are fully stated in the judgment.

Mr. Field, Q.C., and Mr. Cave, for the Appellant, and Mr. Forsyth, Q.C., and Mr. Merivale, for the Respondent.

For the Appellant it was contended, first, that the lands in dispute were included in the Appellant's Pergunnah Sahosh and were not within the limits of the Soonderbuns, and secondly, that the proceeding of Mr. Dampier was invalid, and not binding on the Appellant. They referred to and commented on Ben. Reg. III. of 1828, sec. 13, cl. 2.

On the part of the Respondent, it was insisted, that the disputed lands were not part of the permanently settled lands of mouzahs Tildangah and Kumarkhola in Pergunnah Sahosh, but formed part of the Soonderbuns, and that as the Appellant had not objected to the line of demarcation made by Mr. Dampier, within three months, the time limited, his claim was barred by Ben. Reg. III. of 1828, sec. 13, cl. 2. They also relied on Ben. Reg. II. of 1819, sec. 30, cl. 9.

Their Lordships reserved judgment, and having heard another appeal between the same parties, respecting the Appellant's right to another portion of land, claimed by the Respondent as part of the Soonderbuns (*post* [12 Moo. Ind. App.], p. 242), now delivered their opinion by

The Right Hon. Sir James W. Colville (Jan. 16, 1869).—The Appellant in this case (the Plaintiff in the [228] suit) is the Rajah of Jessore. The Respondent is the Commissioner of the Soonderbuns, representing the Government of Bengal. The real object of the suit is to obtain a judicial declaration that the lands, which are the subject of it, form part of Pergunnah Sahosh, the revenue on which was permanently assessed at the Decennial Settlement with the Appellant's ancestor; and, on that ground, to set aside certain instruments which have been executed by or on behalf of the Appellant to Government for the payment of the revenue lately assessed on the same lands, on the assumption that they were not part of his settled estate; and to recover back the payments which have been made to Government under that engagement.

The persons who are in actual possession of the lands are not parties to the suit, which is erroneously stated to be one for the recovery of possession, an error which has led to some confusion in the argument. The true nature of the suit is shown by the issues which have been settled in it. These were,—

First, whether the boundaries of Lots No. 221 and 224, fixed by Mr. Dampier, the former Commissioner of the Soonderbuns in 1829, in accordance with rule not having been set aside up to this date by any Court, and the Plaintiff not having filed objections in reference to such boundaries for thirty-one years, his claim was barred by cl. 2, sec. 13, of Reg. III. of 1828.

Second, whether the land claimed formed part of the decennially settled Pergunnah Sahosh, or the right of Government as being part of the Soonderbuns, and, whether the Plaintiff's former proprietor had ever been in possession of the land.

[229] Third, when the disputed land with its boundaries had been released from the claims of Government, on proof of its being rent-paying or mal land, and subsequently by means of survey, Dowl was unjustly taken for it on the allegation, that

it was the right of the Soonderbuns, whether the Plaintiff is entitled to have the Dowl set aside, and obtain possession of the land, as his mal right, together with wasilat.

The history of the Pergunnah Sahosh is briefly this. After the Perpetual Settlement, the then Rajah, the Appellant's Grandfather, mortgaged it to one Bissonath Bose. He is said fraudulently to have allowed the revenue to fall in arrear, and to have purchased the estate when put up for sale by Government benamnee some time in 1804. This transaction was afterwards impeached, and the Government (we must assume regularly) declared the estate to be forfeited; but in the year 1825 re-granted it to the Appellant, then an infant. It is alleged, and not disputed, that the effect of this regrant was to remit the Appellant to the precise rights of his ancestor under the Perpetual Settlement. The estate between 1825 and the date at which the Appellant attained his majority was administered by the Collector and other revenue Officers acting as the Court of Wards; but their acts are material only as bearing upon one or other of the issues in the suit, and particularly upon that which affirms that the lands in question formed part of Pergunnah Sahosh in 1792.

This Pergunnah, whatever were its precise boundaries, unquestionably abutted upon, and, at least on one side of it, was bounded by that large tract of waste and jungle land which forms the seaboard of the delta of the Ganges, and is known as the Soon-[230]-derbuns. And it is certain that the Soonderbuns, whatever were then their precise limits, were neither included, nor intended to be included, in the Decennial Settlement of 1792, but remained the property of Government as the General owners of the soil.

From the Quinquennial Register of 1795, it appears that two of the component parts of Pergunnah Sahosh were the mouzahs or chucks of Tildangah and Kumarkhola. There is, however, no evidence to show what the areas of these mouzahs, when settled, were. They were situated at two of the points at which Pergunnah Sahosh touched the Soonderbuns. And the broad question of fact between the parties is, whether these settled mouzahs or chucks comprehended the whole of the areas marked Lots 221 and 224 in the coloured map which is part of the record, or whether they were limited to the two smaller areas which are coloured yellow, and lie within those lots or in immediate juxtaposition to them.

In 1828 the Bengal Government appears to have been active in taking measures for extending cultivation in the Soonderbuns, and for ascertaining and asserting the rights of the State therein. As a step thereto, it determined to fix and lay down the boundaries of that tract of unsettled land; and for that purpose (amongst others) Regulation III. of 1828, the effect of which will be afterwards considered, was passed. In 1829, Mr. Dampier, the then Commissioner of the Soonderbuns, under the 13th section of that Regulation, proceeded to fix and lay down the boundaries of the Soonderbuns in the immediate neighbourhood of Tildangah and Kumarkhola. His proceeding and the Map, called "Captain [231] Hodge's Map," was made pursuant to the Regulation, in accordance with that proceeding. The boundary line, as defined by Mr. Dampier's proceeding, seems to have included within the limits of the Soonderbuns the whole of Lots 221 and 224, together with the two areas marked yellow on the coloured Map, which have before been mentioned; or, in other words, all the land now in question, and also the lands represented by those two coloured portions of the map, and now admitted to belong to the settled mouzahs of Tildangah and Kumarkhola.

At the time of Mr. Dampier's survey, certain proceedings were pending between the Government and the Rajah, or his guardians on his behalf, which must now be considered.

There is some trace of a claim on the part of Government as early as 1812, but the proceedings in question were not actually commenced until the 12th of November, 1825, when the Collector of Jessore instituted a suit under Regulation II. of 1819, as amended by Regulation IX. of 1825, for the assessment of revenue upon 8000 beegahs of land. The ground of his claim was, that this parcel of land, though in possession of Rajah Burodacant Roy, under the names of chucks, Tildangah and Kumarkhola, was, in fact, part of the Soonderbuns, and, as such, subject to the claim of Government. This suit was in the first instance defended (the Rajah then being a minor) by the Surbarakur appointed by the Court of Wards, and was, therefore, in this peculiar condition, that the Plaintiff was the Collector asserting the proprietary

or fiscal rights of Government, and the Defendant was an Officer appointed by that same Collector acting as a Court of [232] Wards. And this may be one reason why for some years the suit appears to have been conducted very languidly. In 1829 Mr. Dampier fixed his boundary line, which included the lands in dispute with the other lands in that locality within the limits of the Soonderbuns. Some proceedings in this pending suit seem afterwards to have been had before him as Commissioner of the Soonderbuns; but the suit was not decided until November, 1834, when the then Commissioner, Mr. Grant, gave judgment in favour of Government.

His decision was grounded partly upon Mr. Dampier's map, partly on the absence of proof on the part of the Rajah that the lands formed part of his settled estate; and it seems to have treated the whole of chucks Tildangah and Kumarkhola as "newly-cultivated lands of the Soonderbuns' jungle." From this decision the Surbarakur appealed. A new trial was directed. The case was then tried by Mr. Kemp, whose decision, on the 20th of September, 1839, was to the effect, that the 8000 beegahs were lands belonging to chucks Tildangah and Kumarkhola, which formed part of the Rajah's zemindary of Pergunnah Sahosh, and that the Government had no right to assess them. This decision was, on the 19th of August, 1842, confirmed on appeal by the Special Commissioner, Mr. D'Oyley, who, however, intimated a doubt, whether some portion of the land in question might not have been acquired from the Soonderbuns by gradual encroachment, and added to the settled mouzahs.

The so-called 8000 beegahs appear to have been, according to ordinary measurement, 12,000, and in the course of the argument there was much discussion as to their precise locality. Mr. Field insisted, that they were situated at the southern extremity of Lot 224. But from the proceedings which will be next mentioned, and other evidence in the cause, their Lordships are satisfied that, of the 12,000 beegahs, 6476 form the whole or part of the two before-mentioned yellow areas in the coloured Map which are now admitted to represent the settled mouzahs of Tildangah and Kumarkhola: and that the remaining 5524 beegahs were probably contiguous to them.

From the proceedings stated in the record their Lordships gather the following facts:—

Some time between the years 1849 and 1851, Mr. Smith, a Deputy Collector deputed for that purpose, made a survey of Lots 221 and 224, and a Settlement of part of them. His instructions were to leave out the land which had been released by the decision of Mr. Kemp; to specify and define the other land belonging to the two Lots on which the claim of Government attached; and to bring it under assessment. He seems to have satisfied himself that within the admitted boundaries of Tildangah there were 3193, 12, 3 beegahs, and within the admitted boundaries of Kumarkhola 3282, 7, 2 beegahs of land; and it is impossible to read the proceeding of the Revenue Commissioner, of the 13th of August, 1853, at pages 49 and 50 in the Record, without coming to the conclusion, that these 6476 beegahs have been exempted from the Government claim, and are now held by the Appellant as part of mouzahs, Tildangah and Kumarkhola, within his settled zemindary of Pergunnah Sahosh. As to the remaining 5524 beegahs, there is considerable confusion. It [234] appears that Mr. Smith took two parcels of land aggregating that number of beegahs from Lots 221 and 224, in order to make up the 12,000 beegahs, the whole of which he could not find within what, according to his view, were the boundaries of the zemindary. But from the statement of his proceedings on the 16th of December, 1856, it would seem that, after excepting and setting apart the 6476 beegahs, he found that Lot 221 consisted of 26,277, 13, 4 beegahs, of which 14,679, 16, 12 beegahs were cultivated and 11,597, 16, 4 were jungle; and that Lot 224 consisted of 57,000 beegahs, of which 14,119, 12, 4 were cultivated and 42,880, 7, 12 beegahs were jungle; and that after deducting the last-mentioned quantity of jungle, which he left unsettled, he made a settlement for Lot 221 with Ramrutton Roy and another, as the representatives of one Brijokissore Roy, and a settlement for the cultivated lands in Lot 224 with one Nobokant Roy. These parties were in occupation of the lands in question under Junglebooree Pottahs, which had been granted by the Court of Wards during the minority of the Rajah on his behalf.

The Rajah appealed against these settlements, insisting that the lands so settled were part of his settled zemindary, Pergunnah Sahosh. The Government threatened

resumption proceedings, but gave the Rajah the option of settling for the lands on favourable terms. Those terms were ultimately accepted; a settlement was made with him for both Lots, 221 and 224, for ninety-nine years, and he signed by his Mookhtar the usual Dowls and Ikrahnamahs on the 26th of November, 1856. These are the instruments which the present suit is brought to set [235] aside. One term in the arrangement was, that he should respect the possession and rights of the Pottahdars, in the proceedings called Gantidars, viz., Nobokant Roy and the representatives of Brijokissore Roy.

From the above facts their Lordships have come to the conclusion, that these settlements included the 5524 beegahs, part of the 12,000 beegahs which had been released, by Mr. Kemp's decision, from the claims of Government; but that they did not include the 6476 beegahs.

This settlement with the Appellant was complicated by the fact, that settlements had previously been made with the Gantidars as occupiers at less favourable rates; and part of the arrangement contemplated was, that the Appellant should receive from them the revenue assessed on them, paying that for which he was liable under the Dowls, and retaining the difference. The representatives of Brijokissore Roy afterwards resisted this arrangement; and in a suit between them and the Appellant, the Judge held, that he could not enforce his claim against them, and made observations on the settlements which probably led to the institution of the present suit.

The result, however, of the last-mentioned litigation can have no effect on the determination of the present suit. The Appellant is not seeking to be relieved from the settlement because it cannot be carried out as contemplated; nor does he sue for the performance of any agreement that may have been made. He seeks to avoid the settlement on the broad ground, that the whole of the lands included in it are part of the settled zemindary of Pergunnah Sahosh. [236] The Zillah Judge has held, that this contention is well founded, and has decided in favour of the Appellant. The High Court, proceeding entirely on the consideration that the Appellant is, by force of Regulation III. of 1828, bound by Mr. Dampier's demarcation of the boundary line of the Soonderbuns, has dismissed his suit,

The first question which their Lordships will consider is, what is the effect upon the present suit of Regulation III. of 1828, sec. 13, and the demarcation thereunder of Mr. Dampier's boundary line?

The Regulation was passed, as the preamble declares, with the double object of appointing Special Commissioners, whose judgment should be final in resumption suits, and of amending the procedure furnished by Regulations II. of 1819, and IX. of 1825, in such suits; and of making provision for the immediate settlement of the limits of the Soonderbuns as ascertained by careful local inquiry conducted by the Commissioner specially appointed to the duty, and the Surveyors under his authority. The latter object is dealt with by the 13th section.

The first clause of the section declares, that "The uninhabited tract known by the name of the Soonderbuns has ever been, and is hereby declared still to be the property of the State: the same not having been alienated or assigned to Zemindars, or included in any way in the arrangements of the Perpetual Settlement." It then affirms the right of Government to make grants and leases of any part of the Soonderbuns, and to provide for the clearance and cultivation of the tract; and provides, that if any Zemindar or other person owning and occupying, or collecting the rent are [237] revenue of cultivated land in the neighbourhood of the land so granted, shall bring a suit to contest the validity of the grant, his suit shall be dismissed on proof that the land so granted is or was when the grant was made within the limit of the unoccupied jungle so named and described. And then it provides for compensation to persons who may have acquired certain rights in respect of gathering wax, cutting wood, or obtaining other jungle products.

The second clause enacts, "That the boundary of the Soonderbuns jungle shall be laid down by accurate survey, as determined on the spot by the Commissioner of the Soonderbuns"; it next makes provision for enabling any Zemindar or party interested to obtain a copy of the survey map, with the boundary marked thereon, together with a copy of the Commissioner's proceedings on the subject; and it then proceeds in these words:—

"Any party deeming his right injured by the demarcation so laid down, shall

be at liberty, at any time within three months from the date of the Commissioner proceeding fixing the same (which proceeding shall always be held and published on the spot), to contest the same by petition to a special Commissioners under this Regulation, having local jurisdiction for the time being (or if no such jurisdiction exist, to the ordinary Courts of Justice, by which the case is cognizable) praying further investigation: provided that no plea of objection against the line of demarcation laid down shall be heard or admitted, excepting only such as shall declare and offer proof that at the time of survey a specific quantity of land, or land with defined limits, was in the occupation of the Petitioner cleared and under [238] cultivation, which, by the line of demarcation adopted, is placed within the Soonderbuns tract belonging to Government. Every such application so made shall be regarded as a claim to hold the tract claimed free of the public assessment, and shall be investigated and decided under the rules of Regulation II. of 1819, as modified by this Regulation."

The first thing that strikes the mind on reading these enactments is, that as the object of passing them was to make provision for the immediate settlement of the limits of the Soonderbuns, so that object could only be attained by fixing peremptorily a period at which the demarcation of those limits should be final. The object would be defeated if any person could come in after that period, pleading infancy or other ground for reopening the question of boundary, since the geographical boundary line was necessarily to be one and the same for all the world. Another inference to be drawn from these provisions is, that the line of demarcation so drawn was to be final and conclusive, at least in respect of all waste lands and uncleared jungle. The Petitioner could not be heard to object to the line unless he declared and offered proof that, at the time of the survey, he was in the occupation of a definite quantity of land cleared and under cultivation within the line. Nor was this unreasonable. The presumption which might arise in other parts of India, that jungle was within the limits of a settled zemindary, would not arise in the case of a zemindary bounded by the Soonderbuns. For that tract of land was advisedly excluded from the Perpetual Settlement; and, therefore, the presumption would be, that the settlement in that locality was confined to the land then in cultivation. A person [239] in occupation of cultivated land might, within three months, do two distinct things: he might pray for a further investigation, which might result in a new demarcation of the boundary; and he might put forward his claim to hold the particular lands free from public assessment, which would lead to a judicial investigation of his title.

But as the line defines the tract called the Soonderbuns, and the Soonderbuns are declared to be *extra* the Perpetual Settlement, it is difficult to see how, after the line had, on the expiration of the three months, become final, any party could be heard to say that even cultivated lands within it were part of his settled zemindary. Upon the whole, therefore, their Lordships are disposed to agree with the High Court in the conclusion, that the Regulation was a bar to the Appellant's suit. The decision, with respect to the 12,000 beegahs, does not necessarily conflict with this view of the Appellant's rights; "and the judgment in this case will leave that decision and its practical effect untouched." That suit was pending before the Commissioner when he drew his boundary line: and the mere pendency of the suit took it out of the operation of the Act, so far at least as it was a claim to hold the lands free from further assessment. There was no application within the proper time for a rectification of the boundary line.

Let it be assumed, however, for the sake of argument, that the Regulation is not an answer to this suit. Their Lordships would, nevertheless, be of opinion, that the Appellant has failed to make out his case, or to establish the second of the issues settled in the suit.

[240] He comes into Court under a very heavy burthen of proof. He comes to set aside settlements made with a full knowledge of the facts, without fraud, and by way of compromise of a disputed right. The boundary line of Mr. Dampier has at least settled the general outline of the Soonderbuns, and shows that if the Appellant's case be true, his zemindary must have made a very extraordinary indentation into that tract of country. The decision as to the 12,000 beegahs is final as to them, but as to nothing more; and even as to part of them the Special Commissioner expressed a doubt, whether they had not been gained by encroachment on the Soon-

derbuns. The Appellant is claiming not only cultivated land, but many thousand beegahs of jungle in the face of the strong presumption that jungle in that locality was not included in the settlement of his zemindary.

To these presumptions what evidence has he to oppose? Certain vague admissions of his title made by one Collector in 1805 and 1807, and by another Collector in 1812 (the latter only being in a suit), upon the application of a third party for the Pottah of some lands, of which the precise position is not accurately determined, and which (if any) were at most but a very small part of the lands now in dispute. Besides these there is the Tummalundee of 1826, which, at first sight, is a more important piece of evidence. But of that document it is to be observed that, even if it goes the length of supporting the Appellant's present case to its full extent (which, as regards Lot 221, it hardly does), it was prepared by the Court of Wards in the interest of its minor ward; and that its value as an admission by a Government Officer is destroyed by the fact, that more than a year [241] before the date (26th of December, 1826) which it bears, Government had commenced the suit for the resumption of the 12,000 beegahs, which included even the lands now admitted to belong to the settled mouzahs. Their Lordships, therefore, think that the Zillah Court was wrong in holding, that the Appellant had proved, as matter of fact, that the lands in question were part of his settled estate.

Mr. Field has, however, contended, that he is, at least, entitled to succeed as to the 5524 beegahs. Their Lordships, as they have before stated, believe them to be included in the settlement; and they consider that, rightly or wrongly, this parcel of land has been finally decided to be part of the settled zemindary. They conceive, however, that no decree can be made respecting it in this suit. The settlement in which it is included, was entered into with full knowledge that it was so included, and by way of compromise. It may be that its inclusion in the settlement was part of the compromise, and a consideration for more favourable terms of settlement. For these reasons, their Lordships think, that it is impossible to give in this suit any particular relief concerning it. Upon the whole, then, their Lordships have come to the conclusion, that the decree of the High Court dismissing the Appellant's suit should be affirmed; and they will humbly recommend Her Majesty to dismiss this appeal with costs.

[242] RAJAH BURODACANT ROY,—*Appellant*; THE COMMISSIONER OF THE SOONDERBUNS,—*Respondent* * [Dec. 17, 1868].

On appeal from the High Court of Judicature at Calcutta.

Decree of the High Court defining boundaries of land as forming part of the Soonderbuns for revenue assessment, reversed on appeal.

This was another appeal between the same parties, brought also from a decision of the High Court (No. 47 of 1859), which reversed the decree of the Judge of Jessore, in favour of a claim preferred by the Appellant, for confirming his possession, by declaration of mal right, in 8933 beegahs of land, and for removing an attachment, by setting aside an Order of the Revenue Commissioners of the Nuddea District, for assessment of revenue.

The point in dispute was, whether the Appellant was entitled to the lands in question, known as the chucks, Magoorah Delutter, and Jeerbooniah comprised in chuck, Delutter, as forming part of his Zemindary, Pergunnah Sabosh, or whether the Government was entitled to them, as comprised in and falling within the limits of the Soonderbuns.

[243] After the case had been opened by Mr. Field, Q.C., (with whom was Mr. Cave), Mr. Forsyth, Q.C. (with whom was Mr. Merivale) intimated to their Lordships, that they could not, on the part of the Respondent, maintain the judgment of the High Court.

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Fitz-Roy Kelly (The Lord Chief Baron of the Exchequer). Assessor.—The Right Hon. Sir Lawrence Peel.

The Right Hon. Lord Chelmsford.

We think that nothing can be more fair and honourable than the course which the Counsel for the Respondent have thought proper to adopt. It is undoubtedly the duty of Counsel, as long as any reasonable doubt exists upon which they may ask for the judgment of the Court, to maintain the cause of their Client; but when they feel no doubt, and when it is perfectly clear, that there can be but one judgment in the matter, and more especially when the case cannot be maintained, except by imputing fraud or the want of fair dealing towards another party, Counsel are bound to withdraw from the case. Under these circumstances, their Lordships can have but one course to adopt, which is to reverse the judgment of the Court below in this case, and to allow the appeal.

[244] MUSSUMAT RANEE SURNO MOYEE.—*Appellant*; SHOOSHEE MOKHEE BURMONIA and Others,—*Respondents* * [Dec. 17, 1868].

On appeal from the High Court of Judicature at Calcutta.

An auction sale, under Ben. Reg. VIII. of 1819, of the rights of Putneedars in a Putnee talook, by the Zemindar for arrears of rent, was set aside by the Zillah Court for informality in the notices under that Regulation, and the Putneedars, who had been dispossessed, restored, with mesne profits to be paid by the Purchaser, during the time they were out of possession. The Zemindar then brought a suit against the Putneedars under Act, No. X. of 1859, to recover the arrears of rent which had accrued before and during the time they were out of possession. The High Court decided that the suit, not being brought within three years from the time the rent first became due, was barred by section 32 of Act, No. X. of 1859. Such finding reversed on appeal: the Judicial Committee holding, that the cause of action accrued at the date of the decree reversing the auction sale, and that the suit having been brought within three years from the date of that decree, the time had not by Act, No. XIV. of 1859, run out.

In this case the appeal was brought against a decision of the High Court at Calcutta, reversing a decree of the Deputy Collector of Zillah Nuddea, passed in favour of the Appellant, under the following circumstances:—

On the 10th of Shrabun, 1251 (July, 1844), Rajah Krishito Nauth Roy, Bahadoor, the Husband of the Appellant, who was the then Zemindar of [245] Pergunnah Plassey, in the Zillah of Nuddea, made a putnee settlement with Kashub Chunder Roy, by which the latter agreed to take the Zemindary of the Rajah, under the provisions of Ben. Reg. VIII., of 1819, at a yearly jumma of Rs. 51,500.

After the making of this agreement and before the year 1857, Rajah Krishito Nauth Roy died, leaving his Widow, the Appellant, his heir.

In the month of Cheyte, 1264 (March, 1858), there was due to the Appellant a balance of Rs. 3125 in respect of the rent from Bysack to Assin; and a further sum of Rs. 31,500 for arrears of rent for the succeeding half-year from Kartick to Cheyte, and Rs. 1130 15a. 2p. for interest, making together the sum of Rs. 35,755 15a. 2p.; and she took proceedings to recover that amount by instituting a suit under Ben. Reg. No. VIII. of 1819, against the Respondents, who claimed to be entitled to the Putnee talook in various shares, under the settlement made with Kashub Chunder Roy, in the year 1844, and ultimately their estate and interest was put up for sale by auction, in June, 1858, and purchased by one Tarinnypershud Ghose, at the price of Rs. 60,000, out of which the Appellant's claim for rent in arrear, and interest thereon, amounting to Rs. 36,021 7a. 7p., was paid, and the balance deposited in the Collector's Treasury.

Afterwards, on the 5th of February, 1859, Juddoonauth Roy, Sreenauth Roy,

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Fitz-Roy Kelly (The Lord Chief Baron of the Exchequer). Assessor.—The Right Hon. Sir Lawrence Peel.

Sectonath Roy, and Adeetonauth Roy, the heirs and Sons of Chundromohun Roy, Tara Soondree Burmonia, the guardian and Mother of Mirgandronauth Roy, a minor, and Behary Lall Roy, on his own behalf, and as the guardian of Aushinee Koomar Roy and [246] Kaminnee Koomar Roy, minors, instituted a suit in the Civil Court of Nuddea, against the Appellant, her Agent, the auction Purchaser, and the other co-sharers, praying for the cancellation of the auction sale and for the recovery of their share of the Putnee talook, on the ground of various irregularities which they alleged had occurred in the sale and in the proceedings previous thereto. The case was decided by the Zillah Judge, on the 26th of December, 1860, when the sale was cancelled, and it was ordered, that a return of the purchase-money, with interest, should be made to the Purchaser, and that the Plaintiffs should recover the mesne profits from the auction Purchaser and be put in possession, on the ground that the notices of the sale required by cl. 2, of sec. 8, of Ben. Reg. No. VIII. of 1819, to be served on each of the Tenants had not been proved to have been served on the Plaintiffs. The Appellant appealed to the High Court at Calcutta, when, on the 30th of June, 1863, the judgment of the Zillah Judge was upheld, and it was ordered, that the auction Purchaser should receive back the amount of the purchase-money, with interest.

In consequence, the Appellant had to return the purchase-money to the auction Purchaser, who, in his turn, was ordered to pay the whole of the mesne profits to the Putneedars without any deduction, so that the Appellant was left without any means of satisfying the arrears of rent and interest due from them to her, and which had been temporarily satisfied by the proceeds of the sale. She, therefore, instituted a suit, on the 5th of October, 1863, by filing a plaint in the Court of the Deputy Collector of Zillah Nuddea, under Act, No. X. of 1859, for the purpose of obtaining payment of the arrears of rent due to her for the year 1857-1858, together with interest, amounting together to Rs. 58,493 0a. 6p., and further interest until the date of payment.

On the 8th of December, 1863, the Defendant, Shooshee Mokhee Burmonia, one of the Respondents, filed a written statement in which, without disputing the fact that the arrears sued for were unpaid, she contended, first, that the Appellant's claim was barred by section 32 of Act, No. X. of 1859, and that the suit ought to have been brought under Ben. Reg. VIII. of 1819, sec. 17, cl. 3, and not under Act, No. X. of 1859; secondly, that when the sale was set aside no express Order was made for institution of a suit for the arrears of rent; and thirdly, that at all events, the Plaintiff was not entitled to interest. Similar written statements were filed by the other Defendants, Juddoonath Roy, Sreenauth Roy, Sectonath Roy, Adeetonauth Roy, Tara Soondree Burmonia, and Beroja Moyee Burmonia, and by Ishun Chunder Roy, Bunnallee Roy, and Trimallee Roy, and also by Kisto Nauth Roy, who stated, that he was a minor at the time, and that his share, having been attached by Orders of the Court, was under the management of the Collector, who offered to pay the Appellant his share of the rents, for which reason he contended that he was not liable to the Appellant's claim for interest on the arrears.

The suit was heard on the 22nd of December, 1863, by the Deputy-Collector (Mr. H. L. Harrison), who held, that the Appellant was not barred by the law of limitation, inasmuch as she could not both take the rents and sell the Putnee talook; that so [248] long as she was engaged in lawfully defending a suit to reverse the sale, she could not possibly sue for the rent, and, therefore, that the cause of action did not accrue until the 26th of December, 1860, the date of the decision of the Zillah Judge, in which case, being within three years, the suit was in time. The Deputy-Collector also decided, that the suit was properly brought under Act, No. X. of 1859, and that the Appellant was entitled to interest upon the arrears, not only in the case of the other Defendants but also in that of Kisto Nauth Roy, on the ground, as to the last-named Defendant, that the tender made by the Collector was not such as the Appellant was bound to accept, and he decreed for the full amount claimed.

From this decree, Shooshee Mokhee Burmonia and Kisto Nauth Roy appealed to the High Court of Calcutta, and their appeal was heard on the 19th of August, 1864, before Messrs. Bayley and Phear, two of the Judges of that Court, when the decision of the Deputy-Collector was reversed, on the ground, that the Appellant's claim was barred by section 32 of Act, No. X. of 1859. The material part of the judgment upon this point was in these terms:—"The substantial ground of appeal

to this Court, is upon the question as to the limitation of time for bringing the suit. The Plaintiff urged, firstly, that the arrears were put in abeyance by satisfaction out of the proceeds of the irregular sale, and revived, or rather became a second time due, when the High Court in 1863, finally declared the sale to have been illegal, and decreed restitution of the purchase-money, with costs. This ground of contention is untenable, otherwise the Plaintiff would be enabled to take advantage of her own wrong. She committed [249] a trespass in bringing to sale that property with a defective notice, when it was her duty, in law, to have that notice duly served, and cannot now be heard to say that that trespass prevented her from running against her right of action. Secondly, she maintains that, at any rate, her cause of action was subsisting at the time of the passing of the Act, No. X. of 1859; and that as she was unable, on account of the pending litigation, above-mentioned, to sue during the first portion of the three years prescribed by that Act for causes of action; so situated, she is entitled to deduct from the computation of those three years—at least so much of the time as intervened between the passing of that Act and the decree of the High Court on 26th of June, 1863. On this we must observe, that the words of section 32 of that Act are absolute, and, unlike those of similar Acts, do not either expressly or by implication admit of any exception whatever to their operation. It was urged, that the exceptions to the limitation in Act, No. XIV. of 1859, may be applied by analogy. But this is not so, for section 32 of Act, No. X. of 1859, is a special Statute of limitation of itself for all cases coming under that Act. Moreover, it is not correct to say, that this suit could not have been brought, pending the litigation respecting the irregular and invalid sale; and here again she cannot claim any benefit from acts of her own, which she ought from the beginning to have known were illegal or defective, or she could at any time have sued and abided the result, so saving her time. The appeal must be upheld, on the ground that the Plaintiff's suit was barred by section 32 of Act, No. X. of 1859."

[250] The appeal was from this decree.

The Respondents having put in no appearance, the case was heard *ex parte*.

Mr. Cave (Sir R. Palmer, Q.C., with him) for the Appellant. The tenure known in India by the name of Putnee, or Patni, is one by which the Occupant holds of a Zemindar, under a Pottah, or lease, a portion of the Zemindary in perpetuity, or for a fixed term, with or without the right of hereditary succession, and of letting or selling the whole or part as limited by the Pottah; as long as a stipulated amount of rent is paid to the Zemindar, who has the power of sale for arrears of rent. In consequence of the sale for the arrears due by the Putneedars being set aside, the Appellant had to return the purchase-money to the Purchaser, and the mesne profits were received by the Putneedars from the Purchaser. As the arrears still continued due, the Appellant as Zemindar was not affected by the provisions of section 32, of the Act, No. X. of 1859, which does not, so far as the point of limitation of suits arises, apply to the case. The Act applicable, is No. XIV. of 1859, sections 7 and 14, which is to be construed by Ben. Reg. III. of 1793, section 14, which enacts, that the rule of limitation there laid down is excepted, when "good and sufficient cause" has been shown, which precluded the Plaintiff from obtaining redress. Here the cause of action only accrued at the date of the final decree of the High Court of the 30th of June, 1863, which declared the auction sale void. The suit to recover the arrears of rent was brought in October, in the same year. Such [251] suit was, therefore, not affected by the above Acts, for until the sale was declared invalid the right to sue for the arrears could not arise.

The Right Hon. Sir James W. Colville.—The facts of this case are simply these. The Appellant is a Zemindar. Those whom she represents had granted a Putnee talook, and the Putneedars had fallen into arrears of rent. The Zemindar, the Appellant, pursued her remedy under Regulation VIII. of 1819, and brought the Talook to sale. It sold for a sum greatly in excess of the rent in arrear. The Purchaser was put in possession of the Talook. Out of the purchase-money the arrears were paid, and the balance, in the ordinary course, remained in the Collector's hands, for the benefit of those who were entitled to it. A suit was then brought to set aside the sale of this Putnee talook, on the ground of irregularity; and we must assume that it was correctly set aside by the judgment of the Court below. The first judgment on the case was on the 26th of December, 1860. The

Appellant brought her appeal in the High Court; and the final judgment, dismissing her appeal, was on the 30th of June, 1863. The effect of the judgment was, that she had to pay back the purchase-money to the Purchaser, with interest; that the Putneedars were again put into possession of the Talook; and that they recovered the mesne profits, during the period in which they were out of possession, from the Purchaser. The Appellant then brought the present suit for recovery of the arrears of rent. She brought it in the Collector's Court, as in ordinary case, and must, therefore, we apprehend, be taken to have brought it under [252] Act, No. X. of 1859. She was then met by the defence that the suit was out of time, that it was barred by the 32nd section of that Act; the construction put on that enactment being, that the suit should have been brought within three years from the time on which these arrears first became due, viz., the last day of the year for which the rents constituting them had accrued. The result of the decision is, that she has not only lost the remedy which Ben. Reg. VIII. of 1819 gave her, but that she has no other remedy for those arrears of rent. If that decision is founded upon grounds which cannot be shaken, it certainly is a very unfortunate result, and a result which obviously works a great injustice; for the Putneedars have got back their Putnee, and have, at the same time, relieved themselves from the obligation of paying for that period, the very rent upon which they held it.

The case of the Appellant has been argued on various grounds. Mr. Cave has argued, that this clause is to be qualified by introducing certain clauses of the old Regulation of limitations of 1793. He has also argued, that if those claims can no longer be imported into the consideration of the case, it falls within one of the exceptions imported into the existing Act of limitation—the Act, No. XIV. of 1859.

Their Lordships are of opinion, that if this case had arisen in an ordinary Court of Law, and that the law of limitations to be applied was Act, No. XIV. of 1859, there could be no doubt at all upon the question; and that it would not be necessary to fall back upon the exception referred to by Mr. Cave, because it seems to their Lordships to be perfectly [253] clear, that the cause of action accrued at the time at which, the sale having been set aside, the obligation to pay this sum of money revived; and whether that time be taken to be the date of the first decree, or the date of the final decree, the present suit would, in either case, have been brought in time. They do not, however, think it necessary to decide that either that Act, or the particular exception in it, is to be brought in to qualify the peculiar and special law of limitations introduced by the Act of 1859, because they think that, upon the fair construction of the 32nd section of that Act, the time had really not run. Their Lordships' view of the case is this: that, upon the setting aside of this sale, and the restoration of the parties to possession, they took back the estate, subject to the obligation to pay the rent; and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place. It follows, that upon the language of the 32nd section of Act, No. X. of 1859, the Appellant was not barred from her remedy. Their Lordships further authorize me to say, that they do not concur in the view taken by the High Court, that the Appellant can be said to have committed an act of trespass, because, when she pursued the remedy, which was clearly competent to her if it had been regularly pursued, she inadvertently omitted one of the formalities prescribed by the Act, and that her proceedings, therefore, became inoperative. Their Lordships cannot treat this as an act of trespass, or hold with the High Court, that in bringing this suit she is a person seeking to take advantage of her own wrong. They must also respectfully dissent [254] from another statement of the learned Judges of the High Court, to the effect that the Appellant might have sued for these arrears pending the proceedings to set aside the sale of the Putnee. It is clear, that until the sale had been finally set aside, she was in the position of a person whose claim had been satisfied; and that her suit might have been successfully met by a plea to that effect.

On these grounds, their Lordships are prepared to recommend to Her Majesty that the appeal be allowed with costs, that the judgment of the High Court be reversed, and, in lieu thereof, that the appeal to that Court be dismissed, and the judgment of the Court below affirmed with costs.

An order in Council reversing the decision of the Court below was made thereon.

Ex parte KISTO NAUTH ROY * [Feb. 2, 1869].

The re-hearing of an appeal heard *ex parte*, on which an Order in Council had been made, refused, the default in not appearing and contesting the appeal being occasioned by the Agents of the Respondent, who sought to have the appeal re-heard.

A re-hearing will not be allowed except under very special circumstances.

A petition for re-hearing the above appeal was afterwards presented by Kisto Nauth Roy, one of the parties to the same.

The petition alleged, that on the 19th of August, 1864, the Petitioner obtained a decree in his favour in the High Court at Calcutta, in a suit brought by the Appellant, Mussumat Ranee Surno Moyee, against the Petitioner and others, and that from that decree the Ranee appealed to England; that in the month of September, 1867, the Petitioner instructed his [255] Agents in England to appear for him in the appeal, and take all necessary steps on his behalf, with a view of maintaining the decree of the High Court; that on the 23rd of October, 1867, the Petitioner's Agents attended the Privy Council Office, and made inquiries with respect to the appeal, and were informed that the record of the appeal had not yet arrived in this country; that the Agents on the same day wrote a letter to the Registrar of the Privy Council, headed "Ranee Surno Moyee, Appellant; and Kisto Nauth Roy, Respondent," asking him to give them notice when the transcript arrived, and to enter an appearance in their names for the Petitioner; that the appeal was, notwithstanding many inquiries by his Agents, and every diligence on the part of the Petitioner, set down for hearing, and ultimately heard *ex parte* in the absence of the Petitioner, and judgment given on behalf of the Appellant; that the Petitioner had ascertained that in the certificate of the Registrar of the Indian Court accompanying the transmission of the record to England the title of the appeal was given "*Mussumat Ranee Surno Moyee v. Shooshee Mokhee Burmonia*," without adding the words "and others," and that in consequence of this omission and mistake the appeal was entitled in the same manner in the record of the Privy Council Office, and that the Appellant having many other appeals pending before the Privy Council, the Officers of the Privy Council were misled by such title, and unable to give your Petitioner information of the steps taken in the appeal; that there were other parties Defendants in the suit, but that the Petitioner and Shooshee Mokhee Burmonia alone appealed from the Court of First Instance to the High Court, and that in the proceed-[256]-ings in the Court below the Petitioner's name was sometimes used first, and sometimes the name of Shooshee Mokhee Burmonia; and the Petitioner stated, that he had used every diligence to have the appeal argued on his behalf before the Privy Council, and submitted that a re-hearing of the appeal so heard *ex parte* ought, under such circumstances, to be allowed, and prayed that he might be at liberty to appear to and argue such appeal.

Mr. Manisty, Q.C., and Mr. Doyne, for the Petitioner.—There was a *bona fide* intention on the part of the Petitioner to appear and support the decree made in his favour by the High Court. He had retained Counsel, who were to be instructed at the hearing of the appeal. No default can be imputed to his Agents in England for not entering an appearance, and the hearing took place under circumstances over which he had no control. The Petitioner's Agents were misled by the name of the Petitioner being omitted in the title of the appeals transmitted from India, the fact being, that there were other appeals then pending by the same Appellant in which the Petitioner was not a party. A re-hearing of an appeal heard *ex parte* in similar circumstances was granted in *Rajundernarain Rao v. Bijai Gorind Sing* (1 Moore's P.C. Cases, 117); *Dumaresq v. Le Hardy* (1 Moore's P.C. Cases, 127). There the law and practice in such circumstances were investigated, and are fully stated both in the argument and judgment, and in the notes appended by the Editor to the report.

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Joseph Napier, Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

[257] Mr. Cave, for Mussumat Surno Moyee, opposed. —Nothing is shown to entitle the Petitioner to the extraordinary relief now asked for, and there does not appear to have been a *bona fide* intention to enter an appearance, no step being taken until the Order in Council was made reversing the decree of the Court below. In such circumstances, the Court will adopt the rule laid down in *The Singapore and the Ilche* (4 Moore's P.C. Cases (N.S.), 271; S.C. Law Rep. 1 P.C., 378); *The Montreal Assurance Company v. McGillivray* (13 Moore's P.C. Cases, 125); *Motz v. Moreau* (13 Moore's P.C. Cases, 376); and refuse the application.

Judgment was reserved, and now delivered by

Lord Chelmsford (Feb. 6, 1869).—This is a petition for the re-hearing of an appeal from a decree of the High Court of Judicature at Fort William in Bengal, which was heard *ex parte* on the appearance of the Appellant alone, and in which their Lordships agreed to recommend to Her Majesty that the appeal should be allowed, and the decree of the Court below be reversed.

The Petitioner, one of the Respondents in the appeal, prays for a re-hearing, on the ground that he had fully intended to appear in support of the decree and had given instructions to his Agents in England to enter an appearance for him, and take all necessary steps for maintaining the decree, but that neither he nor his Agents had any notice that the appeal had been entered, nor were they aware of its having been fixed for hearing until after the [258] hearing had taken place, and the report made to Her Majesty in Council had been agreed to.

In support of the petition the case of *Rajandernarain Rae v. Bijai Gorind Sing* (1 Moore's P.C. Cases, 117) was relied upon to show, that it is competent to their Lordships, even after a report to the King and the confirmation of the report, to recommend that there shall be a re-hearing.

Such an unusual indulgence, however, ought never to be granted except under very special circumstances, and only where the *ex parte* hearing has not been occasioned by any default in the party applying for a re-hearing. The case referred to was one of this exceptional character. The hearing was *ex parte* upon the appearance of the Respondent alone, and the Committee, adopting a form of Order which had been used on previous occasions, affirmed the decree of the Court below, and dismissed the appeal with costs. Upon a petition by the Appellants, praying to have the Order for dismissing the appeal and affirmance of the judgment recalled, and for leave to prosecute their original petition of appeal, their Lordships considered, that a simple dismissal was to be regarded as the Order which must have been in their contemplation, and that no more could have been intended in substance, although the objectionable form importing affirmance was followed. And upon the application for a re-hearing, Lord Brougham, in delivering the opinion of the Committee, stated that the case for indulgence was a strong one, provided there was power to grant the application. The parties were infants under the Court of Wards in [259] Calcutta, and appeared by a public functionary through the appointment of that Court as their guardian *ad litem*: this person neglected the case altogether, and not only did not provide funds for carrying it on, but absconded with the fund in his hands which had been allowed for the expense of the suit, and he was not to be found when the Agent here desired to communicate with him, nor had he since returned. Their Lordships, therefore, thought "in the particular circumstances of the case," His Majesty should be advised to amend the Order, and to let in the Appellants to be heard, notwithstanding the dismissal, that is to say, "to restore the appeal," but the conditions were imposed of payment of the Respondent's costs occasioned by the default at the time of the *ex parte* report, and also by the application for a re-hearing.

In the present case it cannot be truly alleged, that the *ex parte* hearing took place without any default on the part of the Petitioner or his Agents.

The appeal was from a decision of the High Court of Judicature at Fort William in Bengal, in favour of the Defendants, in a suit in which Mussumat Ranee Surno Moyee was Plaintiff, and Shooshee Mokhee Burmonia, the Petitioner, Kisto Nauth Roy, and several others, were Defendants.

In the certificate of the Registrar of the Court accompanying the transmission of the Record, the only Defendant named in the title of the appeal was Shooshee Mokhee Burmonia, without the addition of the words "and others"; but in the

record itself the words "and others" were added to the name of the Defendant. The Petitioner's instructions to his Agents probably named only himself as the Respondent in appeal, because a Letter, dated the 23rd of October, 1867, was written by them to the Registrar of the Privy Council in these words:—

"Ranee Shurno Moyee, Appellant,
and

Kisto Nauth Roy, Respondent,
In appeal from Bengal."

"We are instructed on behalf of the Respondent in the above appeal, and shall be obliged by your giving us notice when the transcript of proceedings arrives in this Country, and by your entering an appearance in due time in our names on behalf of the Respondent."

The Agents made inquiries at the Council Office on the day this Letter was written, and also subsequently in the same month of October, whether the record in the appeal had arrived. As there was no appeal with the title named in the Letter, they were of course answered in the negative. The misinformation as to the non-arrival of the proceedings in this Country was owing to the inaccurate description of the appeal given by the Petitioner to his Agents. This inaccuracy is inexcusable, because he knew perfectly well that there were many other Respondents beside himself, and that his name did not stand the first amongst the Defendants in the title of the suit. All the ignorance of the proceedings taken on the part of the Appellant resulted from the Petitioner having thus originally misled his Agents in his instructions to them. The Agents themselves, too, are not wholly free from blame. They should not have been satisfied with having requested the [261] Registrar to give them notice of the arrival of the proceedings, which it was no part of the duty of his office to do, but they should have examined for themselves at the Council Office, and, having the name of the Appellant accurately given, they would have ascertained that there was an appeal by him, and upon the production of the proceedings they would have found that to the name of the Respondent there were added the words "and others," which would have led to a further examination, and to the discovery that it was the appeal in which the Petitioner was interested, and in which they were instructed to appear for him. Under these circumstances, to grant the indulgence of a re-hearing to the Petitioner, would be to give him the benefit of his own and his Agent's default.

It is necessary to distinguish this case from that of *McLeary v. Hill* and others, which was heard by this Committee on the 30th of June, 1868, and in which their Lordships intimated their opinion, that the decree appealed from ought to be varied and amended, and directed minutes of the proposed report to be prepared by the Counsel for the Appellant. This was accordingly done, and on the 2nd of July the minutes were approved and adopted by their Lordships, and were afterwards, on the 7th of July, submitted to Her Majesty for approval. Immediately after the Order in Council had been made, the Registrar, in drawing the final Order, discovered that the Appellant's Solicitor had omitted to take out and issue the usual process requiring four out of the five Respondents to appear to the appeal, although he had issued the regular process against the fifth Respondent. The Registrar reported this fact to their Lordships, and [262] on the 10th of July their Lordships reported to Her Majesty that the Order of the 7th of July ought to be revoked. The appeal then stood over for further directions, and the Appellant was ordered to serve a personal notice of the appeal on each of the four Respondents who had not appeared.

The distinction between this case and the present is, that in *McLeary v. Hill* and others, the Appellant had neglected to take an essential step in the appeal, and was, therefore, not entitled to set down the case *ex parte* as against the Respondents. In the present case, although no appearance had been entered on behalf of the Respondents, or either of them, the Appellant had done all she was required to do by the practice and rules of the Judicial Committee, and the omission and neglect is that of the Petitioner, who now asks for a re-hearing of the appeal. The petition must be dismissed with costs.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 6. *Practice*; j. *Re-hearing appeal*. S.C. 5 Moo. P.C. (N.S.) 373; L.R. 2 P.C. 274; 38 L.J. P.C. 21; 20 L.T. 333; 17 W.R. 521. See note to *Rajundernaraiah Rae v. Bijai Govind Sing*, 1836, 1 Moo. P.C. 143.]

[263] RAJAH SUTTOSURRUN GHOSAL.—Appellant, MOHESHCHUNDER MITTER.—Respondent; RAJAH SUTTOSURRUN GHOSAL.—Appellant, TARINEE CHUNDER GHOSE,—Respondent * [Dec. 18, 1868].

On appeal from the High Court of Judicature at Calcutta.

A Purchaser of a permanently settled Talook (sold at an auction sale, under Ben. Reg. XI. of 1822, for arrears of Government revenue), has no power as such auction Purchaser to enhance the rent of a holder of lands in the Talook, who is in possession under a title founded on a Pottah, or Lease, dated in 1786 (before the Decennial Settlement), at a fixed and invariable rent paid at and since the date of such Pottah [12 Moo. Ind. App. 273].

Held further, following *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 191), that the absence of words of limitation in the Pottah which create an Istemrari tenure, was supplied by evidence (1) of long and uninterrupted enjoyment at a fixed rent; and (2) of the descent of the tenure from Father to Son: by which the hereditary character was to be legally presumed [12 Moo. Ind. App. 263].

With respect to the rights of Purchasers under an auction sale for arrears of revenue by force of sections 30, 31, 32, and 33 of Ben. Reg. XI. of 1822. Held, that those enactments are repealed by Act, No. XII. of 1841, and the latter Act by Act, No. I. of 1845, which is confined to "future sales" under that Act [12 Moo. Ind. App. 269, 270, 271].

The case of *Ranee Surnomonee v. Maharajah Sutteeschunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123) reviewed and approved [12 Moo. Ind. App. 270].

Whether, section 5 of Ben. Reg. XLIV. of 1793, can be held in force for any purpose but that of declaring the general principles upon which subsequent legislation has proceeded, namely, putting a Purchaser at an auction sale for arrears of revenue, in the position of the party with whom the Perpetual Settlement of the estate was made. *Quære?*

These several appeals involved the same question, and related to the right of the Respondents, proprietors in certain shares of a permanently settled [264] Talook in the Twenty-four Pergunnahs to enhance the rent payable by the Appellant to them for lands held by him as their tenant.

One of the suits was brought by the first Respondent as the proprietor of a 10 annas and 10 g. share in the Talook against the Appellant to enhance his rent, and the other suit was brought by the second Respondent, the owner of a 5 annas and 10 g. share in the same Talook against the Appellant for the same purpose. The Respondents, in both suits, claimed all the rights and powers of avoiding, and annulling tenures and enhancing the rent conferred on Purchasers of a Talook or Zemindary at a public sale for arrears of Government revenue, under Ben. Reg. XI. of 1822, as deriving their title through the original Purchaser at such sale.

The Appellant's case was, that an invariable fixed and uniform rent had been paid under a Pottah, or lease, dated in 1786, A.D., before the Decennial Settlement, for a period of seventy-three years, by him and his predecessors, from whom he derived title by hereditary succession: which fixed rent had been acquiesced in by the Talookdars, for the time being, down to the institution of the above suits, and he contended, that it was not competent to either of the Respondents to enhance his rent.

The Sudder Ameen (Baboo Norotun Mullick) before whom the suits were in the first instance tried, decided, that the Pottah was genuine and operative, and that as under it, for a period of upwards of sixty years, and before the Decennial Settle-

* Present:—Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, the Right Hon. Sir Fitz-Roy Kelly (The Lord Chief Baron of the Exchequer). Assessor.—The Right Hon. Sir Lawrence Peel.

ment, rent had been paid by the Appellant, and those under whom he derived title, at a uniform rate the rent could not be enhanced. On appeal, Koonjoololl [265] Bannerjee the Principal Sudder Ameen, in effect, affirmed the finding of the Lower Court as to the genuineness of the Pottah, but held, that there was no express limitation in it, that it should be held hereditary, without increase of rent, and that it could not be considered as Mourassee; that the land included in the Pottah was not proved to have been held at a uniform rent for twelve years before the Decennial Settlement, and that, therefore, it was not exempt from assessment, and accordingly so far reversed the Lower Court's decree, and ordered an assessment of the lands of the Appellant. The High Court at Calcutta, consisting of Messrs. Kemp and Seton-Karr, on special appeals from decrees founded on this finding, affirmed the same. The present appeals were from their decision.

The Respondents not appearing, the appeals were heard *ex parte*.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant in each appeal, referred to the following cases:—

First, on the question of the right of the Respondents, as Zemindars, to enhance rent held in Putnee tenure, *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123); secondly, as to the application of the law of limitation to such tenure in a suit for enhancement of rent, and the effect of the Government sale law in respect to the right of auction Purchasers, *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 183); *Degumber Mitter v. Ramsaonder Mitter* (7 Ben. Sud. Dew. Ad. Rep. 617); and Ben. [266] Regs. V. of 1812, sec. 9; XI. of 1822, secs. 30, 31, 32, 33; Acts, No. XII. of 1841, Nos. I. X. of 1845, and Nos. X. and XI. of 1859; and, thirdly, they insisted, that the dealings with, and the hereditary character of the tenure under which the Appellant and his predecessors had held the land, supplied the want of words of limitation in the Pottah: *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 191).

Their Lordships' judgment, in both appeals, was pronounced by

The Right Hon. Sir. James W. Colville (Jan. 18, 1869).—The question raised on these appeals is, whether the Respondents (being the Plaintiffs in two different suits) have established, as against the Appellant, their right to enhance the rent payable by him in respect of 134 beegahs and 2½ cottahs of land, situate in the Twenty-four Pergunnahs.

This parcel of land is alleged in both suits, to form part of a zemindary, of which somewhat more than ten undivided sixteenths belong to Moheshchunder Mitter, the Respondent on the first appeal, and the remainder, being somewhat less than six sixteenths, belong to the Respondent in the second appeal, or, rather, his Master, Degumber Mitter.

Moheshchunder Mitter claims title to his portion of the zemindary as the Nephew *ex parte maternâ*, and representative in estate of one Gunganarian Ghosal, who purchased it at a sale for arrears of Government revenue in 1839, and died in 1851. Degumber Mitter's title to his portion is derived through several [267] successive alienations from some person who purchased that portion at a similar sale in 1837. From the fact that these undivided portions of the zemindary were thus sold at different Government sales, it is to be inferred, that before those sales they were held by different parties, each of whom was separately liable for his share of Government revenue.

In these circumstances, the two Mitters have brought separate suits for the enhancement of the rent of the lands in question: and for the purposes of these appeals, their Lordships will assume, that in the Courts below they have been properly held entitled so to do, though there certainly appears to have been a well-grounded objection to the form in which the plaints were originally framed.

In each case the Plaintiff rests his claim to enhance on the statutory rights of a Purchaser at an auction sale, meaning thereby, a sale for arrears of Government revenue: and the Regulation under which each of the sales in question took place was Ben. Reg. XI. of 1822.

The defence in the two suits was very much the same. The Appellant insisted, that of the land in question, 67 beegahs and 3 cottahs had been held by him and

his ancestors under a Pottah, dated in 1786, at a fixed rent of S. Rs. 163. 13a. 10p.; that of the rest of the lands, 42 beegahs and 14 cottahs were Lakhiraj; and the remainder, either including, or, perhaps, with the exception of a very small portion which had been resumed by Government as a towing-path, was held by him as part of a different Talook, under one Rantonoo Dutt. He further insisted, that the suits were barred by lapse of time, twelve years [268] having in each case elapsed since the date of the purchase at the auction sales. And, in Degumber Mitter's suit, he further questioned the right of one who was a mere Purchaser by private contract from one who had bought at a Government sale to institute such a suit. He also raised the question, whether, the suit ought not, under cl. 7 of the 23rd section of Act. No. X. of 1859, to have been brought in the Collector's instead of the Zillah Court.

Their Lordships think it will be convenient, in the first instance, to consider the Respondent's claim to enhance, as if all the lands in question were covered by the Pottah of 1786.

Both the Courts below, which dealt with the questions of fact, have affirmed the genuineness of that Pottah, and their Lordships see no reason for impeaching it.

Again, though the document is not in the form of the ordinary instruments which create an Istemrari tenure, it is in terms a grant of the lands at a fixed rent, for it specifies the sum. And, upon the principle laid down by this Committee in the case of *Baboo Gopal Lall Thakoor v. Teluck Chander Rai* (10 Moore's Ind. App. Cases, 191), the absence of words importing the hereditary character of the tenure is here, as in that case, supplied by evidence of long and uninterrupted enjoyment, and of the descent of the tenure from Father to Son, whence that hereditary character may be legally presumed.

Upon the evidence their Lordships have no doubt, that at the date of the earliest of the Government sales, those whom the present Appellant represents were, by virtue of the Pottah, in possession of the [269] land which it covers at a fixed rent, under a sub-tenure upon the then Zemindars.

It follows, that the Respondent's right to enhance the rent, which implies a right to vary the terms of the sub-tenure, and to set it aside, if that title to enhance be disputed on grounds inconsistent with the obligations of such a dependent tenure, must, if it exists at all, depend upon the peculiar and statutory powers acquired by a Purchaser at a sale for arrears of revenue. And accordingly, both in the complaints and in the notices given in pursuance of Ben. Reg. V. of 1812, sec. 9, those powers are put forward as the foundation of the right.

The first question, then, is—Are the Respondents, or is either of them, entitled to exercise those powers? That neither is so entitled has been strongly argued by the learned Counsel for the Appellant, upon the following among other grounds. The sales took place under Ben. Reg. XI. of 1822; and the rights of the Purchasers through whom the Respondents claim were defined by the 30th and three following sections of that Regulation. Those enactments were repealed by the 1st section of Act. No. XII. of 1841; and all the provisions of that Act, with the exception of the first and second sections, were again repealed by Act. No. I. of 1845, which, as modified by some subsequent Acts, is the existing sale law. Neither of the two last-mentioned Acts contain any saving of rights acquired under the Acts which it repealed; and though each gave to Purchasers at sales for arrears of Government revenue powers equal to or even larger than those given by the repealed Acts, it expressly limited those powers to Purchasers at future sales, *i.e.*, "sales under this Act." The Respon-[270]-dents, therefore, cannot invoke Regulation XI. of 1822, as the foundation of their alleged rights, because that has been absolutely repealed; and they cannot call in aid the subsequent Acts, because they have given no power to Purchasers at sales which took place before they were passed.

This point, though it seems to have been overlooked in many cases in India, is not now adjudged here for the first time. It was fully considered and determined by this Committee in the case of *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123). The Judges of the High Court have attempted to distinguish that case from the present, on the ground that in the former the sale relied upon was made under Ben. Reg. XLIV. of 1793. But that statement proceeds upon a misapprehension of the facts of the earlier case. In

that, as in these, the sale on which the power to enhance depended had taken place under Ben. Reg. XI. of 1822; and it was not until they found that they could not support their case, either on that repealed Regulation, or on the subsequent Acts, that the learned Counsel for the Respondent, the Maharajah, fell back upon the 5th section of Ben. Reg. XLIV. of 1793, which, though suspended by the subsequent Legislation on the subject, had never been expressly repealed.

Their Lordships must also observe, that in the judgment delivered in that case it was carefully considered, whether a sale for arrears of revenue of itself merely, and without any act, proceeding, or demonstration of will on the part of the Purchaser, altered the character of the tenure. And it was decided, that the sale law had not "that hard and rigid [271] character." It is true that the judgment, assuming that the powers given by Ben. Reg. XI. of 1822 had been swept away by the repeal of that Regulation, dealt only with the effect of a sale under Reg. XLIV. of 1793. But what is laid down concerning such a sale may, even *a fortiori*, be predicated of a sale under any of the subsequent sale laws, and, in particular, of one under Regulation XI. of 1822. For the words of the Regulation of 1793 (sec. 5) are, that all engagements of the former proprietor, and all under-tenures granted by him, shall "stand cancelled from the day of sale;" whereas the Regulation of 1822 (sec. 30) enacts, that "all tenures which may have been created by the defaulter or his predecessors, being representatives or assignees of the original Engager, as well as all tenures which the first Engager was competent to set aside, alter, or renew, shall be liable to be avoided and annulled by the Purchaser, etc.,"—expressions which, far more strongly than those of the earlier Regulation, import that the estate is not, upon a sale for arrears of revenue, necessarily and *ipso facto*, changed in its nature and incidents. And, if this be so, the repeal of the Regulation which destroys the power to change the estate, must leave its freedom from change, independent of mutual will, unimpaired.

Their Lordships, then, being clearly of opinion, both upon principle and the authority of the decision in *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123), that the Respondents cannot now for the first time exercise powers which, if they ever existed, existed only by virtue of the repealed sections of Ben. Reg. XI. of 1822, do not deem it necessary to consider, whether [272] the stringent powers given by those enactments to Purchasers, *co nomine*, could in any case be exercised by the heirs or assignees of such Purchasers. Justice and sound policy alike require that inasmuch as the Law has given them for the particular purpose only of enabling the Purchaser again to make the income of the estate an adequate security for the public revenue assessed upon it, and the exercise of them cannot but occasion great hardship to under-tenants, and insecurity to property, they should be exercised within a reasonable time. And their Lordships believe that that object has now been in some measure secured by Acts, Nos. X. and XVI. of 1859.

Their Lordships have further to remark, that in the case of the *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* [10 Moo. Ind. App. 123], to which they have already referred, this Committee, whilst it carefully abstained from determining whether, upon the true construction of all the Regulations taken together, the 5th section of Regulation XLIV. of 1793 ought to be taken to have been repealed, nevertheless proceeded to consider whether that enactment, if assumed to be still in force, would support the Respondent's case. And after putting upon the section the construction stated at page 147 of Vol. 10, Moore's Ind. App. Cases, the judgment ruled, that the Purchaser had an option to confirm the existing rate of rent, and must, upon the evidence in the particular case, be taken to have exercised that option in favour of the dependent Talookdar.

Their Lordships must reiterate the doubts expressed by those who decided the case of the *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* [10 Moo. Ind. App. 123], whether the clause in question can be held to be in force for any purpose but that of declaring the general principles upon which all the subsequent legislation has proceeded, viz., that of putting a Purchaser at a sale for arrears of revenue in the position of the party with whom the Perpetual Settlement of the estate was made. They do not think that a party who has lost the particular rights which were given to him, or to the Purchaser whom he represents, by any of

the subsequent Statutes, can fall back upon the old law which has been so repeatedly modified.

It is to be observed, however, that, even if the section be in force, the tenure here in question is not one which, upon the strictest interpretation of that clause, could stand cancelled. It existed at the time of the Decennial Settlement, and their Lordships apprehend, that the only right which the Zemindar with whom that Settlement was made could have exercised over it was that conferred by section 51 of Ben. Reg. VIII. of 1793. No attempt has been made to bring the present cases within that section, which seems to cast upon the Zemindar the burthen of proving particular grounds for enhancement of rent.

Upon the whole, then, their Lordships are of opinion, that the Court of the Principal Sudder Ameen and the High Court of Calcutta were in error in holding that the Respondents had established their right to enhance the rent of the lands covered by the Pottah of 1786.

It may be said, that this does not dispose of the question as to the other parcels of land. But the foundation of the suits is, that the Respondents have [274] the powers of Purchasers at sales for arrears of revenue; and if that foundation fails, the failure is fatal to the whole suit. Their Lordships, however, are of opinion, that there are further objections to the maintenance of the present suits in respect of those parcels of land. There is no evidence that the Appellant has ever paid to the Respondents any rent except the sum of S. Rs. 136. 13a. 10p., being the rent reserved by the Pottah in respect of the 67 beegahs and 3 cottahs. He disputes the title to rent in respect of the other parcels, treating one parcel as Lakhiraj, the other as held of a different Landlord. A suit for enhancement implies such a privity of title or tenure existing between the parties, that a claim to some rent is legally inferrible from it, and there is here proof that that relation is denied to have existed at any time between the parties in respect of these two parcels of land. As to the latter portion, where the Respondents' title is denied and the right of another Zemindar set up, the proper remedy seems to be by a suit in the nature of an ejectment. Again, if the lands alleged to be Lakhiraj lie within the Respondents' zemindary, the law has given them an appropriate remedy in a suit for resumption and re-assessment.

The present decision will not deprive them of either remedy, if sought by them in the character of ordinary Zemindars. But it is to be observed, that a suit of either kind is now subject to a particular law of limitation, and that consideration is a strong ground for not allowing such rights to be irregularly litigated in a suit like the present, which is subject to a different, if it is subject to any, rule of limitation. Upon the whole, therefore, their Lordships have [275] come to the conclusion, that they must recommend to Her Majesty to allow these appeals: to reverse the decrees of the Court below, and in lieu thereof to Order, that both suits be dismissed with costs. The Appellant will be entitled to the costs of these appeals: but it will be for the Registrar, in taxing those costs, to consider whether the costs of more than one case should be allowed (see *Shah Mukhun Lall v. Bahoo Sree Kishen Singh*, ante [12 Moo. Ind. App.], p. 157).

[See *Kooldeep Narain Singh v. The Government*, 1871, 14 Moo. Ind. App. 256; *Rajah Leelanund Singh Bahadoor v. Thakoor Munooranjun Singh*, 1873, L.R. Ind. App. Sup. Vol. 188.]

RAJAH SAHIB PERHLAD SEIN.—Appellant: BABOO BUDHOO SING.—

Respondent * [Feb. 8 and 9, 1869].

On appeal from the Sudder Dewanny Adawlut of Bengal.

Suit for possession of a four-anna share of a Raj and Zemindary under a Kowala, or a Bill of Sale, purporting to be an absolute sale for the sum of Rs. 75,000, executed at a time when the alleged Vendor was not in possession or had established his title to the Raj and Zemindary. The Vendor who established his title to the Raj, and was in possession, by his answer set up this case; that being in want of money to carry on suits to recover the Raj and Zemindary, he applied to one K. (whose rights had become vested by purchase in the Plaintiff), who agreed to make advances to him on condition of his executing the Bill of Sale, and that no part of the consideration money there expressed was paid on execution of the Bill of Sale, though some inconsiderable advances were made to him; that he was afterwards pressed to execute a Bond to secure the same sum of Rs. 75,000, hypothecating the whole Raj and Zemindary in substitution of the Bill of Sale, but that no consideration was paid on that occasion; the real contract being one to secure moneys already advanced, and future advances, which contract had not been complied with by K.'s Assignee:—Held, by the Judicial Committee, upon the evidence, that the real arrangement between the parties was for K. to make advances, from time to time, and that the form of the contract was a device adopted to evade the effect of the transaction being stamped with the character of champerty, and the Bill of Sale set aside.

In a suit so framed to obtain possession, the appellate Court will not impose terms upon the Defendant to repay the advances made by K. as the Plaintiff, his Assignee, had his remedy, and could sue on the Bond. Whether the effect of the execution of a Bill of Sale by a Hindoo Vendor is to pass the estate irrespective of actual delivery of possession, giving to the instrument the effect by English Law of a conveyance operating under the Statute of Uses. *Quære?*

The suit in this appeal was brought by the Widow of the late Khajah Talib Ally Khan, against the Appellant, to oust him from possession of one-fourth of his ancestral zemindary of Rannuggur by force of [276] a Bynama, or Bill of sale, dated in 1811, executed by the Appellant, which instrument purported to sell and convey to Sultan Jan, the Father of her late Husband, Khajah Talib Ally Khan, such one fourth, for the sum of Rs. 75,000, therein stated to have been paid to the Appellant upon the execution of the instrument. A previous suit by the Khajah against the Appellant for the same object had been dismissed by the Zillah Judge, and confirmed on appeal by the Sudder Dewanny Adawlut. By the former Court on the merits, and by the latter on the ground of the insufficiency of the stamp on the copy of the Bynama and receipt which were put in evidence.

The principal question raised in the present suit was, whether the purchase-money, mentioned in the Bill of sale and in the receipt, was the true consideration for the former, and, further, whether it had been actually paid at the time of the execution thereof, as alleged and contended for by the Plaintiffs; or [277] whether, such consideration was merely nominal and not paid, as contended by the Appellant, and whether the instrument was not made and executed by the Appellant upon the faith and in consideration of a verbal agreement and undertaking at the time entered into by the Father of the Khajah to pay certain debts then due by the Appellant, and also, from time to time, to advance and pay the moneys required by him to meet the costs and expenses of the Appellant's carrying on several suits then pending, which involved the claims of several persons, including the Appellant, to succeed as heir to the Raj and Zemindary of Rannuggur. The non-performance

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Joseph Napier, Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

of this agreement was admitted. Another question was also raised, viz., whether the Bond or Tumusook, subsequently executed, was granted and accepted in substitution and supercession of the previous Bill of sale, as contended by the Appellant.

By the decree of the Principal Sudder Ameen, Mirza Mahomed Siddick Khan, made in the suit, on the 28th of May, 1858, it was decided on the evidence, that the true consideration for the Bill of sale was not the sum mentioned therein and alleged by the Plaintiff to have been so paid, but the agreement and undertaking to advance and pay subsequently monies to carry on the suit; that default had been made in the performance of such undertaking, and the terms and conditions thereof had not been performed, to the loss and injury of the Appellant. The decree accordingly set aside the Bill of sale, and dismissed the suit with costs.

This decree was appealed from to the Court of [278] Zillah Zaram, and the decree of the Principal Sudder Ameen modified and altered so far as ordered the Plaintiff to pay the Appellant's costs, but was in all other respects affirmed. The Judge (Mr. Henry Atherton) stated in his judgment, that he was clearly of opinion with his predecessor, the Judge of the Zillah Court (Mr. Hathorn, who had heard and decided a former suit, and whose judgment was put in evidence), that the Appellant did not receive the consideration-money mentioned in the Bill of sale, and that he was satisfied that the evidence in support of the Plaintiff's claim was false.

A special appeal was made from this decree to the late Sudder Dewanny Adawlut. The appeal was heard before Messrs. Raikes and Bayley, two of the Judges of that Court, who gave judgment on the 27th of September, 1860, to the effect that the execution and delivery of the Bill of sale perfected and completed the transaction. It then decided, that the Appellant having chosen to do so without receiving the purchase-money therein mentioned, such instrument, nevertheless, must be regarded "as a valid conveyance of his right and title to the purchaser, and debarred the Appellant from holding the land any longer as the Owner of it, the ownership then becoming vested in the Purchaser." The Judgment afterwards proceeded in these terms: "It appears to us, however, that if possession be withheld in consequence of failure to pay up the whole amount of the purchase-money, and the seller be allowed to retain possession until such payment is made, it follows that he can only retain the estate as Trustee for the Purchaser, and that upon the principle of English Equity Law, the Vendor has only a right to a lien in the [279] estate to the amount of purchase-money unpaid to him. If so, all profits received by him must be accounted for, and when such profits have amounted to the purchase-money due to him, the debt of the Purchaser is discharged and the Seller is bound to deliver the estate forthwith to the Purchaser. It was admitted that equitably such a lien should exist for the benefit of the Vendor in all cases in which the Vendor can be entitled to look to such security as the estate itself, when the sale was made, but that in the present instance the Seller had no right to regard the estate he sold in the light of affording him additional security for his money, inasmuch as he was not himself in possession of the estate and had at the time only a lawsuit pending for its acquisition. Matters of this kind should, however, be first considered in the Courts below, where questions of fact can alone be determined." The decree then ordered a remand of the case to the Zillah Court, to be decided *de novo* by the Judge, but subject to the following instructions. "First, the Judge, having held that the Bill of sale was executed and delivered to the Plaintiff, should have also held the sale perfected and binding upon the Seller; second, under the precedents cited, and with reference to the plea that full consideration had not been paid, as a large amount, some Rs. 20,000, was considered by the Judge to have been advanced in part payment, while the Seller had kept possession for a series of years, he should have called upon him to account for the profits received by him, and if the full amount, with reasonable interest, was not discharged from that source he should only hold the Defendant (the Appellant) entitled to continue in possession upon the [280] ground that he had a right to look upon the estate sold as burthened with such a lien, from the circumstances attending the sale of the property, and not otherwise. With these instructions, which the Judge of the Zillah Court could himself carry out, without remanding the case, under the new Code of Procedure, the case is remitted to be decided *de novo* in that Court, on the points mooted, or upon others which should arise on the pleadings."

The appeal was from this decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—The evidence failed to establish first, that the transaction in question was one of purchase and sale of the one-fourth part of the Raj or zemindary, or secondly that any payment of the consideration money was mentioned when the alleged deed of sale was made. The Appellant, on the other hand, proved a verbal agreement between both parties with respect to the Kowala at the time of its execution, and that the party through whom the original Plaintiff and the Respondent claim title to the one-fourth, had made default, and failed to perform his part of the agreement. The evidence adduced by the Appellant also proved, that the Bond or Tumusook, subsequently executed by him, was demanded and accepted by the late Khajah Talib Ally Khan, in substitution and supersession of the alleged deed of sale now sought to be enforced. Under these circumstances, and the facts proved in the Court below, the Plaintiff would not be entitled to the aid and assistance of a Court of Equity, either in respect of the particular relief [281] prayed, or in respect of any relief whatsoever as against the Appellant, in respect of the one-fourth of the Raj and zemindary.

Mr. J. D. Bell, for the Respondent.—The instrument relied on by the Respondent was a valid instrument by way of sale of the property. It was necessary, according to the view of the case taken by the Court below, to have an account taken of the mesne profits of the four annas share received by the Appellant subsequent to the date of the sale, and to ascertain what actually was the consideration given. Without a further reference to the inferior Court to take evidence upon those points, the rights of the Respondent could not properly be determined. If the sale cannot be upheld, it is necessary, to do complete justice between the parties, that terms should be imposed on the Appellant to repay the advances made to him by the Father of the Rajah. He cited *Issurchunder Ghose v. Nil Kimmul Pal Choudree* (7 Ben. Sud. D.A. Rep., 224).

Judgment was delivered in this case, and four other appeals affecting the same property, at the same time.—See *post* [12 Moo. Ind. App.], p. 301.

[282] KALEEPERSHAD TEWARREE.—*Appellant*: RAJAH SAHIB PERHLAD SEIN,—*Respondent* * [Feb. 9 and 10, 1869].

On appeal from the High Court of Judicature at Calcutta.

Suit to set aside a Zur-i-peshgi (usufructuary mortgage) of certain mouzahs, part of the Raj of the Mortgagor, for securing re-payment of Rs. 49,453, under which the Mortgagees had been put in possession. The Plaintiff admitted his execution of the Deed, but alleged, that it was executed to secure the amount of a Bond previously executed in favour of the Mortgagees as a further security to indemnify a third party, and security for him for advances in the prosecution of his claim to the Raj; that the conditions of the Bond to the Mortgagees not having been complied with, there was no sufficient consideration for the Bond and Deed which he had been fraudulently induced to execute. Held, that, in the first instance, it lay on the Plaintiff, who sought to set aside a Deed executed by him and perfected by possession, to make out the case alleged by him, and that the *onus probandi* was upon him to establish, at least, a good *prima facie* title to the relief prayed for, so as to cast on the Defendants the burthen of proving the consideration for the Deed.

In the absence of clear and consistent evidence on the Plaintiff's part, establishing that the Deed was obtained fraudulently and without consideration, such Deed sustained.

The suit in this appeal was instituted by the Respondent in the Court of the Principal Sudder Ameen against the Appellant, and his Brother, Mudun Mohun

* Present: Members of the Judicial Committee—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart. Assessor:—The Right Hon. Sir Lawrence Peel.

Tewarree, since deceased, and one Lalla Binda Lall, the Appellant's Mooktar, to set aside and cancel a Zur-i-peshgi (usufructuary mortgage instrument) executed by the Respondent, as alleged, at the instance of Lalla Binda Lall, acting in collusion with the other Defendants, in whose favour it was made, relating to certain [283] mouzahs (villages) specified therein, the property of the Respondent, and forming a portion of his Raj or zemindary of Ramnuggur, to secure the repayment of Rs. 49,458, with mesne profits during the period of possession under such Deed.

The grounds upon which the Respondent sought to set aside the above Deed were, first, that the consideration, viz., the payment of the sum of Rs. 20,000 to a third party, to whom the Respondent was indebted or under an obligation to pay that amount, had been fraudulently withheld, and had never been paid by the Defendants, and secondly, that the terms and conditions on which that instrument had been granted had never been complied with or performed by them, to the great pecuniary loss and injury of the Respondent.

It was, on the other hand, contended by Appellant and his Brother, the two principal Defendants, that the Deed was executed by the Respondent to secure a balance founded on a settlement of accounts, that the consideration money Rs. 40,101 had been, in divers amounts and at various times, prior to the execution of the Deed, lent by them as Bankers and money-lenders, to the Defendant, Lalla Binda Lall, as the Agent for and on account of the Respondent, and that the residue of the consideration of Rs. 49,453, had accrued due as interest upon the moneys so lent.

Evidence was entered into upon this disputed question of fact, the substance and effect of which is detailed in the judgment of their Lordships.

The Principal Sudder Ameen (Sayud Mahomed Wuheedooden) dismissed the suit on the ground, that Lalla Binda Lall had opened a money transaction with the other Defendants as Bankers and money-lenders in [284] Calcutta, on behalf of the Respondent, his Master, and had misappropriated the money borrowed from them on his behalf.

On appeal the High Court, consisting of Messrs. Steer and Seton-Karr, reversed the above decision, on the ground, that the Defendants had failed to prove that they had given consideration for the Bond, and decreed that the Zur-i-peshgi deed should be set aside, but they declined to award any wasilat to the Respondent, as certain services done by the Defendants were taken and declared to be a set-off against the claim for mesne profits, and ordered that both parties should bear their own costs.

Kaleepershad Tewarree appealed from this judgment so far as it decreed the Zur-i-peshgi deed null and void. There was also a cross appeal by the Respondent against so much of the decree as rejected his claim for wasilat, and the refusal to give him costs of suit.

Mr. Pontifex, for the Appellant.—The execution of the Bond and Deed being admitted by the Respondent, the *onus* of proving that they were executed without valuable consideration lay on him, and he failed to prove that fact. Where a Deed on the face of it admits the consideration-money received by the Vendor or Mortgagor, the *onus* is on the party impeaching the Deed to disprove such admission which the Court below erroneously cast on the Appellant. *Manikal Bahoo v. Ramdass Mazumdar* (1 Ben. Law Reps., 92). Ben. Reg. III. of 1793, sect. 15, which applies to Bonds, or that it was fraudulent. *Sirmundul Dass v. Chawdree Dyal* [285]-*narain Singh* (Decisions S.D.A., 30 May, 1857, pp. 925-929); *Kirpanund Shaha v. Gobra, Gunnesh* (Decisions S.D.A., 29 June, 1857, p. 1114); *Ramkishan Dass v. Bahoo Juggutputtu Singh* (Decisions S.D.A., 1856, p. 1513); *Rice v. Rice* (2 Drew, 73). The case set up by the Respondent is altogether improbable and unworthy of credit. It is not supported by evidence, and is wholly inconsistent with the facts proved, and the conduct of the Respondent in putting and allowing the Mortgagees to remain in possession of the mouzahs.

Sir R. Palmer, Q.C., and Mr. Leith, for the Respondent.—The question, whether there was a good consideration for the Bond and Deed was distinctly raised by the issues in the Court below, and that question was purely one of evidence, which the Courts in India could best determine. The Defendants failed to prove the case set up by them as regarded the alleged consideration of the Bond and Deed. On the other hand, the Respondent substantially proved the case set up by him in his

plaint in respect of such alleged consideration, as well as the terms and conditions on which both instruments were made and executed by him in favour of the Appellant and his deceased Brother. The Defendants having failed to pay the consideration money, or to perform the terms and conditions on which the Bond and Deed of Zur-i-peshgi were respectively executed; the consideration, therefore, failed through the wilful default of these two principal Defendants, and their possession and receipt of the rents and profits under the Deed was wrongful [286] and without a just and *bona fide* title in law. They became, therefore, in respect of such possession, accounting parties to the Respondent on his recovering the Raj. With respect to the cross appeal the decree was wrong, as it ought to have directed the wasilat or mesne profits as well as costs of the suit.

For the judgment see *post* [12 Moo. Ind. App.], p. 311.

RAJAH SAHIB PERHLAD SEIN.—*Appellant*; DOORGAPERSAUD TEWARREE *alias* BOOTOO TEWARREE, MUNNE LAIL TEWARREE, and KALEE-PERSHAD TEWARREE, the Brothers, and the Widow, the heirs-at-law of MUDDEN MOHUN TEWARREE, deceased.—*Respondents* * [Feb. 10 and 11, 1869].

On appeal from the High Court of Judicature at Calcutta.

To establish the right to mouzahs as forming part of a Zemindary under a Mocurrery grant, purporting to have been made by the Zemindar, in consideration of past services, the grant must be strictly proved. So held by the Judicial Committee, reversing the concurrent decisions of the Inferior and High Courts in India, in a suit impeaching the validity of the grant, and the suit remitted with directions for a new trial on further evidence.

Costs of the appeal directed to be taxed, and to be costs in the cause to be dealt with by the High Court.

In this case the appeal was brought from a decree of the High Court of Judicature at Calcutta, which confirmed a decree of the Judge of Sarun, both of which decrees were adverse to the Appellant. The [287] suit was instituted by the Appellant as Zemindar of the Raj and zemindary of Ramnuggur, against the Respondents, to oust them from two mouzahs or villages, named Doobnee, Tuppah Ramguhr, and Buthowra, Tuppa Jumowlee, situate in and belonging to the Raj and zemindary of Ramnuggur, which they were in possession of as alleged, but was denied by the Appellant under a Mocurrery grant (*bekh-birt*, from generation to generation,) an hereditary estate held at a fixed rent and purporting to have been made by the Appellant as Zemindar to one Mudden Mohun Tewarree, under whom the Defendants (the Respondents in the appeal) claimed. The suit also sought to set aside two proceedings of the Revenue authorities of the 9th and 16th June, 1856, under which Mudden Mohun Tewarree, on an allegation of his being Mocurreredar, was declared entitled to a sum of Rs. 189. 11. 3, being a portion of the rents and profits of the zemindary in respect of the villages, and which had been deposited in the collectorate, under an Order of the Collector for the attachment of the Raj and zemindary during the time that the right of succession and title thereto was in litigation between the Appellant and third parties, and for mesne profits.

By the decree of Mr. W. H. Brodhurst, the Judge of Zillah Sarun, dated the 17th December, 1862, it was declared first, that the villages had been in the possession of Mudden Mohun Tewarree and the Defendants claiming through him since the year 1256 Fusly (1848-9), the date of the alleged instrument of grant; and that the suit was, consequently, barred by Ben. Reg. III. of 1793, sec. 14, more than twelve years having expired before it was brought; and [288] secondly, that the villages had been held under the above instrument of grant, which instrument was declared to have been proved by the witnesses, and, therefore, genuine and valid.

The Judges of the High Court, Messrs. Raikes and Seton-Karr, on appeal, were

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inclined to think that the probabilities were in favour of Muddun Mohun Tewarree having held under the grant put in evidence by the Defendant, and that, as they were not satisfied that the decision of the Court below was wrong on the merits, they saw no reason to interfere with the judgment, and, therefore, dismissed the appeal, with costs.

From this decree of affirmance the present appeal was brought.

The facts are fully stated in their Lordships' judgment.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant; and Mr. Pontifex, for the Respondent, Munne Lall Tiwarree.

The question involved was entirely one of fact, namely, the genuineness and validity of the alleged Mocurrery grant by the Appellant to Muddun Mohun Tewarree, which, although purporting to have his seal, was not signed, and as subsidiary thereto, the circumstances under which Muddun Mohun Tewarree obtained possession of the mouzahs in dispute.

Judgment was reserved (see *post* [12 Moo. Ind. App.], p. 322) and afterwards delivered with the judgment in the other four appeals.

[289] RAJAH SAHIB PERILAD SEIN,—Appellant; RUN BAHADOOR SINGH, and Others,—Respondents * [Feb. 12, 1869].

On appeal from the High Court of Judicature at Calcutta.

In a suit brought to recover two mouzahs in the possession of the Defendants, under a Mocurrery tenure, alleged to have been granted by the Plaintiff, the Deeds creating which he impeached as forgeries; the Courts below, without adverting to that allegation, or examining the merits of the case, confined the issue in the suit solely to one of limitation, and held the Plaintiff barred by the Regulations of limitation. Such finding reversed, on appeal, by the Judicial Committee, and the suit remanded to the Court below, to be tried on its merits.

As the miscarriage of the suit was occasioned by the manner in which the issue was framed by the Judge, the costs of appeal were directed to be costs in the cause.

This, which was the fourth case, was an appeal from a decree of the High Court, made by Sir Charles Jackson and Justice Kemp, the presiding Judges, affirming a decree of the Principal Sudder Ameen of Zillah Sarun, which dismissed the suit of the Appellant, on the ground of being barred by the expiration of the twelve years' period of limitation.

The suit was brought to recover possession of two mouzahs, Gokla and Kullan Belonia, situate within the Appellant's Raj or zemindary of Ramnuggur, against the Respondents, with mesne profits, and to set aside two Deeds, the first called a Bekhbarut [290] pottah, and the second a Sudruth puttur, dated in 1843-4, which had been set up by the Defendants, the Respondents, as the title Deeds under which they claimed to be in possession of the mouzahs, and as giving an hereditary title, at a fixed rent. These instruments, on which the title and possession of the Defendants rested, were in the plaint charged to be fabricated and forged, and it was also stated that evidence in disproof of these alleged Deeds, and to prove collusion, would be adduced on the part of the Plaintiff. The cause of action was therein stated to have arisen on the 27th of December, 1854, the date of a proceeding of the Government Commissioner of Revenue, under which the Defendants had obtained an Order for possession of the mouzahs, and on which occasion the Appellant alleged he first discovered the fraud and forgeries. The Appellant sought also by the suit to set aside the above-mentioned Order of the Commissioner.

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The first question which arose on the appeal was one of a preliminary nature, whether there ought not to be a remand of the suit to India, the Appellant contending, that there had been a miscarriage of justice by the Principal Sudder Ameen (Syud Mahomed Wahedooddeen), having recorded a single issue, namely, whether the law of limitation applied or not, and when the cause of action arose in the suit, which, although raising ostensibly a question as to the bar of the suit by limitation only, yet virtually involved the consideration of the whole merits of the suit; and by the Court proceeding, on framing such issue, to decide the case against the Appellant without giving him an opportunity of calling and examining witnesses to prove his case on [291] the merits. Other questions also arose, as fraud was expressly charged in the pleadings; first, whether the time of limitation did not run from the discovery of such fraud under Ben. Reg. III. of 1793, sec. 14, which it was submitted by the Appellant, could only be rightly decided on evidence taken in the suit; and, secondly, as not only fraud was so charged, but also the subject of the suit being real or immovable estate,—whether the Courts below were not wrong in applying the twelve years' period of limitation under the above Regulation, and holding the suit barred by eighteen years having elapsed from the date of the alleged instrument of grant instead of the sixty years' limitation under Ben. Reg. II. of 1805, sec. 3, cl. 3, which requires evidence to be gone into with reference to the proof and disproof of the alleged fraud.

Mr. Leith (with him Sir R. Palmer, (Q.C.), for the Appellant, and Mr. Pontifex, for the Respondent, Run Bahadour Singh.

In this case also judgment was postponed, and afterwards delivered with the judgments in the four other cases, see *post* [12 Moo. Ind. App.], p. 332.

[292] RAJAH SAHIB PERHLAD SEIN.—*Appellant*; MAHARAJAH RAJENDER KISHORE SING.—*Respondent* * [Feb. 15, 16, 1869].

On appeal from the High Court of Judicature at Calcutta.

An Award, under Ben. Reg. VII. of 1822, of the Thakbust, of survey authorities, in a disputed question of boundaries, having been made in 1848, a suit was brought in 1861, respecting the same boundaries. *Seemle*, that as the Award had not been contested during the three years limited by the Act, No. XIII. of 1848, it operated as a bar to the suit.

By section 32 of Act, No. VIII. of 1859, a Plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time.

The pendency of an appeal to England to determine a question of succession is not such "a good and sufficient cause" as respects the possession of a third party to take the case out of the general law of limitations.

The question in this (the fifth appeal) was by the frame of the plaint confined to one of boundary, namely, whether the lands in dispute were within the limits of the zemindary of Ramnuggur, belonging to the Appellant, or within those of Bettiah, the zemindary of the Respondent. From the view which the Courts in India took of the case, it substantially resolved itself into a question respecting the effect of the law of limitation, whether it operated as a bar to the Appellant's suit.

In the suit the Appellant sued the Respondent to recover 5000 beeghas of land in Tuppah Jegwan, and to realize the collection of a Bazaar attached to the Tirbance Fair, and which the Appellant alleged [293] to be part of the zemindary of Ramnuggur. The decree of the Principal Sudder Ameen dismissed the suit on the

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ground of its being barred by the law of limitation, which decision was affirmed on appeal by the High Court.

The facts of the case are these:—

The Appellant was the Rajah of Ramnuggur. The Respondent, the Rajah of Bettiah.

In the year 1800, Rajah Burdut Koomar Sein was Rajah of Ramnuggur; after him Rajah Tej Purtab Sein (see 7 Moore's Ind. App. Cases, pp. 37, 43); then Rajah Umur Pertab Sein, who was succeeded by the Appellant. Maha Rajah Beer Kishwur Singh was then Rajah of Bettiah. He was succeeded by Maharajah Anund Kishore Sing, after him by Maharajah Nawul Kishore Sing, who was succeeded by the Respondent.

In March, 1800, the then Rajah of Ramnuggur brought a suit against the then Rajah of Bettiah, for possession of property constituting the Pergunnah Mujhwa, in Behar, and in which Pergunnah the land in dispute lay, and by a decision of the Civil Court of Zillah Sarun the suit was dismissed, and the Respondent's ancestor declared entitled to the property.

No change in possession took place subsequently to that date, but in 1822 disputes arose between the Rajah of Bettiah and the King of Nepaul as to what constituted the boundary line between their respective properties, and on the 28th of May, 1822, the boundary Commissioner, Captain Cooper, declared his opinion, that the Bechund river was the boundary line, and that between the Bechund and Sonha rivers the land belonged to the Rajah of Bettiah.

[294] In 1834, the then Rajah of Bettiah was in possession of the Pergunnah in question up to the banks of the Bechund river.

The Rajah of Ramnuggur died in 1834, when litigation commenced between the Appellant and the other parties as to the succession to the Ramnuggur Raj. Pending such litigation the Raj was put under the Court of Wards, and a lease granted to one Mr. Yule. In 1845, the Principal Sudder Ameen decided the suit as to the Ramnuggur Raj in favour of the Appellant, which decision was confirmed by the Sudder Dewanny Adawlut in April, 1846, and finally in 1858, on appeal by Her Majesty in Council (7 Moore's Ind. App. Cases, 18).

On the 1st of February, 1846, Mr. Yule, the lessee of the Ramnuggur estates, filed a petition before the Superintendent of Surveys, alleging that a Fair was held yearly in Phalgoon (February and March), and in certain years at the time of the eclipse, and that the rent was collected for the Rajah of Ramnuggur, but that in 1253 B.E. the Maharajah of Bettiah's people had forcibly collected the proceeds of the Fair. The Rajah of Bettiah denied these statements, and claimed the lands up to the river Bechund as belonging to his Raj. The case was postponed on the ground that the question of the Appellant's title to Ramnuggur Raj was then pending in the Sudder Court.

The Appellant, as decree-holder of Raj Ramnuggur, joined as a party in the survey-proceeding, and was represented by his Mooktar, Ishur Dutt, and the lessee, Mr. Yule, having retired from the case, the proceedings took place in the presence of [295] the Appellant's Mooktar Ishur Dutt. He tendered no evidence in addition to that produced by Mr. Yule, except a map and five witnesses; and the Survey Officer, having investigated the case, decided it on the 11th February, 1848, and ordered a particular boundary line to be marked off, so as to confirm to the Respondent the whole of the property in dispute, and on the 25th of February, 1848, he passed further Orders in that respect.

On the 20th of March, 1851, the Appellant requested the Magistrate of the Zillah to call for a report as to whether the Rajah of Bettiah had prevented him from receiving the collections of Tirbanee Fair, which application the Magistrate refused, stating that by the proceeding of the 11th February, 1848, the dispute as to the boundary and the Fair was settled, and if he was dissatisfied, he could refer to a Civil Court.

The Appellant, however, took no steps until the 31st of December, 1861, when he filed his plaint in the suit now under appeal. In his plaint he defined the boundaries which he claimed to have established, and charged collusion between Mr. Yule and the Respondent, in having the boundaries laid down wrongly, and he

alleged possession by Mr. Yule and himself up to the 20th of March, 1851, and assigned the ouster of his possession as commencing from that day.

The Respondent by his answer denied the Appellant's allegations, as to the boundaries and possession, and submitted, that the claim was barred by the special law of limitation, under Act, No. XIII. of 1848, as well as the general law of limitation, and also that the suit decided in March, 1800, against the [296] Appellant's Father as above-mentioned, was a bar to the suit.

The Principal Sudder Ameen settled the issues for trial to the following effect:—First, whether the general or special law of limitation applied? And, secondly, whether the suit was barred under the 2nd section of Act, No. VIII. of 1859, which provides, that the Civil Courts shall not take cognizance of suits previously heard and determined. As to the facts he laid down the following issues, viz.:—First, whose was the property in dispute, and in whose possession had it been? and, second, what was the boundary line? Third, upon the merits, whether the Plaintiff was entitled to possession? and fourth, was the Plaintiff entitled to mesne profits?

On the 30th January, 1862, the Principal Sudder Ameen (Itrut Hossein) made an Order dismissing the suit with costs, and in his Judgment he gave as reasons for such Order, that he was of opinion, that the Plaintiff's right to sue was barred, both by the special and general law of limitation. In his judgment in commenting upon the Appellant's attempt to take his case out of the law of limitation, he said:—“Although the Plaintiff, with a view to cure the laches of limitation, represented that he had been in possession of the disputed property prior to the Thakbust up to 19th of March, 1851, and that he was put out of possession of the said land from 20th of March, 1851, under an Order of the Foujdaree Adawlut, and in support of this allegation he produced certain Pottahs, Furghekutties and Kabooleat, from 1251 to 1266, and in Seaha of the collection regarding Terbanee Bazaar from 1256 to 1258; but the very appearance of the papers serves as a witness [297] in favour of its fabrication, inasmuch as it is evident that it is engraved on old paper with fresh ink; moreover, it is not consistent with reason that after the conclusion of Thak of the land in dispute in the name of Defendant on proof that of his right and title thereto, the Plaintiff should have remained in possession thereof after conclusion of Thak, as he was prior to it. Besides this, the Plaintiff himself stated in the Thakbust Roobakaree, that he was dispossessed from the Tirbanee Mella in 1253, and at present contrary to it, he states that he had been in possession thereof prior to the Thakbust; hence it is quite clear, that the Plaintiff, to cure the defect of limitation, has raised a pretended plea as to his possession. But the law of limitation is so fully applicable to the case, that it cannot be cured, but by some strong document of the Court, and not by private papers, inasmuch as the preparation of such papers rests at the disposal of the Plaintiff. Hence, in consideration of the general and special law of limitation, the present suit is not cognizable by the Court.”

On appeal, the High Court at Calcutta, consisting of Mr. Justice Morgan and Mr. Justice Sumboonauth Pundit, on the 8th of January, 1864, ordered the appeal to be dismissed with costs, holding that, independently of the question, as to whether the claim was barred by the law of limitation as contained in Act, No. XIII. of 1848, the Appellant's claim was barred by the twelve years' law of limitation.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—First, the Courts in India ought not to have [298] decided that the suit was barred through effluence of time by the general law of limitation, but ought to have heard and determined the issue on the merits. The High Court ought to have remanded the case to the Zillah Court, to be tried on the merits under the issues fixed and recorded.

Secondly, the Courts were wrong in their construction of the law of limitation as applicable to the case. The Appellant was within the exception provided by sec. 14 of Ben. Reg. III. of 1793, the general law of limitation, having been precluded from seeking redress by “a good and sufficient cause,” which allows a deduction to be made of the full period during which the suit concerning the succession to the Raj was pending, *Rajah Enayet Hossein v. Sayud Ahmed Reza* (7 Moore's Ind. App. Cases, 238); *Troup v. The East India Company* (*Ib.*, 104). Here the Appellant brought his suit within twelve years from the date of the final decree made on the succession suit, by which his right to the Raj was determined.

Neither did the cause of action arise before the present suit was commenced, so as to create the bar, provided by Ben. Reg. III. of 1793, sec. 14. Even if the cause of action had arisen more than twelve years before the institution of the suit, and if the same was not cognizable under the exceptions contained in the above Regulation, yet it was cognizable under Ben. Reg. II. of 1805, sec. 3, cl. 1, being a suit for lands and permanent immovable property, which the Respondent or those under whom he claimed had acquired possession of by "unjust and dishonest means, and neither he nor those who held under him held quiet and unmolested possession of the lands under a title believed to be just and valid, [299] during a period of twelve years" antecedent to the commencement of the suit.

Mr. Field, Q.C., and Mr. Bell, for the Respondent.—According to the provisions of the law of limitation in India, as contained in Act, No. XIV. of 1859, the Appellant's right to sue was barred, as the cause of action arose twelve years before the date when the action was commenced. Independently of the question of twelve years law of limitation being applicable to the case, the Appellant had no right to sue, inasmuch as more than three years had elapsed, the case being within the meaning of sec. 1, cl. 6, of that Act, and the former Act, No. XIII. of 1848. [Sir James Colville:—This case does not seem to be within the latter Act, which appears to be limited to Awards made by the revenue authorities under Ben. Reg. VII. of 1822, IX. of 1825, and IX. of 1833.] The Thakbust proceeding was an Award within the Act, No. XIII. of 1848. The limitation will not stop when once it begins to run, *Doe dem Duroure v. Jones* (4 Term. Rep., 300). The case of *Rajah Enayet Hossein v. Sayud Ahmed Reza* (7 Moore's Ind. App. Cases, 238) does not apply. In *Troup v. The East India Company* (7 Moore's Ind. App. Cases, 104), the sole point was, whether the words "other good and sufficient cause" in cl. 3, sec. 18, of Ben. Reg. II. of 1803, included "insanity."

Mr. Leith in reply.

Judgment was given by their Lordships with the other cases, and will be found at [12 Moo. Ind. App.] p. 334.

[300] Their Lordships having reserved the consideration of these appeals, judgment was pronounced by

The Right Hon. Sir James W. Colville (March 12, 1869).—Their Lordships have now to dispose of five appeals in which the same person, Rajah Sahib Perhlad Sein, is an actor, being in four of them the Appellant, and in the fifth the Respondent. Though the cases are not otherwise connected with, or dependent on each other, it will be convenient to state certain facts relating to the Rajah and his title which are common to all. He is now in undisputed possession of the Raj and zemindary of Rannuggur, the title to which was in litigation from 1835 until 1858. He originally sued for them as guardian on behalf of his infant Son under a deed of gift; they were at the same time claimed by Run Murdun Sein as a Son of the former Rajah, Umur Purtab Sein and by other parties under different titles. Ultimately the right of succession of the present Rajah as the nearest collateral heir of Umur Purtab Sein was declared by a decree of the Zillah Court, dated the 27th of February, 1845, and that decree was affirmed on appeal by the Sudder Court on the 9th of September, 1846. From that date the litigation was confined to the Rajah and Run Murdun Sein, was alone preferred an appeal to Her Majesty in Council, which was finally determined in the Rajah's favour in January, 1858 (see *Chhoturga Run Murdun Syn v. Sahub Purhlad Syn*, 7 Moore's Ind. App. Cases, 18). The estate was in the possession of one of the Widows of Umur Purtab Sein from the time of his death in 1834, until [301] February, 1840, when she died. The Collector of the District was then directed to keep it under attachment until the title to it should be determined in the pending litigation. After the Sudder Court's decree in 1846, an Order was made that the Rajah should be put into possession on giving security to abide the event of the appeal to England; but owing to delays in perfecting that security, he did not obtain actual possession until June, 1848. The security afterwards failed: the Rajah was unable to give fresh security to the satisfaction of the Court: an Order was made on the 18th of May, 1854, that the property should again be attached by the Collector; and it remained under attachment from that time until possession was restored to the Rajah in 1858, upon the determination of the appeal in his

favour. Having stated these facts and dates, their Lordships will proceed to deal with the several appeals in their order, beginning with that in which Baboo Budhoo Sing is Respondent.

RAJAH SAHIB PERILAD SEIN v. BABOO BUDHOO SING [1869].

The suit out of which this appeal has arisen was brought to recover from the Appellant (the Rajah) possession of a four-anna share of certain specified property, comprising the whole, or a very considerable part of the zemindary of Rammuggur. The original Plaintiff was a Mussulman Lady, claiming to be, at least for the purposes of the suit, the sole representative of her late Husband, Sultan Jan, who was the sole representative of one Kajah Hossein Ally Khan. After the institution of the suit she sold all her interest therein to the Respondent, who has been substituted as Plaintiff on the record, and may be taken to have all the rights in the subject [302] matter of the suit which could have been successfully asserted either by Kajah Hossein Ally Khan, or by Sultan Jan.

His title is founded on a Kowala or Bill of sale of the property in dispute, which is admitted to have been executed to the Kajah by the Appellant on the 23rd of September, 1844, and, therefore, at a time when the latter neither was in the possession of the zemindary, nor had established in any Court his title thereto. The case of the Respondent is, that this Bill of sale expresses the real contract between the Appellant and the Kajah, which was one for the absolute sale by the former and purchase by the latter of a four-anna share of the specified property for the price of Rs. 75,000, and that that sum was actually paid down in cash when the instrument was executed.

The case of the Appellant is, that being in want of funds to carry on his suit for the Raj and zemindary, and for his own support, he applied to the Kajah, who agreed to make advances for those purposes on condition of having the Bill of sale executed, registered, and duly notified in the pending suit; that no part of the expressed consideration or sum of Rs. 75,000 was paid on the execution of the Instrument; and that though the Kajah, from time to time, advanced small sums of money, the whole amount of his advances fell far short of Rs. 75,000; that afterwards the Kajah absconded from Patna on a charge of disaffection to the Government; whereupon it was agreed between his Son, Sultan Jan, and the Appellant, that a Bond for Rs. 76,000 hypothecating the whole of the property in question, and not merely a twelve-anna share of it, should be substituted [303] for the instrument importing the absolute assignment of the four-anna share; and that, accordingly, such a Bond was executed by the Appellant to Sultan Jan on the 7th of March, 1846; but that the Rs. 76,000 was merely a nominal consideration, of which no part was paid, the real contract being one to secure moneys already advanced with future advances which Sultan Jan undertook but failed to make.

The questions thus raised between the Appellant and Respondent are not now litigated for the first time. In August, 1848, Sultan Jan instituted two suits against the Appellant, of which one, being almost identical with the present, was brought to recover possession of the four-anna share of the property under the title founded on the Bill of sale; and the other was for the recovery of the Rs. 76,000 purported to be secured by the Bond which he alleged to have been advanced in addition to the Rs. 75,000 said to have been paid on the execution of the Instrument of September, 1844.

Both these suits were dismissed by the Zillah Judge (Mr. Hathorn). He held that the Plaintiff's story in one suit as to the payment of the Rs. 75,000, and in the other as to the payment of the Rs. 76,000, was false; and in his judgment in the Bond suit he expressed an opinion, that the Appellant's account of the transactions was substantially the true one. There was an appeal to the Sudder Dewanny Adawlut against both decrees. The appeal in the Bond suit was absolutely dismissed. On the other appeal the Pleaders for the Respondent (the present Appellant) unfortunately raised a question as to the sufficiency of the stamps on certain documents which [304] had been put in evidence; and the Sudder Court, avoiding the decision of the case upon its merits, directed the suit to be dismissed on that ground only;

and consequently gave to the Plaintiff, Sultan Jan, all the advantages which a judgment of nonsuit has over a judgment for the Defendant.

The result, however, of that litigation was a conclusive decision against Sultan Jan in the Bond suit; whilst in the other suit a decision on the merits was passed against him in the Zillah Court, which was only so far qualified by the decree of the Sudder Court that he was left at liberty to bring a new suit. The date of that decree was the 4th of January, 1853.

In this state of things the present suit was instituted on the 22nd of August, 1856. It was brought in the Court of the Principal Sudder Ameen, who dismissed it with costs; and on appeal his decision, except as to costs, was confirmed by the Zillah Judge (Mr. Atherton). Both decisions proceeded upon the assumption that the Respondent's case as to the payment of the consideration of Rs. 75,000 was false, and the Appellant's true. And both Judges, conceiving that their decision on this point was sufficient to determine the suit, omitted to decide an issue which expressly raised the question whether the Bond for Rs. 76,000 of 1846, had been given in substitution for the absolute Bill of sale of 1844. According to the practice of the Courts of India, these two decisions were final in India, on questions of fact, though on questions of law or procedure there lay a special appeal to the Sudder Court. Such an appeal was in fact preferred. It is unnecessary to state any of the ground of it, [305] except the fourth; which is to the following effect:—"If, for argument's sake, it be admitted, that the Defendant did not receive the full price, yet by reason of his acknowledging to have executed a Bynamah (Bill of sale), a decree in this suit would be just and indispensable, because the Defendant has the power to sue for the recovery of the balance of the purchase-money."

On that appeal the Sudder Court, on the 27th of September, 1860, made the decree which is the subject of the present appeal. Though bound by the finding of the Courts below that the Rs. 75,000, had not been paid as alleged by the Plaintiffs, the Judges who sat on the appeal nevertheless, proceeding upon a statement in Mr. Atherton's judgment to the effect, that the advances made to the Appellant probably amounted to about Rs. 18,000 or 20,000 in all, arrived at the conclusion, that the real and final contract between the parties was one of absolute sale and purchase, upon which there had been a partial payment of the purchase-money. They further held that, in these circumstances, a complete title to the lands passed to the Rajah by virtue of the Bill of sale on its execution; and (by a supposed application of the doctrines of English Courts of Equity) that the Vendor in possession of the lands was to be treated as having only a lien for the unpaid balance of the purchase-money; and was to be held accountable as a Mortgagee in possession for the rents and profits. They accordingly remitted the cause to the Judge, with directions "to decide it *de novo* in his Court, on the points now mooted, or upon others which fairly arise on the pleadings."

[306] Before they consider, whether the principles upon which the Judges proceeded were sound in themselves, or applicable to a transaction of this nature between Hindoos or between a Hindoo and a Mussulman, their Lordships must observe, that this application of them assumed a state of things which was not consistent with the case made by either party, and was certainly not necessarily implied by the findings of the Courts below upon the issues of fact. For even if those Courts had found that advances within a certain limit had been made, it did not follow that they were made in part payment of the consideration for a subsisting contract of sale, and not, as the Rajah insisted, upon a contract for security. And, indeed, the decree under appeal, by remitting the cause for trial upon the points fairly arising on the pleadings, including the undetermined issue as to the substitution of the Bond for the original contract, left this very point open.

Their Lordships, however, are of opinion, that even if this question of substitution had been determined in favour of the Respondent, the decree of the Sudder Court would nevertheless have been erroneous.

It is not easy to see what principle of an English Court of Equity, supposing such to be properly applicable to the case, would support the conclusions to which the Judges of the Sudder Court have come upon the facts before them. Their business was to decide the rights of the parties under the particular contract, and upon the facts found by the Courts below, according to equity and good conscience. They seem

to have ruled that the effect of the execution of a Bill of sale by a Hindoo Vendor is, to use [307] the phraseology of English law, to pass an estate irrespectively of actual delivery of possession; giving to the Instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case, is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases cited in the judgment under review (these cases were *Gopechurn Kurr v. Koroona Dasee*, Decisions, 1857, p. 225; and *Surbonarain Singh v. Mahara Singh*, Decisions, 1858, p. 601); in both of which actual possession seems to have passed from the Vendor to the Purchaser. To support it, the execution of the Bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the Vendor sells that of which he has not possession, and to which he may never establish a title? The Bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency; of which the Purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do. In the present case the Purchaser had alleged that he was in that condition, having paid the whole of the price at the date of the execution of the Instrument; but that allegation has been found to be false. Nor, if the fact had been, as assumed by the Sudder Court, that part of the purchase-money was paid upon the execution of the contract, and the Purchaser had come into Court alleging such part payment and tendering the balance, does it follow that he would have been entitled to a decree for specific performance; for [308] the contract sued upon is an eminently speculative, not to say a gambling, one. On the face of it, the Vendor agrees in consideration of a sum presently paid, to sell that which he has not, and may never have; and the price is presumably fixed upon a calculation of the risk undertaken by the Purchaser, at a sum far below the real value of the thing sold. But if the Purchaser under such a contract has retained part of the price for several years and until the risk has been determined by the happening of the contingency, he has *pro tanto* diminished the risk which he contracted to bear; and the Vendor has *pro tanto* lost that for which he stipulated—the present use and enjoyment of the money. The contract, therefore, has become incapable of being performed, according to the true meaning and intent of the contracting parties. Their Lordships are, therefore, of opinion, that the decree made by the Sudder Court upon their assumption of the facts was in every point of view erroneous, and cannot be supported.

They had now to consider not only what decree the Sudder Court ought to have made on the special appeal, but what ought to be the final decree in the suit; since in order to complete justice between the parties, they have allowed the learned Counsel for the Respondent to impeach the decrees of the two Lower Courts, and to argue the whole case upon the merits. And it has been so argued very ably by Mr. Bell. The first and most material question is, whether it has been correctly found that the Rs. 75,000, were not paid as alleged by the Respondent upon the execution of the Bill of sale. That has been so found by three Courts in India; and therefore, in attempting [309] to disturb the finding, the learned Counsel undertook a more than ordinary burthen. He argued, however, that the two decisions in this suit gave undue weight to the former decision of Mr. Hathorn; and that that Gentleman's judgment had not allowed sufficient weight to the presumptions arising from the admitted acts of the Appellant in executing the Bill of sale, and the receipt for the purchase-money, and in subsequently recognizing them. Their Lordships fully concede, that though, according to the law and practice of the Courts in India, those acts were not conclusive evidence against the Appellant, the presumptions arising from them ought to have been allowed due weight upon the trial of the issue, whether the consideration had been paid as alleged. They observe, however, that the issue came ultimately to be determined upon the testimony of conflicting witnesses, of whom the Judge held, that some were credible and respectable, and others altogether unworthy of credit. Nor, can their Lordships say, after giving full weight to the presumptions in question, and to the other circumstances in the case, that the finding was wrong. They are disposed to believe, that the real arrangement between the Appellant and the Kajah was for advances to be made, from time to time; and that the form of the contract was adopted in order to evade the effect of the decisions of the Indian Courts in

respect of what they consider champerty. They think, therefore, that there is no ground for disturbing the finding, that the Rs. 75,000 were not paid as alleged; and it follows, from the reasons which they have already stated, when dealing with the judgment of the Sudder Court, that if that finding was correct, the suit was properly decided in the Appellant's favour upon it. Their [310] Lordships, however, think it right to add, that upon the evidence, corroborated as it is by the fact that the Bond hypothecated the whole, and not only three fourths of the property in question, they think that the issue as to the substitution of that security for the Bill of sale would also have been properly found in the Appellant's favour.

Mr. Bell pressed upon their Lordships the propriety of doing complete justice between the parties, by imposing upon the Appellant the terms of repaying the advances actually made to him by the Kajah and Sultan Jan. They do not see how they can do this in the present suit, of which the dismissal will not prevent the recovery of those advances if they are still recoverable. Sultan Jan's proper course was to sue for the repayment of them in the Bond suit, if they were included in that security; or if they were not so included, under his general title as representative of his Father. If, in consequence of his failure to do so, or of the lapse of time, the remedy is gone, their Lordships may regret that result; but they do not see how they can supply a new remedy by imposing terms upon the Appellant, who is not in this suit seeking the aid of the Court, but is sued upon a different and inconsistent cause of action. And the difficulty of taking such a course is increased by the circumstance, that the Respondent is not the representative of the Kajah or of Sultan Jan for all purposes, but is merely the Assignee of the rights which Furkhoonda Khanum has specially claimed in this suit.

Their Lordships, therefore, will humbly recommend to Her Majesty that this appeal be allowed with costs; that the decree of the Sudder Court be reversed, and that in lieu thereof an Order be made [311] dismissing the special appeal with costs. The effect of this will be to affirm the decree of Mr. Atherton. Their Lordships are not disposed to interfere with the discretion exercised by him in respect of the costs of the suit in the Lower Courts.

KALEEPERSHAD TEWARREE *v.* RAJAH SAHIB PERHLAD SEIN [1869].

In the second appeal under consideration, Kaleepershad Tewarree is the Appellant, and the Rajah the Respondent.

The suit out of which it arises was brought by the Respondent to set aside a *Zur-i-peshgi* deed, dated the 23rd of December, 1851, which purports to have been executed by him to the Appellant and his Brother, Muddun Mohun Tewarree, since deceased, for securing to them the repayment of Rs. 49,453, with interest, by the pledge or mortgage of fifteen mouzahs, part of the zemindary of Ramnuggur. He also claimed *wasilat*, or the mesne profits of the property, for six years. The Respondent admits the execution of the deed, but says that it was executed as a security for the amount appearing to be due on a Bond previously executed by him in favour of the same parties in February, 1849; that he never received any consideration for the Bond; and that he was induced to execute both documents by his Servant, Lalla Binda Lall, who was acting in collusion with the Tewarrees.

His story as to the consideration for the Bond is, that in the course of the negotiations for procuring the security, to abide the event of Run Murdun Sing's appeal to England, which he had to give when he got into possession of the property in 1848, it was arranged that Ranee Unopoorna, who became his surety and pledged her property by way of security, [312] should receive a bonus of Rs. 20,000; that the Appellant and his Brother should pay that bonus, and for so doing should themselves receive another bonus of Rs. 20,000; that the Bond was given to secure these two sums of Rs. 20,000; but that the Tewarrees failed to pay the Rs. 20,000 to the Ranee, who consequently contrived to escape from her obligations as security by means of a revenue sale and Benamee re-purchase of the property which she had pledged as security, and so brought about the re-attachment of the zemindary in 1854. His case, therefore, is, that the deed impeached was obtained from him fraudulently and without consideration.

The case of the Appellant is, that the transactions were what they purported

on the face of them to be; that the Bond was given to secure advances which had been made in Calcutta to Lalla Binda Lall as the Agent of the Respondent, with his sanction and on his account; and that the Zur-i-peshgi deed was executed to secure a balance found on a settlement of accounts to be due in respect of the Bond debt, and some other transactions.

It is an admitted fact, that the Appellant and his Brother have been in possession of the property under the deed for several years. The Appellant's case is, that he is still in such possession; but this seems to be disputed by the Respondent.

The cause was tried by the Principal Sudder Ameen, who dismissed the suit with costs. His decree was reversed by the High Court, chiefly on the ground that the Defendants, the Tewarrees, had failed to prove that they had given consideration for the Bond; but the decree of that Court, though it directed that the Zur-i-peshgi deed should be set [313] aside, refused to award any of the wasilat, or mesne profits sued for, and gave no costs.

The Appellant, as the survivor of the two Defendants, appealed against the decree; and there is also a cross appeal against so much of it as rejects the claim to wasilat, and refuses to give the costs of the suit to the Respondent.

From the foregoing statement it sufficiently appears, that the question between the parties is one of fact, viz., which of these conflicting stories is true.

It is obvious, however, that, in the first instance, it lies upon the Respondent, who comes into Court to set aside a security solemnly executed by himself, and perfected by possession, to make out his case. And the first question to be considered is, whether he has done so, at least so far as to cast upon the Defendants the burthen of proving theirs. There has been some argument as to the rule and practice of the Courts in India on this point, and, in particular, upon the ruling of the Sudder Court in its judgment in the suit of Sultan Jan upon the Bond for Rs. 76,000, which has been made one of the exhibits in this cause. Upon that their Lordships observe, that if what was stated by the Sudder Court be read in connection with the context, it does not seem to go beyond what both sides would admit to be the law in India. The Appellant in that case had argued that, unless the "party sued in the Bond could establish affirmatively that his signature had been obtained under the influence of force or fraud," he was conclusively bound by that signature, and that a decree must pass against him. The Court said, in answer to this, that it had become the established practice of the Courts in India, in cases of contract, to require [314] satisfactory proof that consideration had been actually received according to the terms of the contract; and that it had never been held there, that a contract made under seal of itself imported that there was a sufficient consideration for the agreement. The latter proposition seems to be indisputable. The former may be too loosely expressed; and the later cases cited by Mr. Pontifex, show that if it is to be taken as affirming that the mere denial of the receipt of the consideration stated is in all cases sufficient to cast upon the party relying on the instrument the burthen of proving payment of that consideration, it is too wide. It is further to be observed, that a party who, like the Plaintiff in the case referred to, comes into Court to enforce a Bond, is in a very different position from him who is suing to set aside a contract under which there has been possession and enjoyment, and of which, so far as it has yet been capable of being performed, there has been performance.

Their Lordships have no doubt that, in the latter case, the law of India, as of this and probably every other Country, casts upon the Plaintiff the burthen of establishing at least a good *prima facie* title to the relief which he seeks; and they will first proceed to consider how far the Respondent has affirmatively made out the case upon which he relies.

Now, what are the facts which are either common to the cases of both parties, or are proved beyond dispute?

In 1845 Lalla Binda Lall was in Calcutta as the Agent of the Respondent, looking after the appeal in the great suit for the Raj which was then pending in the Sudder Court, and possibly other law business. He remained there after the Sudder Court's decree of the 9th September, 1846, had been made in the [315] Respondent's favour. The principal business which he had then to perform was to procure the security which the Respondent had to give in order to get into possession. Whilst he was so resident in Calcutta he certainly had some trans-

actions with the Tewarrees one of whom, Muddun Mohun, was or had been the Vakeel, or quasi Diplomatic Agent of the Maharajah of Nepal; but who also carried on there some kind of Mahajunny, or money-lending business. On the 27th of December, 1847, Ranee Unopoorna executed the security Bond pledging her property; and on the same day entered into an agreement with Lalla Binda Lall as the Respondent's Agent, by which it was stipulated that for her protection her Manager should be allowed to make the zemindary collections from Ramnuggur, paying thereout an allowance to the Respondent, but keeping the surplus moneys in deposit. There is not a word in this subsidiary agreement about the bonus of Rs. 20,000. The Respondent seems to have objected to the arrangement so proposed, and for that, or some other reason, it was not carried out. The security itself was, in the first instance, rejected by the Zillah Judge, Mr. Hathorn; but on appeal to the Sudder Court, was admitted as sufficient. The delay caused by these proceedings accounts for the interval of time between the date of the security Bond and June, 1848, when the Respondent was actually let into possession.

The proceedings put in by the Respondent show that in September, 1848, Ram Chund, and very shortly afterwards, Ranee Unopoorna herself, made an application to have the security Bond set aside, and Ranee Unopoorna and her property released therefrom. The final Order of the Sudder Court refusing [316] to release her was, however, not made until the 19th of February, 1851. Thereupon she took the steps which have been already mentioned to release herself. The property which she had pledged by way of security was sold for arrears of revenue on the 11th of October, 1851. Notwithstanding this sale, the Respondent remained in possession of the zemindary until May, 1854. Run Murdun Singh's first application for fresh security was not made until August, 1853; fresh security, the nature of which does not appear, was then tendered, and was finally rejected in May, 1854. The Respondent, whilst still in possession, received from the Tewarrees, for at least two years, the rent payable to him under the Zur-i-peshgi deed. After the attachment, the following circumstances occurred. The Collector in the first instance attempted to make the gross collections from the zemindary irrespectively of all interests intermediate between the Zemindar and the Ryots which had been created by the Respondent. A remonstrance was made by many of those claiming such interests, though not, so far as the evidence goes, by the Tewarrees. The Commissioner directed that such interests should be respected pending the attachment. In consequence of this, the Collector issued an Order to the Respondent, calling upon him to specify what mouzahs he had given in Mocurrery, and under simple leases and Zur-i-peshgi deeds; and in answer to that Order he filed a report, stating, amongst other things, that the fifteen mouzahs in question were under Zur-i-peshgi to Muddun Mohun Tewarree. Thereupon the tenure and possession of the Tewarrees was confirmed by an Umuldu-stuck of the Collector, dated the 7th of June, 1855; and on the 8th of June, 1855, two Mooktars filed in the name of the Respondent a [317] petition in answer to some remonstrance of Run Murdun Singh's, affirming, among other things, the *bona fides* of this transaction with the Tewarrees, and repudiating the imputation that they were servants of the Respondent holding for his benefit. In August, 1856, under Orders of the Collector, confirmed by the Commissioners, the Tewarrees obtained a refund of Rs. 1883 9p. 2a., the amount of the collections deposited in the Collectorate in respect of the rents and profits of the fifteen mouzahs received between date of attachment and that of the Commissioner's Order above referred to. This proceeding seems to have elicited from the Respondent the first suggestion of the case now made by him. On the 18th of October, 1856, a petition was presented by a Mooktar, professing to act in his name, complaining of the Order for the refund, and setting up against the Tewarrees a case substantially, but not altogether, the same as that now made. The petition was referred to the Respondent, in order to ascertain whether it was really his act; and by another petition signed, not by himself, but a Moonshee, he adopted it generally, though he disputed the accuracy of some of its statements, and insisted that the fifteen mouzahs ought to be re-attached. It does not appear by any evidence what, if anything, was done on the petitions; but the mouzahs were certainly not re-attached. The Tewarrees remained in possession of them up to the time when the Respondent recovered possession of the zemindary in 1858; if not up to the day of the commencement of this suit.

What, then, is the case proved by the Respondent, and how far is it consistent with these established facts?

[318] It is not very easy to make out from the plaint and the depositions of the Respondent in support of it, a clear or consistent story touching the alleged undertaking of the Tewarrees to pay the bonus to the sureties. His case must be tried by the testimony of his witnesses, of whom Lalla Binda Lall, though treated as having colluded with the Tewarrees, and made a Defendant to this suit, is the most important, and certainly not the least friendly. He is, moreover, admitted to have been restored, whatever his former delinquencies may have been, to the Respondent's service.

According to that testimony the history of the transactions in question is this:—

Before the security Bond was drawn up, *i.e.*, before the 27th of December, 1847, Lalla Binda Lall had agreed with Ranee Unopoorna, or with Ram Chund on her behalf, to pay the bonus of Rs. 20,000 as soon as the Respondent, upon the acceptance of the security, should be put into possession. After the execution of the security Bond, but before it was tendered to Mr. Hathorn, Muddun Mohun Tewarree, on Lalla Binda Lall's application, agreed to become responsible for the payment of the bonus on the condition that he and his Brother should receive the further bonus of Rs. 20,000, to be paid out of the rents of the estate.

The undertaking, therefore, was given some time before the 18th of June, 1848, and ought to have been performed at that date. The Bond was executed in February, 1849. The witnesses who speak to that transaction all admit, that the Respondent then knew that the bonus had not then been paid to the surety. They do not explain why, in these circumstances, [319] the Bond was taken for Rs. 40,100, or bore interest from its date.

According to Beharry Lall and some of the witnesses, it was in consequence of the failure of Muddun Mohun Tewarree to perform the promise of payment which he renewed at the time of the execution of the Bond that the surety first made her attempt to be released from her security. But the documentary evidence already adverted to, shows that she had applied to be released before the Bond was executed. Again, the witnesses who speak to the execution of the Zur-i-peshgi deed, equally prove that the Respondent then knew that Muddun Mohun Tewarree had not paid the bonus which they say he had undertaken to pay. They allege, that he then renewed his promise to pay it, and that on the faith of that promise the Zur-i-peshgi deed was executed. They represent that in consequence of the non-performance of this last promise, the surety caused her pledged property to be sold at the auction sale. Yet the documentary evidence proves that it had been so sold more than two months before the date of the Zur-i-peshgi deed. The Respondent himself admits that he executed that deed to secure the amount of principal and interest due on the Bond. But neither he nor any of his witnesses give any explanation why interest was thus allowed upon a sum which, to his knowledge, had not been paid. Again, Lalla Binda Lall says, that when he finally discovered that the surety had not been paid the bonus and had escaped from the liability, he wrote to the Respondent not to give the Tewarrees possession under the deed. Yet the documentary evidence proves that they were put into possession, and that the Respondent repeatedly [320] recognized them as *bona-fide* Zur-i-peshgidars in possession, until, in the autumn of 1856, he was induced to put forward some such case as that now made.

The learned Counsel for the Respondent sought to account for the discrepancies above mentioned by various ingenious suggestions; but these were all more or less speculative, and inconsistent with the depositions of their witnesses. They also contended that their case was established by the admissions made by the Appellant in his deposition.

Their Lordships, however, are of opinion, that these admissions cannot fairly be taken to amount to more than that the Appellant and his Brother, or one of them, took some part in the negotiations with Ram Chund and Ranee Unopoorna for procuring the security; that they knew the surety was to receive a bonus, and believed that she did in fact receive Rs. 18,000 from Lalla Binda Lall, partly directly and partly through them; that is, out of the advances which they made to Lalla Binda Lall on the Respondent's account. If there is any doubt as to what really took place

between Lalla Binda Lall and the Tewarrees on the one side, and Ram Chund or Ranee Unopoorna on the other, and in particular whether, as suggested at the Bar, there were negotiations after the sale of her property for the renewal of that particular security, it lay upon the Respondent to clear all that up by examining, as he might have done, the two last-named persons, or one of them.

Upon this evidence the Principal Sudder Ameen came to the conclusion, that the Plaintiff had failed [321] to prove his case, and dismissed the suit. The judgment of the High Court proceeds on the ground, that the Respondent had, at all events, established such a *prima facie* case as threw upon the Appellant the burthen of proving his own, and that he had failed to do so. Their Lordships cannot assent to the reasoning by which the Judges of that Court have arrived at the first of these conclusions. They seem to their Lordships in some passages to substitute speculation for proof; in others, as for instance in all that relates to Ranee Unopoorna's security, which they treat as subsisting down to 1854, to proceed upon a misconception of the facts proved; and in others to draw inferences from facts proved or admitted, which are not the necessary, or even the legitimate, consequences of those facts.

Their Lordships do not deny, that if it lay upon the Appellant to prove the truth of his case, he has very imperfectly done so, and that exceptions might fairly be taken to the non-production of his Books of account, and to the non-appearance of Muddun Mohun Tewarree as a witness. But considering that it lay upon the Respondent to establish a clear and consistent case for setting aside his own deed, and that the evidence in the cause wholly fails to do so, their Lordships are of opinion, that the conclusion to which the Principal Sudder Ameen came was just and proper, though the reasons which he gives for it may not be altogether satisfactory. The Order, therefore, which in this case they will recommend to Her Majesty is, that this appeal be allowed; that the judgment of the High Court be reversed; and that, in lieu thereof, an Order be made dismissing the appeal to that Court with costs; and further that the [322] cross-appeal be dismissed. The Respondent must pay the costs both of the appeal and of the cross-appeal.

RAJAH SAHIB PERHLAD SEIN v. DOORGAPERSHAD TEWARREE [1869].

In the next case to be disposed of, the Rajah is Appellant, and Doorgapershad Tewarree and others, the representatives of Muddun Mohun Tewarree, deceased, are the Respondents.

This suit was brought by the Appellant on the 31st of December, 1861, to recover possession of two mouzahs forming part of his zemindary of Ramnuggur, from the Respondents, "in reversal of an allegation of Mocurrery, and proceedings of the Deputy-Collector and Collector, dated the 9th and 16th of June, 1856." He also claimed a refund of a small sum of money, being collections in deposit paid to Muddun Mohun Tewarree under those proceedings, and the mesne profits of the mouzahs between 1264 and 1269.

His case was, that in 1849-50 he made over these villages, or their produce, to Muddun Mohun Tewarree, who "lived with him," in consequence of the execution of the security Bond by Ranee Unopoorna "in lieu of allowance" for his rendering service; that no Mocurrery grant of them was ever made by him; that some time in 1857 he discharged Muddun Mohun Tewarree from his service for bad faith, whereupon his tenure determined; and that the moneys in deposit in the Collectorate had been paid out to Muddun Mohun Tewarree upon a false allegation of the existence of a Mocurrery grant, which the Revenue officers had never seen.

The case of the Respondents was, that Muddun Mohun Tewarree held the villages under a Mocurrery [323] (*i.e.*, an hereditary tenure at a fixed rent) granted by the Appellant on 5th Falgoun, 1256 (February, 1849), as a reward for services already rendered; that Muddun Mohun Tewarree never lived with the Appellant as a servant, in the proper sense of the term, but was the Vakeel of the Maharajah of Nepaul, and resident in Calcutta. The substantial issues settled in the suit were, first whether the suit was barred by the law of limitation; secondly, whether the property in dispute was possessed by Muddun Mohun Tewarree by virtue of a Mocurrery grant, or as payment for service from 1257 Fusly; and if by the Mocurrery grant, whether that grant was valid or not; and thirdly, whether Muddun Mohun Tewarree

was a servant of the Appellant or a Vakeel of the Maharajah of Nepaul, residing in Calcutta.

The Zillah Judge found that the suit was barred by the law of limitation, having been instituted more than twelve years after the date of the Pottah set up by the Respondents, and the commencement of Muddun Mohun Tewarree's possession. And dealing also with the other two issues of fact, he found that the Defendants had had possession since 1256 Fusly, by virtue of the Mocurrery grant, and that that grant was genuine and valid. He, therefore, on both grounds, dismissed the suit.

Their Lordships will here observe, that it is upon the latter finding alone that this decision can be upheld. For if it be not established that Muddun Mohun Tewarree, in fact, held possession under a Mocurrery tenure, there is no evidence at all that the Appellant knew that he claimed so to hold it at any time before 1856, and his suit would be in time. [324] On the other hand, if that fact be established in favour of the Respondents, they are entitled to a decree upon the merits. The nature of Moddun Mohun Tewarree's tenure is, therefore, the only real question in the cause.

The High Court, on appeal, affirmed the decree of the Zillah Judge. The grounds assigned by the Judges were, that the Appellant had failed, in their opinion, to establish the precise case set up by him; that there was no proof of any lease other than the Mocurrery Pottah; and, therefore, that Moddun Mohun Tewarree must be taken to have been in occupation of the lands, either under no engagement at all, which was highly improbable, or under the Pottah propounded by his heirs: and the judgment ends with this sentence—"We incline to think, that the probabilities are in favour of the latter view of the case; and as we are not satisfied that the decision of the Court below is wrong upon the merits, we see no reason to interfere with the judgment, and dismiss the appeal."

The result of these decrees, if they stand, will be to establish against the Appellant, and all who claim under him, the right of the Respondents and their successors to hold the villages in question under a perpetual hereditary tenure at a fixed rent. Their Lordships proceed to consider how far this conclusion is justified by the evidence taken in the cause.

The witnesses of the Appellant do not greatly differ from those of the Respondent as to the origin of the transaction. They differ somewhat as to the date of it, but all speak to a visit of Muddun Mohun Tewarree to the Appellant, and to a demand by the former of something for his support. Again, those [325] for the Appellant, whilst they treat what was given as being a retainer for future services, admit that it was also a reward for past services, including that of procuring the security on which the Appellant had obtained possession of his estate. It is, moreover, clear that Moddun Mohun Tewarree was not in the ordinary sense of the term a servant of the Appellant; that he was or had been the Vakeel of the Maharajah of Nepaul; that his residence was in Calcutta; and that whatever services he had rendered or was to render to the Appellant were rendered or to be rendered there. On the whole, the weight of the evidence on this part of the case is in favour of the conclusion, that whatever was given, was given as a reward for a past and special service; and that the gift was not a mere assignment in the nature of wages to a servant for continuing services determinable with those services at the will of the Master. The chief and irreconcilable discrepancy between the witnesses is as to the subject of the grant. Those for the Appellant say, that the mouzahs in question were then under lease to two Ticcadars, and that in answer to Muddun Mohun Tewarree's demand the Appellant caused letters to be written to those persons directing them to pay their rents to Muddun Mohun Tewarree and his Brother Munnoo Lall Tewarree, who was to remain at Rannuggur. From one of the proceedings which will be afterwards mentioned, though not from the testimony of the witnesses, it appears that for the assignment of those rents, which amounted together to nearly Rs. 1000 per annum, Muddun Mohun Tewarree and his Brother were to pay the Appellant a reserved rent of Rs. 81 per annum. And it has not un- [326]-naturally been asked, why if this case be true, is it not corroborated by the production of the letters to the Ticcadars, or by some evidence on their part, or by proof of a kabooleat from the Tewarrees undertaking to pay the reserved rent of Rs. 81.

On the other hand, the witnesses for the Respondents depose that in answer to

Muddun Mohun Tewarree's demand of a reward, the Appellant caused a Mocurrery deed of the two villages to be then and there drawn in the name of Muddun Mohun Tewarree, and signed and sealed it himself. And the Respondents produce a deed which purports to grant to Muddun Mohun Tewarree a Bekh-birt Mocurrery of the two villages on an annual jumma of Rs. 136, to be enjoyed by the lessee from generation to generation. It appears to have been originally on plain paper (for the memorandum at the foot of it shows that the Respondents before filing it in this suit had to pay a penalty for getting it stamped). It was never registered; and as set out in the Record, it does not appear to bear the Appellant's signature. It was contended at the Bar that the impression of his seal is also wanting. Their Lordships cannot think that if this were really the case, both the Courts below would have omitted to comment on these material defects in the document, of which the original was before them. On the other hand, their Lordships are bound to say, that the evidence before them, so far as they have hitherto considered it, is far from being satisfactory proof of the grant of a Mocurrery tenure.

The Respondents have also produced the Farkikuttee, or receipt. The importance of it is that the Appellant thereby purports to admit the receipt of [327] the rent of the villages from 1256 to 1261 (1849 to 1854) from Munnoo Lall Tewarree, Mocurreredar. The date is the 10th of Bysack, 1261. But, in their Lordships' opinion, this document and the evidence in support of it are extremely suspicious. On the face of it, it does not bear the Appellant's signature, but that of some other person. It was written on plain paper. It does not specify the amount paid, and it treats Munnoo Lall Tewarree, who is not named in the Mocurrery deed, as the Mocurreredar. Again it is a general receipt for rents which would in ordinary course have been paid on separate receipts at different times during four or five years. The witnesses who speak to it say, that it was signed by the Rajah on a settlement of accounts between him and Munnoo Lall Tewarree, and that the Rajah then requested Munnoo Lall Tewarree to give him the receipts or letters which he had received. If these receipts were returned, they are not produced; if they were retained, no sufficient reason is assigned for their retention. And this piece of evidence appears to be so far from advancing the Respondent's case that it throws additional suspicion upon it.

The decree in which the proceedings which took place after the re-attachment of the Zemindary tend to corroborate the case of either party remains to be considered.

On the 26th October, 1854, the Collector called upon the Appellant to make a return of the mouzals of which he had given Mocurrery, simple ticca, and Zur-i-peshgi ticca leases. On the 13th November, 1854, the Appellant made a return of the Mocurrery tenures created by him, in which there is no mention of that which is now in dispute. He did not then [328] send a list of the ticca leases, but promised to do so hereafter. On this the Collector passed an Order that the collections should be made from the attached estate, without regard to the tenures created by the Appellant. The persons affected by this appealed to the Commissioner, who, on the 27th of December, 1854, passed an Order reversing that of the Collector, and directing that such rents only as the Appellant would have been entitled to had he remained in possession should be collected by the Manager. Amongst the Appellants, whose names and claims are stated in the Commissioner's proceeding, Muddun Mohun Tewarree is not found; and, on the other hand, certain persons claiming to be simple Ticcadars of the villages in question are so found. On the 14th of March, 1855, the Appellant in obedience either of the original Perwannah of the 26th of October, 1854, or some subsequent Perwannah, sent to the Collector an Arzee, in which he says he has, on inquiry into his records, had prepared a detailed statement (which he forwards) of all the mouzals in Raj Ramnuggur, containing the names of the Ticcadars and Zur-i-peshgidars, and the names of servants to whom particular mouzals have been assigned in lieu of wages and other particulars. And the exhibits, copies of extracts of Settlement Book of collection for the year 1861, of the two mouzals were treated by the Appellant's Counsel as extracts from that statement. Those which relate to the two mouzals in question, state that Muddun Mohun Tewarree is the Ticcadar of both at jummas which make up the sum of Rs. 81; and further that each village is held "on conditions of service." There is in these exhibits also a statement of sums under the head of expenses, which their [329] Lordships feel

some difficulty in explaining, or in reconciling with the hypothesis of either party. On the other hand, Mr. Pontifex, for the Respondents, relies strongly on the Exhibit, No. 29, which is signed by one Lalla Binda Lall as the Roojoonovees on the part of the Rajah, and was filed in the Collectorate on the 17th of October, 1854. In that document Muddun Mohun Tewarree is stated to be Mocurreredar of the two villages: and the rents payable by him amount to Rs. 81.

There are some receipts which show that the Surbarakur afterwards received rent from Muddun Mohun Tewarree as Mocurreredar on various occasions; but these receipts being for small sums do not show whether the total annual rent received was Rs. 81 or Rs. 136. It is further shown, and this is one of the proceedings impeached by the suit, that, on the 9th of April, 1855, Muddun Mohun Tewarree, describing himself as Mocurreredar of the two villages, petitioned for a refund of the rents held in the Collectorate in deposit, and named a sum of Rs. 189 as the amount of such rents under an Order of the Commissioner, dated the 28th of August, 1856, in which the villages are described as covered by the Mocurrery deed executed by the Appellant. There is, however, no other evidence that the deed now relied upon was produced before the revenue authorities; and their Lordships doubt whether an unstamped paper would have been received by any such Officer. It is further to be observed,—and this fact has been strongly pressed against the Respondents,—that, in his petition, Muddun Mohun Tewarree described himself as holding the two villages at jummas aggregating Rs. 81, under a Mocurrery deed, [330] whereas the rent reserved by the deed now produced is Rs. 136.

Their Lordships must observe, that it is difficult, if not impossible, to extract from the proceedings last adverted to any recognition, binding on the Appellant, of Muddun Mohun Tewarree as Mocurreredar of the villages in question under the deed now propounded, or even under any deed.

The Jumabundee filed by the Roojoonovees has been attacked, and the character of the party signing it was impugnant by Muddun Mohun Tewarree himself in his petition in refutation of the claims of one Lalla Binda Lall, claiming as the Mocurreredar one of the mouzabs in question. It is not shown under what circumstances it was filed; and, in any case, it was filed before the Collector's Order of the 26th of October, 1854, and cannot be treated as binding on the Appellant in equal degree with the returns made by him in pursuance of that Order. And, lastly, it states that the rent of the villages is Rs. 81, and is, so far, inconsistent with the deed now produced. The Appellant cannot be held bound by the form of the Surbarakur's receipts, or by the proceedings for the refund, to which he was no party.

Their Lordships are not insensible to the defects in the Appellant's proof. They have already intimated that, in their opinion, the evidence preponderates in favour of the hypothesis that whatever was given was given as a reward for past services, and was not recoverable upon the dismissal of Muddun Mohun Tewarree, of which dismissal there is in fact no proof. They have also pointed out that the Appellant's case as to the nature of the reward might, if true, have been better proved. But even if it be [331] admitted that the Appellant had failed to establish the particular case alleged by him, it does not follow that the Courts below were right in leaping to the conclusion, that the Respondents had established their right to hold the lands under their Mocurrery tenure. It is possible that the reward to Muddun Mohun Tewarree may have been an assignment of the rent of the villages to him for his life, or other life interest.

The Appellant is the Zemindar; as such he has a *prima facie* title to the gross collections from all the mouzabs within his Zemindary. It lay upon the Respondents to defeat that right by proving the grant of an intermediate tenure. In their Lordships' opinion, there is in the record before them no satisfactory proof of the deed relied upon, or of any right or interest in these villages beyond, at most, the lifetime of Muddun Mohun Tewarree.

On the other hand, they have felt that the Respondents have the concurrent judgments of the two Indian Courts in their favour; that some of the doubts thrown upon the Instrument produced might have been removed if the original Instrument, to which exceptions, which do not seem to have been taken in the Court below, have been taken here, had been before them; and that if that document does purport to bear the Rajah's seal or signature, no evidence to show that it is a forgery has been given.

They have, therefore, somewhat reluctantly come to the conclusion, that the safer course is to remit the cause for further trial on additional evidence. If it shall come to such a trial, the duty of the Court which tries it, will be to require satisfactory proofs of the genuineness of the Mocurrery deed produced; [332] for it is upon that, and not upon the defects in the Appellant's case, that the right of the Respondents to hold these villages under a perpetual and hereditary tenure at a fixed rent must depend. The Order which their Lordships will humbly recommend Her Majesty to make on this appeal is, that the appeal be allowed, and the decrees of both the Zillah and the High Court reversed, and that the cause be remitted to the High Court with directions to retry the same or cause the same to be retried upon further evidence on the first issue of facts, and to decide the same, or cause the same to be decided accordingly. With respect to the costs of this appeal, their Lordships propose to take the course which has been followed here in similar cases, viz., to cause the costs on both sides to be taxed, and to make it part of the Order to be recommended to Her Majesty that these costs be costs in the cause to be dealt with by the High Court.

RAJAH SAHIB PERHLAD SEIN *v.* RUN BAHADOOR SINGH [1869].

In the fourth of these cases the Rajah of Ramnuggur is the Appellant, and Run Bahadoor Singh and others are Respondents. In this case, as in the last, the Appellant has brought his suit to recover two villages which the Respondents claim to hold on a Mocurrery tenure created by him. Their title is founded on three deeds, of which two are Bekh-birt deeds which purport to have been executed by the Appellant as Father and guardian of the infant Son for whom he originally claimed the Zemindary on the 14th of Jyest, 1250 (being some time in 1843-44); and the third is a Sudruth Puttur, or deed of confirmation, purporting to have been executed by the Appellant in his own right on the 17th of Bhadoor, [333] 1255 (1847-48). The Appellant impeached these documents as forgeries; and there may have been other questions to be tried concerning them. The Principal Sudder Ameen, however, saw fit to settle one issue in bar in these words, viz.:—"Does limitation apply or not; and when must the cause of action be said to have arisen in this suit;" and on the assumption that the determination of the suit depended on that issue, proceeded at once to try it.

The question raised by the issue was not, whether the deeds impeached were genuine, but whether the Appellant was precluded by the law of limitation from showing that they were not genuine, and the twelve years period of limitation was to be calculated not necessarily from the date of the deeds impeached, but from the time when the Appellant having notice of them might first have brought his suit to impeach them. That time the Appellant alleged to be the 27th of December, 1854, in which case his suit, which was commenced on the 31st of December, 1861, was in time.

The Principal Sudder Ameen, however, found the issue against him, and dismissed the suit. His decision proceeds on the ground that on the 7th of December, 1858, the Appellant, by his Mooktar, had filed a petition before the Collector, admitting that the Respondent, Run Bahadoor Sein, was Mocurreredar of the villages in question, and assenting to the payment of some rents in deposit to him out of the Collectorate. The Principal Sudder Ameen held that this was an admission of the deeds impeached, and that the period of limitation was to be calculated from the date of the deeds. His decision was affirmed in effect by the High Court, and the [334] question is, whether those decisions can stand. It was almost admitted at the Bar that they cannot. It is obvious, that the petition, if taken as mere proof that the Appellant knew of the title asserted by the Respondents in 1858, does not help the case, for he admits that he knew of it in 1854. On the other hand, to treat it as a conclusive admission of the genuineness of the deeds, and thence to infer that the Appellant, having executed them, must have known of their existence at their date, is to determine against him upon one piece of evidence, which may be capable of explanation, the material question in the cause, before the issue raising that question has been settled, and without giving the party the means of bringing forward all the evidence which he may have to adduce upon it.

Their Lordships, therefore, must in this case advise Her Majesty to allow the appeal, to reverse the decrees of both the Courts below, and to remand the cause for

trial upon its merits. The miscarriage being that of the Judge, they think that the costs of this appeal should likewise be costs in the cause, and should be dealt with in the same manner as those of the last case.

RAJAH SAHIB PERHLAD SEIN *v.* MAHARAJAH RAJENDER KISHORE SING [1869].

In the fifth and last of these appeals the Rajah of Rannuggur is Appellant, and the Rajah of Bettiah is the Respondent.

The suit was brought by the Appellant to recover 5000 beegahs of land, or thereabouts, being the whole or the larger part of the lands included between the yellow and red lines on the Map, No. 2, which is one of the exhibits in the cause: and with them the right of realizing certain profits derivable [335] from a Bazaar attached to the fair which is periodically held within them at a place called Tribenee. The question between the parties is, therefore, simply one of boundary, viz., whether the property in dispute lies within the limits of the zemindary of Rannuggur or within those of the contiguous zemindary of Bettiah. The northern boundary of that property is the river Beclund, which in that locality is the frontier line between the territories of British India and the Kingdom of Nepal.

The suit has been decided both by the Court of First Instance and also by the High Court of Calcutta upon the question of limitation. The plaint was filed on the 31st of December, 1861.

On this point of limitation the Respondent raised two distinct questions. He alleged that the boundaries between the two Rajas had been fixed and adjudicated by a decision of the Thakbust (or Survey) authority, dated the 11th of February, 1848; and that under Act, No. XIII. of 1848, the Appellant's suit was barred because brought more than three years after the date of that decision. He also alleged, that it was barred by the general law of limitation.

The Principal Sudder Ameen, who first tried this case, held that the suit was barred by both the special and the general law of limitation. The High Court entertaining some doubt as to the application of Act, No. XIII. of 1848 to the particular case rested its decision upon the general law of limitation alone.

In the course of the argument their Lordships intimated their opinion, that this case was not within Act, No. XIII. of 1848, because the operation of that Act is in terms limited to Awards made by the Revenue authorities under Ben. Regulations VII. of [336] 1822, IX. of 1825, and IX. of 1833; and the learned Counsel for the Respondent had failed to show that the Thakbust proceeding in question was an Award made under either of those Regulations. They now deem it right to observe that having, since the close of the argument, examined the Regulations more closely, they are not prepared to say that the Thakbust proceeding of the 11th of February, 1848, may not be an Award under Ben. Reg. IX. of 1825 within the meaning of the Act. For although Ben. Reg. VII. of 1822 was originally limited in its operation to what are now known as the North-Western Provinces, many of its provisions were, by Ben. Reg. IX. of 1825, extended to the Lower Provinces of Bengal; and looking at the 2nd and 3rd sections of the latter Regulation, and at sections 36 to 44 (both inclusive) of the survey Manual issued by the Board of Revenue, their Lordships think it probable that Mr. Chapman as Superintendent of Survey, was duly invested with power to determine boundary disputes, by an Award under the 34th section of Ben. Reg. VII. of 1822, and may have made such an Award by the proceeding in question. The proceeding seems to have been assumed in the Courts below to be an Award within the scope of Act, No. XIII. of 1848; and if the determination of this appeal necessarily turned upon the applicability of that Act to the present case, their Lordships would have had that point re-argued with reference to the Regulations to which they have drawn attention.

Their Lordships, however, have come to the conclusion, that the Courts below have properly held that this suit is barred by the general law of limitation.

[337] The Appellant comes into Court admitting upon the face of his plaint that he is out of possession, and has been so for more than ten years: and the date which he assigns to his dispossession is the 20th of March, 1851. Upon the issue as settled by the Court it lay upon him to establish that he was in possession up to that date; or, failing in that, that the date at which he or some former proprietor of Rannuggur

was last in possession is consistent with a right to institute this suit. Act, No. VIII. of 1859, sec. 32, shows, that the Plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time.

In the present case the Magistrate's Order of the 20th of March, 1851, certainly did not cause the dispossession. As far as its effect can be gathered from the extract of Report of the Foujdary Court of Zillah Chumparun, if it proves anything, it proves that the Appellant was then out of possession, and had been so, at all events, since the date of the Thakbust proceeding of the 11th of February, 1848; it does not in any degree prove that he or any former Rajah of Ramnuggur had been in possession at any former period. The Appellant has, however, produced evidence to show that in point of fact he was in possession after the date of the Thakbust proceeding, and up to 1851. But both the Courts below have treated that evidence as unworthy of credit; and their Lordships cannot see any grounds for holding that they were wrong in that conclusion. That there was any possession adverse to the Rajah of Bettiah after the date of the Thakbust proceeding seems highly improbable.

Great stress is then laid upon the Report and pro-[338]-ceedings of the Commissioners who in 1847 settled the frontiers of Nepal and British India, and on the evidence given in this suit by two of the Nepaulese Commissioners. The effect of the official documents is merely to show, that as between the two Governments it was settled in January, 1847, that whatever was north of the Bechund, within certain limits beginning from the Tribenee Ghât, and extending to Gurl Somessur, was to be treated as Nepaulese, and all south of that river as British territory. It is true, that one document recommends that the Amlah of Ramnuggur should be directed not to make any collections north of the Bechund, and that another speaks of settling the boundary of Ramnuggur. But it is to be observed, that if Map, No. 2, be compared with any good general Map of India, and the frontier line of Nepal and the course of the River Bechund be carefully examined, it will be found that a considerable portion of the tract south of the Bechund, which was the subject of discussion, lies beyond the red line on Map, No. 2, and within the admitted limits of Ramnuggur. And, it was far from improbable, that the Commissioners and the Resident should speak of all the lands south of the Bechund as Ramnuggur without adverting to the precise boundary-line between that and the contiguous zemindary of Bettiah, with which they had no concern. Again, the testimony of the two Nepaulese Commissioners proves at most that, according to their information at the time, the collections of the Tribenee Fair, and the lands immediately south of the Bechund river at that point, were in 1847 in the possession of the Rajah of Ramnuggur, who has since been dispossessed by the Rajah of Bettiah. The evidence [339] might be worth something if it stood alone; but when opposed by that which is to be gathered from the contemporaneous Thakbust proceeding, it is really worth little or nothing.

From that proceeding it appears clearly, that before January, 1846, the boundary between the two zemindaries was in dispute, and that on the 1st of February of that year, Mr. Yule, the Ticcadar of Ramnuggur under the Collector, invoked the aid of the Superintendent of Survey, complaining that in the Fuslee year 1253, the Bettiah Rajah had forcibly collected the proceeds of the Fair. The inference is, that if he had ever had possession of the lands on which the Fair is held, he had then been dispossessed. The Bettiah Rajah, on the 2nd of May, 1846, brought his case before Mr. Chapman (the then Deputy Collector), and asserted that the lands in question had been always part and parcel of the zemindary. The Map, No. 2, was then made. The Amlah on both sides pointed out what each side considered the boundary-line; and these are designated by the red and yellow lines upon the Map. Mr. Chapman, however, delayed to make any final Order in the matter before the decree of the Sudder Court affirming the title of the Appellant had been made. It is proved, that the Appellant then executed a Mookternamah in the name of Lalla Sohur Dutt, and appeared by that person in the subsequent proceedings; and he must be taken to have then adopted the proceedings of Mr. Yule, who seems, on the Appellant's appearance, to have retired from the contest. The final judgment of Mr. Chapman was on the 11th of February, 1848, as has been already stated. It held, on the proofs of possession before him, that the greater part, if not the whole, of the lands between [340] the yellow and the red lines, with the right to the profits of the Fair, belonged to Bettiah.

and settled a line of demarkation which, if not identical with the red line, at least includes the lands which are the subject of this suit within the limits of Bettiah.

Now, whatever be the effect of that proceeding, and whether it were, or were not, on Award under Regulation VII. of 1822, it cannot be treated as being other than a material piece of evidence upon the question of possession, now under consideration. To discredit it, their Lordships have been referred to the proceedings before the Magistrate on the 21st of March, 1851, and to the decree in the civil suit which was brought thereon. But these seem to their Lordships not to relate to the lands now in question, or to the effect of Mr. Chapman's proceeding, but to other lands, and to a question of boundary settled by some other proceeding. Their Lordships think, that this proceeding before Mr. Chapman establishes that the property in dispute was then in the possession of the Bettiah Rajah, and that there is no satisfactory evidence that it has ever since ceased to be so.

They further think, that this careful local investigation, conducted in the presence of both parties, and implying that the property in dispute had always formed part of the Bettiah Zemindary, casts upon the Appellant the burthen of showing by satisfactory counter-evidence at what precise time, if ever, the Rajah of Ramnuggur was in possession of it. And their Lordships agree with the Judges of the High Court, that this he has failed to do. There may have been assertions of right such as were likely to occur in respect of a tract of wild and jungly land on the confines of two large estates; but of an actual [341] legal possession, and of the determination of it at any given time, there is no proof. And their Lordships must observe, that it is a fallacy to treat the Appellant, as one of the reasons in the petition of appeal seems to treat him, as having necessarily twelve years from the date of the establishment of his title in which to enforce this claim. For he did not come in under a new title; he merely established his right to succeed to the former Rajah of Ramnuggur; and if the right of that Rajah to sue for the property in question was barred by the law of limitation, the right of the Appellant was also barred.

Their Lordships, therefore, think, that the decrees under appeal may be supported on the ground stated by Mr. Justice Morgan, viz., that even if the Appellant was allowed to deduct the full period during which this suit concerning the Raj was pending, he had failed to show that he had a right of suit which accrued to him during the legal period of limitation.

If, however, it were granted that a right of action accrued to the Appellant at the date of the Thakbust proceeding,—and their Lordships think it impossible on the evidence to fix the dispossession at a later date,—the suit would, nevertheless, fall within the twelve years' limitation, unless the Appellant could show that he is entitled to deduct the whole or some part of the period between February, 1848, and the beginning of 1858. And to support this claim to deduction, he must show that during the period to be deducted, he was, in the words of the Regulation, "from good and sufficient cause precluded from obtaining redress."

Their Lordships would have great difficulty in [342] affirming the proposition that such good and sufficient cause had here been shown to exist. The Appellant's title to the Raj of Ramnuggur was established in the Courts of India in September, 1846; he was put in possession of the property in June, 1848, though between May, 1854, and some day in the beginning of 1858, it was again under attachment. How can it be said that, in these circumstances, he was between 1848 and 1858 precluded from maintaining a suit for protecting his zemindary, and recovering lands taken from it by encroachment? It would be very dangerous, in their Lordships' opinion, to lay down as a rule, that the pendency of an appeal to England puts the party who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties.

The cases in the 7th Moore's East Indian appeals which have been cited, are very distinguishable from the present. In *Troup v. The East India Company* (7 Moore's Ind. App. Cases, 104), the "good and sufficient cause" was insanity, a personal disability *ejusdem generis*, with infancy, which is specified in the Regulations. In *Rajah Enayet Hossein v. Sayud Ahmed Reza* (7 Moore's Ind. App. Cases, 238), the facts are complicated; but it will be found that the decision proceeded on the ground, that the title upon which the Plaintiff sued had only accrued to

him on the 15th of January, 1842, when Her Majesty's Order in Council had determined the right of succession to be in the general heirs according to the Sheah law of succession, and that the suit to which the bar was pleaded had been commenced in February, 1852. Here the Appellant's title to Ram-[343]-nuggur, subject to the appeal to England, was complete in 1846.

Their Lordships, therefore, must humbly advise Her Majesty to dismiss this appeal, and to affirm the decrees of the Courts below, with costs.

KALEEPERSHAD TEWARREE,—*Appellant*; LALLA BINDA LALL,—*Respondent* * [March 12, 1869].

The High Court dismissed an appeal from the Zillah Court on the ground, that it involved the same question as had been decided by them in another suit brought by the Plaintiff in respect of the validity of a Zur-i-peshgi deed. The decision in the prior suit was, on appeal, reversed by the Judicial Committee. In such circumstances, on the appeal from the last decision coming on for hearing *ex parte*, their Lordships, with the consent of the Appellant, remitted the case to the High Court, with a declaration, that the deed was valid; and with directions that, if the Respondent did not appear within a reasonable time, to be fixed by the High Court, to dismiss the appeal from the Zillah Court, and, in the event of the Respondent appearing, then to hear the case on the merits.

As to costs, held, that if the Respondent failed to appear in the High Court, or if the appeal should be decided against him, the Respondent was to pay the Appellant's costs of the appeal in England, and the costs (if any) paid under the decree of the High Court were to be repaid to him.

This suit was instituted by the Appellant for possession of mouzah Koorkoorha, with mesne profits, held under a Zur-i-peshgi deed, dated the 23rd of December, 1851, executed by Rajah Sahib Perhlad Sein, the Rajah of Ramnuggur, in the Appellant's [344] favour and Muddun Mohun Tewarree, his deceased Brother. The Respondent claimed to be entitled to possession under an alleged Mocurrery Pottah from Rajah Sahib Perhlad Sein, dated the 21st Jeyt Soodee 1259 Fuslee.

The facts and circumstances of the case were so immediately connected with the former case of appeal of *Kaleepershad Tewarree v. Rajah Sahib Perhlad Sein* (*ante* [12 Moo. Ind. App.], p. 282), that both the Sudder Ameen and the Judges of the High Court rested their decisions on their previous decree in that case.

The case of the Appellant was, that Rajah Sahib Perhlad Sein had executed the Zur-i-peshgi deed, comprising fifteen mouzahs (including mouzah Koorkoorha), for the purpose of securing the payment of Rs. 49,453 and interest then due to the Appellant and his Brother. By the terms of this deed, the Appellant and his Brother were to "hold possession of the whole of the mouzahs," a provision which he now submitted was altogether inconsistent with the existence at the time of a Mocurrery Pottah in favour of the Respondent.

The Respondent, Rajah Sahib Perhlad Sein, in this, as in the other suit before referred to, alleged that the Zur-i-peshgi deed, having been executed in consideration of a promise by the Appellant and his Brother, which they did not fulfil, was invalid, no consideration having been given for the same.

It appeared that the Appellant and his Brother had made under the Zur-i-peshgi deed a sub-lease of the mouzah in dispute to one Goolab Khan, and had put him in possession thereof, and that while so in [345] possession, one Behari Lall attempted to collect the profits of the mouzah. Such attempt was opposed by Goolab Khan, who applied to the Police authorities, when the Criminal Court of Zillah Chumparun

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Robert Phillimore. Assessor,—The Right Hon. Sir Lawrence Peel.

directed, that if there was any claim regarding the title to the mouzah, a suit should be instituted under Act, No. IV. of 1840. Accordingly, Behari Lall and the Respondent instituted a suit under that Act against Goolab Khan and the Appellant and his deceased Brother. The Magistrate (Mr. Glover) decided the case in favour of Goolab Khan and the Appellant. Against such decision Behari Lall and Lalla Binda Lall appealed to the Sessions Court, and the Judge, Mr. Robert Forbes, being of opinion, that the Zur-i-peshgi deed was executed by Rajah Sahib Perhlad Sein in collusion with the Appellant and his Brother, for the purpose of prejudicing the rights of Behari Lall and Lalla Binda Lall, set aside the Order of the Magistrate, and decreed possession of the mouzah to Behari Lall and Lalla Binda Lall.

In consequence the Appellant and his deceased Brother filed a plaint against Rajah Sahib Perhlad Sein, Behari Lall, and Lalla Binda Lall, for possession of the mouzah with mesne profits.

Rajah Sahib Perhlad Sein by his answer, alleged collusion between Lalla Binda Lall and the Appellant, and stated that the Bond for Rs. 40,000, and the Zur-i-peshgi deed of the fifteen mouzahs, which included the mouzah in dispute, in substitution therefore, in question in the appeal of Kaleepershad Tewarree against himself, was without consideration, and fraudulent.

Lalla Binda Lall by his answer set up the validity of the Mocurrery Pottah.

[346] The Principal Sudder Ameen fixed the issues in the suit as follows:— First, was the deed of Zur-i-peshgi, which has been founded on a previous Bond, correct and valid, owing to the receipt of the Peshgi money and other circumstances? and are the Plaintiffs, in accordance therewith, entitled to recover possession of the disputed mouzah, as one of those covered by the Zur-i-peshgi deed, or not? Second, was the Mocurrery Pottah put forward by Lall Binda Lall, Defendant, collusive and fabricated, and fit to be set aside, or not? and are the Plaintiffs entitled to personal possession, or by maintenance of the Mocurrery of Lalla Binda Lall, Defendant, or not?

The Appellant put in, among other evidence, the Zur-i-peshgi deed, in which no mention was made of the mouzah in question having been granted in Mocurrery, but, on the contrary, granted possession of the whole fifteen mouzahs comprised therein.

The suit came on for hearing on the 2nd of June, 1860, before Syud Mahomed Wuhudooddeen, the Principal Sudder Ameen, who stated as his opinion, that it was "quite evident that the Mocurrery Pottah has been prepared through the collusion of the Rajah of Ramnuggur and Lalla Binda Lall, his Mooktar, after the execution of the deed of Zur-i-peshgi of the Plaintiffs, and simply with a view to cause loss to the latter; for the Mocurrery deed bears on it no sign of registration or of the seal of the Cazi, besides being originally written on plain paper, the same has been subsequently stamped"; and he proceeded, "Although from a copy of the abstract of the Jumma-bundee of the settlement of villages of Raj Ramnuggur, etc., up to 1261 Fuslee, submitted on the 17th of October, 1854, and from a copy of the returns of the Rajah, dated [347] the 13th of November, 1852 (1854?), and as well as from the list of lessees of the same date, it appears that the disputed village of Koorkoorha was given in Mocurrery lease for Rs. 41. Still the same are not at all trustworthy, as before a list of the mouzahs covered by the Zur-i-peshgi deed was filed by the Rajah, with his petition of the 14th of March, 1855, whereon orders were passed on the 7th of April of the same year, and in which list the jumma of this disputed village has been, without any mention of the Mocurrery lease, stated to be Rs. 850; so, if the Mocurrery jumma at Rs. 41 were valid, how could any mention of the jumma of Rs. 850 have been made before that date? The date of the Mocurrery lease is, apparently, prior to that of the Zur-i-peshgi, but at the same time a denial on the part of the Rajah of the existence of this Mocurrery tenure, is clear from a copy of his petition of the 18th of June, 1855. From the decision of the Magistrate of Chumparun, it is also seen that Lalla Binda Lall and Behari Lall declare themselves to be in possession of the disputed village under the Mocurrery lease; now then, as Behari Lall is himself an attesting witness to the Zur-i-peshgi deed in the names of the Plaintiffs, in which the jumma has been, without any mention of the Mocurrery lease, stated to be Rs. 850, so there is no doubt that this Mocurrery lease has been fabricated after the execution of the

Zur-i-peshgi deed on behalf of Plaintiffs," and decreed in favour of the Appellant, with mesne profits and costs.

Against this decree the Respondent appealed, and on the 21st of May, 1863, Messrs. Steer and Seton-Karr, two of the Judges of the High Court, [348] gave judgment. They did not go into the merits of the case, but reversed the decree of the Principal Sudder Ameen on the following grounds:—"Having held in the other suit (*ante* [12 Moo. Ind. App.], p. 282), that the present Plaintiffs have no further right to the fifteen vilages of which they held the lease; and this suit being to cancel a Mocurrery in one of those villages, and to get possession of it, we must decree on the appeal of the Mocurreredar that the suit ought to have been dismissed."

The Appellant alone brought the present appeal, his Brother having died pending the appeal to the High Court.

The Respondent not having appeared, the appeal was heard *ex parte*.

The Appellant, by his case, submitted that the validity of the Mocurrery lease, as against him, was not supported by trustworthy evidence; but, on the contrary, was inconsistent with the facts disclosed by the evidence. That even if the Mocurrery lease was executed prior to the Zur-i-peshgi deed, it was executed without consideration, and ought consequently to be declared void as against the Appellant's deed, executed without notice for valuable consideration, and that the Appellant's title, in priority to and without notice of the Mocurrery lease, was sufficiently proved.

Mr. Pontifex, for the Appellant, was stopped.

The Right Hon. Sir James W. Colvile.—The only question is, whether their Lordships can decide this appeal without remitting it back to the [349] Court below, as the case substantially involves the same question, and turns on the decision of their Lordships just pronounced in the case of *Kaleepershad Tewarree v. Rajah Sahib Perhlad Sein* (*ante* [12 Moo. Ind. App.], pp. 282, 311). Can their Lordships decide the case in its present form on its merits? If we are not in a condition to try the question, the appeal must either stand over or be remitted, or we can recommend Her Majesty, that the decree appealed from be reversed, subject to notice being given to the Respondent in India.

Minutes were then agreed to, which are embodied in the following Order in Council:—

"It is hereby ordered, that the decree of the High Court of Judicature, at Fort William, in Bengal, of the 21st of May, 1863, be reversed, and the cause remitted to the High Court, with a declaration, that the Zur-i-peshgi deed, alleged to have been granted by the Rajah of Rannuggur to the Appellant and his Brother, is a valid instrument, and the High Court is hereby directed, in case the Respondent does not appear within a reasonable time to be fixed by the High Court, to dismiss his appeal from the Zillah Judge of Sarun to the High Court, with costs, and if the Respondent does so appear, then the High Court is to hear and determine the appeal on its merits, and in case the Respondent shall fail to appear in the High Court, or in case the appeal shall be decided against him, then the Appellant's costs of this appeal are to be paid by the Respondent, and the costs (if any) paid under the decree of the High Court of the 21st of May, 1863, are to be repaid."

[350] CHOWDRY PUDUM SINGH,—Appellant; KOER OODEY SINGH,—

Respondent * [Feb. 16 and 18, 1869].

On appeal from the late Sudder Dewanny Adawlut, North-Western Provinces, Agra.

Suit by A., one of the co-heirs of H., against B., to recover the whole of H.'s real and personal estate in B.'s possession, as the alleged adopted Son of H. There were other persons entitled with A. to share in the succession to H.'s estate, who were not made parties to the suit. The Sudder Court at Agra held, that B. had failed to establish his title as adopted Son of H., but declared that A. was entitled to succeed, as one of the heirs of H., to a share of his estate, and decreed him the whole estate as sought by the plaintiff. Such decree, on appeal, so far as it declared that B. had failed to establish his title as adopted Son of H., confirmed; but as the decree was manifestly wrong in decreeing to A. the entire estate of H., and there were no materials to enable the Judicial Committee to vary the decree, so as to limit it to the share of the estate to which A. had established his right by inheritance, the decree was reversed, and the cause remitted to India for inquiries as to the amount of his share.

An adoption may be made by a Widow under an authority conferred upon her for that purpose by her Husband, but such authority must be strictly carried out, as the adoption is for the benefit of the deceased Husband and not the Widow alone [12 Moo. Ind. App. 356].

Adoption by the Widow alone does not, by Hindoo Law, give the adopted child (even after the Widow's death) any right to property inherited by her from her Husband [12 Moo. Ind. App. 356].

Adoption, being a matter of fact, must be strictly proved, and the party who claims as adopted Son must establish by evidence (1) the authority given by the Husband to the Widow to adopt a Son to him, and (2) his actual adoption by the Widow as her Husband's Son.

Under circumstances raising a strong presumption against an alleged adoption, such adoption held not to have been made [12 Moo. Ind. App. 356].

This was a suit in the nature of an ejectment, brought by Chowdry Mohur Singh, deceased, the Father of the Respondent, against the Appellant, to obtain possession of the whole of the real and personal estates of one Hem Singh, who died leaving a Widow, but no issue.

The nature and facts of the case and pleadings in the suit are so fully stated in the judgment [351] delivered by their Lordships, that it is unnecessary to set them out.

The principal question in the Court below and upon appeal, was the title of the Plaintiff, a cousin, who was one of the co-heirs of Hem Singh, to the entire estate of Hem Singh, he contending that the possession by the Appellant of Hem Singh's estate was illegal, as he had never been adopted in Hem Singh's lifetime, nor had Hem Singh given permission to his Widow to adopt him. The Appellant relied upon his adoption by the Widow under a power from her Husband. He also set up a Will made in his favour by the Widow of Hem Singh. The Sudder Court at Agra held, that the Appellant had not established his claim as adopted Son, and by the decree declared that the Appellant was, as one of the co-heirs of Hem Singh, entitled to a share of Hem Singh's estate, and decreed him the entire estate in the terms of the prayer of the plaint.

Upon appeal to the Privy Council, Mr. Leith appeared for the Appellant, and Sir R. Palmer, Q.C., and Mr. J. D. Bell, for the Respondent.

The following points were raised and argued:—

First, that the suit was defective for want of parties, as there were other heirs of Hem Singh, and that the decree of the Sudder Court was un-[352]-certain,

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart.

defective, and incapable of being given effect to, as the Plaintiff was not the sole heir of Hem Singh, whereas the decree gave him the whole estate, and not his aliquot share.

Secondly, upon the effect of the evidence as to the Appellant's alleged adoption by Hem Singh's Widow, the Appellant submitted, that the general presumption of Hindoo Law with respect to adoption, and the probabilities arising out of the state and condition of Hem Singh's family, was in his favour. *Muradhun Mookurjia v. Muthoranath Mookurjia* (4 Moore's Ind. App. Cases, 414), and *Katama Natchier v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 539), were cited and relied on.

Their Lordships' judgment was pronounced by—

Sir James W. Colville (March 14, 1869). This is an appeal from a decree of the late Sudder Dewanny Adawlut at Agra, reversing a decree of the Principal Sudder Ameen of Zillah Meerut, made in favour of the Appellant.

The suit was instituted by Chowdry Mohur Singh, the Father of the Respondent (who died while the suit was pending), to recover possession from the Appellant of the whole of the moveable and immoveable property formerly belonging to Hem Singh, deceased, a cousin of the Plaintiff, consisting of ancestral property, and of property acquired and amassed by Hem Singh and by his Widow, Khoosal Kooer, out of the proceeds of his ancestral estate.

The suit was instituted after the death of the Widow, Khoosal Kooer, the Plaintiff's claim being founded on his right of heirship to Hem Singh. It [353] appears by the plaint and a genealogical Table annexed to it, that there were other persons descended from the same common ancestor as the Plaintiff, who would have an equal right with him to a share in the succession of Hem Singh. The Plaintiff, in his plaint, assigns a reason for not including them among the Defendants, that "they had not possession of the property in suit, and that if they thought they had any right or interest in the matter, they could proceed against the Plaintiff at their option."

The plaint states, that after the death of Khoosal Kooer the Managers of the estate presented a spurious Will to the Collector, setting forth the Defendant as her adopted Son, and by that means he contrived to get possession of the estate. And it alleges, that the Defendant is not the adopted Son of the deceased Widow, Khoosal Kooer, and that she had no power to adopt a Son as long as the Plaintiff was alive. That the Defendant does not belong to the family of which Khoosal Kooer and Plaintiff are members, and that he is merely the foster Son of one Suhej Kooer. That it is not true that Khoosal Kooer ever executed a Will, and, had she done so, a Will made on the point of death would not be legal.

The Defendant by his answer to the plaint, states that the villages and properties claimed belonged to Hem Singh, the sole and absolute proprietor, though some of the properties were purchased after his death by his Widow, Khoosal Kooer. That Hem Singh had no issue, and, therefore, he selected the Defendant, who was of the same family and sect as himself, and was then but twelve months old and the youngest child of his parents, with their consent, to be his [354] adopted Son. That he received the Defendant into his arms, and brought him up as his own Son, and authorized his Wife, in case the rites of adoption were not performed during his own lifetime, to perform them after his death, declaring that he had constituted the Defendant proprietor of his entire estate, as though the Defendant were his own Son. That accordingly, when Hem Singh died, Khoosal Kooer carried out his injunctions, and performed the ceremony of adoption of the Defendant. The Defendant further states in his answer, that the property left by Suhej Kooer, Aunt of Hem Singh, also came into his possession in consequence of his being Hem Singh's adopted Son. And that, although being the rightful heir and successor of the estate, he did not need the support of a Will, yet that, as a matter of precaution, Khoosal Kooer executed a Will in his favour. That he does not rest his title upon that Will, but bases his claim as lawful proprietor of the estate on his hereditary rights.

Issues were framed by the Zillah Court which were calculated to raise various questions, but the Sudder Court, in their judgment upon appeal from the Zillah Court, after observing that the issues were very badly drawn, said, "The pleadings

show that the only point for determination was, whether the Widow, Khoosal Kooer, adopted the Defendant, Pudum Singh, by desire of her Husband, Hem Singh."

This single question appears to have been the one to which the greater part of the evidence in the suit was directed, and upon which alone the judgment in the Zillah Court, and also in the Sudder Court, proceeded.

[355] The Principal Sudder Ameen dismissed the Plaintiff's claim with costs, being of opinion, that it was clearly proved by the testimony of the Defendant's witnesses,—most of whom, he said, were respectable and trustworthy persons,—that Hem Singh adopted the Defendant, Pudum Singh, when he was twelve months old, and gave authority to his Wife, Khoosal Kooer, to complete the formal ceremony of adoption, and that it was further proved by the testimony of the same witnesses, that after Hem Singh's death, Khoosal Kooer went through the ceremonies of adoption in respect to the Defendant.

Upon appeal from this decree to the Sudder Court, that Court, upon the documentary evidence in the suit, arrived at a conclusion directly opposed to that of the Lower Court, considering that it entirely excluded the presumption of the truth of the Defendant's story, that the Widow adopted him at the end of 1836 by desire of her Husband.

They, therefore, held, that the Plaintiff was entitled to succeed to a share in the property in suit as one of the next of kin of Hem Singh, and decreed in favour of the appeal and of the Plaintiff's claim, and reversed the decision of the Lower Court with costs.

The decree, which was drawn up in conformity with this judgment, embraced the whole of the property included in the plaint, although the Court held, that the Plaintiff was entitled only to a share in the succession as one of the next of kin of Hem Singh. The decree, therefore, cannot be maintained, and the evidence furnishes no materials to enable their Lordships to vary it so as to limit it to [356] the share of the property to which the Plaintiff has established a right. It is possible, also, that some portion of the property claimed may have belonged to Khoosal Kooer in her own right, and may have passed to the Defendant by her Will, the validity of which, as to such property, the Plaintiff can have no right to question.

But although the decree in favour of the Respondent for the whole of the property claimed by him cannot stand, yet as he would not be entitled even to a share in the succession to Hem Singh if there were a valid adoption of the Appellant, their Lordships have felt it their duty to determine that question (the most important if not the sole question dealt with by the Courts below) in order to prevent further litigation respecting it.

The question as to the adoption of the Appellant is one entirely of fact. There is no doubt, and indeed it was fully admitted, that adoption might be made by a Widow under an authority conferred upon her for that purpose by her Husband. Of course, such authority must be strictly pursued, and as the adoption is for the Husband's benefit, so the child must be adopted to him and not to the widow alone. Nor would an adoption by the Widow alone, for any purpose required by the Hindoo Law, give to the adopted child, even after her death, any right to the property inherited by her from her Husband.

In order, therefore, to establish the validity of the adoption in this case, it was necessary for the Appellant to prove:—

First. The authority given by Hem Singh to his Wife to make the adoption; and

[357] Second. The actual adoption by Khoosal Kooer of the Appellant as the Son of Hem Singh.

The Appellant proved, by several witnesses to whom the Principal Sudder Ameen gave credit, but upon whom the Sudder Court placed no reliance, that the Appellant was the younger Son of Zalim Singh; that Hem Singh asked, and obtained permission of Zalim Singh and his Wife, to adopt the Appellant. That Hem Singh took away the Appellant, then a child of twelve months old, and carried him to his house, and placing him on the lap of Khoosal Kooer, said, "I have brought you this child to adopt as our Son." That a year after, Hem Singh said to Khoosal Kooer, "If I live long enough, I shall go through the ceremony of adopting the child myself: if not, I authorize you to perform the ceremonies of adoption as soon as he is

five years old;" and that Hem Singh died a year after giving this authority. The witnesses also proved, that when the Appellant had attained the age of five years, Khoosal Kooer went through all the ceremonies of adoption which they minutely described. It does not appear by the evidence of any of the witnesses, that Khoosal Kooer declared at the time, that the ceremonies were performed for the purpose of the adoption of the Appellant as the Son of Hem Singh, in pursuance of the authority which he had given her. One of them, on the contrary, says that "Khoosal Kooer adopted Pudum Singh as her own Son, at the request of Hem Singh."

If the adoption of the Appellant as the Son of Hem Singh had really been completed by Khoosal Kooer, his name ought to have been substituted for [358] hers in the Books of the Revenue Collector, as the property of Hem Singh would, by the act of adoption, have been divested from Khoosal Kooer, and would have vested in the Appellant as his Son and heir. Some of the witnesses say, that after performing the ceremonies, Khoosal Kooer ordered her Dewan to give notice of the adoption to the Collector. Either this Order was never given, or it was not obeyed, for it does not appear that any change was made in the entry in the Collector's Books; and Hem Singh's property continued to be registered in Khoosal Kooer's name down to the time of her death, which took place at least ten years after the Appellant had attained his majority. But Khoosal Kooer caused herself to be entered in the Books of the Canoongoe, or Record Keeper, of the village of Koorja, as the guardian and protector of Pudum Singh (the Appellant).

Now, if this were intended as the record of the fact of an adoption which had divested the property of Hem Singh from his Widow, and made her merely guardian of the minor adopted Son, it seems extraordinary, after such a complete lawful adoption as the witnesses represent, that Khoosal Kooer did not take the most effectual mode of recording it, by pursuing the regular course of substituting the Appellant's name for her own in the Revenue Collector's books. In the absence of any such record, the instances of the occasional description of the Appellant as the Son of Hem Singh are of no value. The Principal Sudder Ameen laid great stress upon a supposed entry of the Defendant's name as under the guardianship of Khoosal Kooer in the Khewut for proprietary Register of 1256 Fuslee, which he said [359] would not have been made if the Appellant were not the adopted Son of Hem Singh. Upon turning, however, to the only Khewut printed in the proceedings of the date named, it will be seen that there is no entry at all as to guardianship, but under a column headed "Name of Puttidar" the Appellant is entered as "Pudum Singh, Son of Hem Singh." In a statement of mutation of names of Lumberdars and Puttidars, however, in which Pudum Singh's name is entered in the column of Puttidars, but not as the Son of Mem Singh, there is the signature of Khoosal Kooer, with the addition of the words "guardian of Pudum Singh;" and it is probable that the Principal Sudder Ameen mixed up the Khewut and this document together in his mind. It is the only one of the similar documents in evidence which is signed by Khoosal Kooer, and there is nothing upon the face of it to show that it relates to Hem Singh's property.

The description of Pudum Singh, as the Son of Hem Singh, in the first power of attorney executed by him and Khoosal Kooer, is of little importance, as the parties were at liberty to describe themselves as they pleased in this private instrument; and the same observation applies to the entry of Hem Singh's name as the Father of the Appellant in the income-tax receipts, as most of the particulars inserted in the different columns could only be known to and filled in by the party by whom the tax was to be paid. The Appellant, in support of the evidence of an adoption, relied upon a proceeding by Khoosal Kooer on the 25th of March, 1836, when she presented a petition at the office of the Deputy-Collector of Revenue, describing herself as the Widow of [360] Hem Singh, and praying that the name of Pudum Singh might be added to her own in the Zemindary registers of certain villages. The Sudder Court observed upon this proceeding that "the joint entry of the Widow's and Pudum Singh's names was in some respects inconsistent with the avowal of his adoption, which would have placed the two in the position of parent and child, or guardian and heir." And, they added, "We find that the application referred to property acquired by the Widow after her Husband's (Hem Singh's) death, and which is not in suit in the present case."

There is some doubt as to the accuracy of the statement, that the villages named in the petition of Khoosal Kooer are not in suit in this case, as it was pointed out in the course of the argument that most of them are included in the plaint. But there still remains an objection to the use of this proceeding in proof of the adoption of the Appellant, which was slightly adverted to by the Court. It must have preceded the alleged ceremony of adoption. The Appellant was twelve months old at the time of the commencement of the intended adoption. Hem Singh lived a year afterwards, and died on the 22nd of October, 1834. The ceremonies of adoption are stated to have been performed by Khoosal Kooer when the Appellant was of the age of five years, which, according to the dates, he could not have been on the 25th of March, 1836, when the petition of Khoosal Kooer was presented.

All the facts of Khoosal Kooer with respect to Hem Singh's property appear to have been dictated by a desire to continue to be Zemindar during her life, and to secure the succession to it after her death to [361] the Appellant. She may have attempted at the same time to reconcile her continued possession with the alleged wishes of her Husband in favour of the Appellant.

The documentary evidence produced on the part of the Respondent tends much more strongly to throw suspicion upon the veracity or the accuracy of the witnesses who speak to the fact of the adoption by Khoosal Kooer, as it is wholly inconsistent with the idea of any such adoption having taken place.

It must always be borne in mind, that Khoosal Kooer, remained the registered owner of Hem Singh's property for the whole of her life. In addition to this circumstance, there are acts and declarations of Khoosal Kooer which cannot be reconciled with the fact of an adoption of the Appellant. Stress was laid by the Council for the Respondent on a statement made by Khoosal Kooer in a suit instituted by her against Tara Singh, claiming the succession as heir to the whole of her Husband's property, that, "Hem Singh died without leaving any issue male or female." It was observed that this action, which was brought on the 23rd of March, 1836, was contemporaneous with the above-mentioned petition of Khoosal Kooer, to have the Appellant's name added to her own as the proprietor of certain villages, which was presented on the 25th of March, 1836. According to what has been already remarked, this must have been prior to the time at which the alleged adoption took place, and, therefore, it was then strictly true that Hem Singh had died without leaving issue. But yet it is extraordinary, if Khoosal Kooer had any intention of carrying out her Husband's wishes with regard to the Appellant, that no mention whatever should have been made of the authority to adopt, and of her purpose to adopt the Appellant when the proper period arrived, in a suit which seemed peculiarly to require a true and full account of the destination of Hem Singh's property. Again, in 1841, long after the alleged adoption, Hem Singh, and Tara Singh, his Brother, having been joint proprietors of a village, and upon the death of Hem Singh, Khoosal Kooer's name having been entered in the register instead of his, and upon the death of Tara Singh, the name of his Widow, Meha Kooer, having been substituted, upon the death of Meha Kooer, Khoosal Kooer caused her name to be recorded as proprietor of the village, which, if there had been an adoption of the Appellant as heir of Hem Singh, he would have been

Although the Appellant does not rest his title to Hem Singh's property upon the Will of Khoosal Kooer, yet it is impossible to pass over the fact of her having made this Will or to omit all notice of the contents of it. Although, according to the case of the Appellant, Khoosal Kooer had failed in her duty by not divesting herself of Hem Singh's property upon the completion of her adoption, yet as that act made him heir to his adopting Father, no strength could be added to his title by the Will of the Widow. In consequence, however, of her remaining in possession of Hem Singh's property, doubt would probably be cast upon the fact of the Appellant's adoption, and, therefore, her declaration of her having performed the ceremonies in pursuance of her Husband's authority would have been useful as evidence; but instead of describing the Appellant [363] as the adopted Son of Hem Singh, the Will of Khoosal Kooer is in these terms:—"As Kooer Pudum Singh, the adopted Son of your Petitioner, has been in possession of your Petitioner's estates for a long period, and as the Petitioner has no other heir or successor but him, and as the Petitioner has retained him in possession during her lifetime, and he carries on all the

business of managing the villages and zemindaries, etc., therefore, the Petitioner prays, that the name of Pudum Singh be substituted for her own name as proprietor of all the zemindary and Malguzary villages and maafee lands of her estate, and Pudum Singh may be recognized as the owner of all her real and personal property."

Upon the death of Khoosal Kooer, reports were made of the facts connected with her death by the Canoongoes of the different mouzahs, in which Khoosal Kooer was styled either Zemindar, or Zemindar and Lumberdar, and all of them stated the conditions of settlement of mouzahs in these terms:—"Whomsoever Khoosal Kooer may constitute her heir in her lifetime, the same shall be entitled to the office of Malguzat after her death."

The Putwary's memorandum on the death of Khoosal Kooer is as follows: "The said Mussumat departed this life by the will of God on the 17th of December, 1861, etc., and left Kooer Pudum Singh, her adopted Son, aged thirty-one years, as the heir and successor to all her property."

Pudum Singh being of the age above mentioned at the time of Khoosal Kooer's death, it is not likely that he had never heard of his having been adopted as the Son of Hem Singh, if such a ceremony had taken place. And, if he had been [364] informed of the fact, it was to be expected that, although he had patiently submitted to Khoosal Kooer's usurpation of his property during her life, he would have seized the earliest opportunity of asserting his rights as the heir of Hem Singh. But it appears, that this was not the course which he pursued, nor the title by which he claimed the succession. The report of the Tehseeldar of Koorja on the succession to Khoosal Kooer states, "that the Putwary and Canoongoe, in their respective reports of the death in question, have mentioned Kooer Pudum Singh, her adopted Son, as the heir to the property of the deceased Mussumat. And that Pudum Singh had put in a petition praying that his name might be recorded as Lumberdar and Puttidar in place of that of Khoosal Kooer, deceased, as there was no other heir but himself."

The Counsel for the Appellant endeavoured to explain away the effect of this claim as heir of Khoosal Kooer, by the suggestion that, in thus claiming, the Appellant had been misled by the reports of the Canoongoes as to the right of succession to the property held by Khoosal Kooer. But (as already observed) if the Appellant really had a title to the property as the heir of Hem Singh, it is impossible to believe that he could have been ignorant of it; and his claim to the succession in a different character is almost conclusive against the attempted proof of a lawful adoption of the Appellant as the Son of Hem Singh by Khoosal Kooer, and consequently against the truth of the story told by the witnesses upon the subject.

Their Lordships, therefore, agree with the Sudder Court, that the Appellant has failed to prove that he [365] was lawfully adopted as the Son of Hem Singh by Khoosal Kooer, in pursuance of authority conferred upon her for that purpose by her Husband; and that he has, therefore, no answer to the claim of the Respondent to a share of the succession to Hem Singh's property. But as the Court has made a decree which gives the Respondent the whole of Hem Singh's property, when he is entitled only to a part, that decree must be set aside.

Their Lordships, however, think it right, for the purpose of restricting future litigation within as narrow bounds as possible, to declare, that it has been established between the parties to the suit, that the Appellant is not the duly adopted Son of Hem Singh, and that on the death of Khoosal Kooer, Mohur Singh, the Father of the Respondent, and the other heirs in equal degree then living, became entitled to inherit the estate of Hem Singh, of which his Widow died possessed. And they will recommend to Her Majesty, that with this declaration the cause be remitted to the High Court of Agra, to make such inquiries as shall be necessary to ascertain what share of the estate of Hem Singh the said Mohur Singh was entitled to, and what part of the property claimed by the plaintiff was the estate of Hem Singh. And as the Appellant has succeeded in proving the invalidity of the decree, although he has failed in his opposition to the Plaintiff's title, their Lordships will further recommend that each party bear his own costs of the appeal.

[366] RAJAH ENAYET HOSSAIN.—*Appellant*; GIRDHAREE LALL, —*Respondent*; and RAJAH ENAYET HOSSAIN.—*Appellant*; SUMEERCHAND and Others.—*Respondents* * [Feb. 22, 1869].

On appeal from the High Court of Judicature at Calcutta.

A. died in 1841, having executed a deed of gift in favour of his eldest Son B., and also a Will, making B. Executor, and directing certain allowances to his Widow and children out of his estate. Disputes arose among A.'s heirs respecting these instruments, which led to a summary suit under Act. No. XIX. of 1841, in which B. was, in 1842, put in possession of the whole of A.'s estate. Afterwards the members of A.'s family acquiesced in the deed and Will, renounced their claims as heirs, and received certain stated allowances given by the Will out of A.'s estate. In 1846, C., the youngest Son of A. in consideration of advances made to him, executed a Bond, and was afterwards sued by the Bond-holder, which suit resulted in a decree against his, and ultimately an execution sale under such decree in 1853. The decree-holder sued C. in 1857, seeking to make his share in A.'s estate liable, as in case of an intestacy:—Held, by the Judicial Committee, reversing the decree of the High Court (1) that the burthen was on the decree-holder to show circumstances to take the case out of the operation of the Regulation of Limitations; and (2) in the absence of such evidence, that the time began to run in 1842, when B. was put in possession, and consequently that the suit was barred by Ben. Reg. III. of 1793, sec. 14.

Held, further, with respect to the operation of that Regulation, that there is no distinction between a person claiming under an execution sale and one who claims under an assignment or conveyance.

These appeals, substantially involving the same question, the operation of the Bengal Regulation of Limitation, III. of 1793, sec. 14, as a bar to the suits, were heard together.

With respect to the first appeal, the facts were these:—

Rajah Deedar Hossain, the Father of the Appellant, Mahomedan, died in the month of Aughan, 1249 Moolky, leaving a Widow, five Sons, and several Daughters. The Appellant was the eldest [367] Son, and one of the younger Sons was named Bahadoor Hossain.

Prior to his decease, Rajah Deedar Hossain executed a Hebah-bil-ewas, or deed of gift, bearing date the 26th of the month of Shabun, 1255 Hijree (corresponding with the 19th Kartick, 1247 Moolky), and thereby, in consideration of Rs. 10,000, gave one-third of his immoveable property, and the whole of the moveable property specified in the schedule thereto, to the Appellant, and after acknowledging that he had received the consideration-money, put the Appellant into possession.

Rajah Deedar Hossain also executed a Will of even date with the deed of gift, and thereby constituted the Appellant his Executor and representative, and the Testator directed, that out of every kind of property belonging to him (after deducting one-third) of which he had made the deed of gift to the Appellant, the remaining two-thirds should be divided into three portions, whereof one portion was to be applied by the Executor for charitable and religious purposes, and the remaining two-thirds, after payment of debts, the Executor was to pay to the Testator's heirs, male and female, and salary-holders, in certain proportions as therein mentioned.

[368] At the date of the execution of the deed of gift, the Soorjapoor Zemindary was under attachment, and collections were made by a Surburakar.

After the death of Rajah Deedar Hossain, the Appellant entered into possession of the entire estate. But three of Rajah Deedar Hossain's Sons and four of his

* Present:—Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

Daughters, for some time disputed the validity of the deed of gift and Will, and threatened to act in opposition to the terms thereof by taking possession of Rajah Deedar Hossain's property. The Appellant, in consequence of such disputes, instituted a summary suit under Act, No. XIX. of 1841, for the protection of the property; and on the 19th of November, 1842, the Judge of the Civil Court of Zillah Purneah ordered that the Appellant should give security, which he did, and was put into possession of the property.

During the pendency of the summary proceeding, Bahadoor Hossain, on the 19th of December, 1841, presented a petition in support of the validity of the deed of gift and Will, and he and the three other younger Sons and the five daughters of Rajah Deedar Hossain, received from the Appellant their allowances, in accordance with the terms of their Father's Will.

On the 16th of Assar, 1254 Mookly (July, 1846), Bahadoor Hossain executed a money Bond, to secure to Lukkee Saho and Doulut Saho, Bankers, the sum of Rs. 5400, with interest, and Ranee Kheerooneessa (the Widow of Rajah Deedar Hossain) executed to Lukkee Saho and Doulut Saho, a security Bond, by way of suretyship, for payment by Bahadoor Hossain of that sum.

Lukkee Saho and Doulut Saho, some time after-[369]-wards instituted a suit against Bahadoor Hossain and Ranee Kheerooneessa on these Bonds; and on the 18th of November, 1847, a decree was made against them for the payment of the sum of Rs. 6168, principal and interest.

The decree-holders took proceedings in the suit for the purpose of realizing the amount decreed to them by attaching and selling what was alleged to be the right and interest of the surety, Ranee Kheerooneessa, in the Soorjapoor zemindary, as Widow of Rajah Deedar Hossain. The Appellant, however, submitted a petition of objection in the suit, stating that by reason of the deed of gift and Will, the Ranee had no interest in the zemindary besides her allowance under the Will, and objecting to the attachment and contemplated sale; and an Order was, on the 6th of January, 1852, passed by the Principal Sudder Ameen of Zillah Purneah, to the effect, that inasmuch as no share of the Ranee had been found to exist, it could not be properly sold; and it was ordered, that the property which had been attached should be exempted from sale.

Against this last-mentioned Order the decree-holders appealed to the Sudder Dewanny Adawlut at Calcutta; and on the 21st of April, 1852, it was ordered by that Court, that the Order of the Principal Sudder Ameen of Zillah Purneah be reversed, and a copy of the proceeding, with a direction, that, according to the request of the Petitioner's decree-holders, the rights and share of the judgment Debtor, whatever that be, in the property attached, be sold by auction.

On the 3rd of March, 1853, an auction sale, in execution of the decree of the 18th of November, 1847, was held of the right and share of Bahadoor [370] Hossain, and at such sale one Motee Lall became the Purchaser for the price of Rs. 4025; and subsequently, on the 17th of June, 1853, a Bill of Sale of his share in the Pergunnah Soorjapoor was made, and on the 5th of October, 1853, Motee Lall, by deed of that date, in consideration of Rs. 20,000, transferred to the Respondent what he had purchased at the auction sale of the 3rd of March, 1853, with mesne profits.

On the 18th of February, 1859, more than twelve years after the date of the Bond given by Bahadoor Hossain to Luckhee Saho and Doulut Saho, the Respondent instituted the present suit against the Appellant and other Defendants (the heirs of Rajah Deedar Hossain), for possession of 1 anna, 13 gs. 1 c. 1 kt. of the entire Pergunnah Soorjapoor, with mesne profits.

The Appellant by his answer, denied the Respondent's right, and pleaded that the suit was barred by limitation; and the other Defendants (co-heirs of Rajah Deedar Hossain), by their answers, also denied the Respondent's right to sue them, admitting the validity of the deed of gift and Will.

The Principal Sudder Ameen of the Zillah Court of Purneah, Abdool Azeel, gave judgment on the 2nd of October, 1860, as follows:—"From the date of the Bond upon which a suit was preferred against Bahadoor Hossain, and a decree obtained, after the lapse of twelve years and some months, this suit has been instituted, and there is no doubt that at the time of the execution of the Bond Bahadoor Hossain was of years of understanding and of full age; and from a copy of a petition of

Bahadoor Hossain, it is evident that Bahadoor Hossain, in accordance with the Was-[371]-seeutnamah (Will) of his Father, having renounced his right and share in the zemindary, has remained satisfied with the allowance; when to the right of judgment Debtor, Bahadoor Hossain, in respect to a claim to a share in the zemindary, seeing that the entire zemindary has been in the continuous possession of Enayet Hossain, limitation applies;" and dismissed the suit with costs.

In dissatisfaction with this judgment, the Respondent appealed to the Sudder Dewanny Adawlut at Calcutta. The appeal came on for hearing on the 13th of April, 1863, before Messrs. Bayley and Campbell, two of the Judges of the High Court of Judicature at Calcutta, and on the same day judgment was given, reversing the decree as to the operation of the Regulation of limitations. The judgment concluded as follows:—"It may be very much regretted that under the old system, rights and interests in action, and not in possession, should be absolutely sold; but since they have been sold under the system then existing, we cannot think that, in the present case, the Purchasers are debarred from trying their rights by time. We, therefore, order that the case be remanded to the Court of original jurisdiction, to be tried on its merits."

The facts of the second appeal in no way differed from the first, so far as related to the deed of gift and Will of Rajah Deedar Hossain, and the possession under the summary decree. That suit arose under these circumstances:—

Shortly after the summary Order, a deed of release was executed by the five Daughters of Rajah Deedar Hossain (including Ruheem Oonissa), and by the [372] Widow, to the Appellant, which recited the execution by Rajah Deedar Hossain of the deed of gift and Will, and the summary proceedings before mentioned, and the Order made thereon, and that liberty to bring regular suits was reserved to the heirs of Rajah Deedar Hossain. The release contained the following declaration:—"We, therefore, having of our free will and accord, foregone our claim to a share in the inheritance, have agreed to all the terms of the Will of our ancestor, and engage and give in writing, that we and our heirs, from generation to generation, shall receive the allowances inserted in the will, as mentioned below, in cash, from the said Trustee (the Appellant) and his heirs." At the foot of the deed was a detailed statement of the allowances referred to in the deed, including the allowance to be paid to Ruheem Oonissa, who received such allowance as it became due.

On the 5th of Kartick, 1255 Moolkee, Ruheem Oonissa executed a money Bond to secure to Luchmee Put and Motee Lall, Bankers, the sum of Rs. 335. 8a.

Afterwards, Luchmee Put and Motee Lall instituted a suit against Ruheem Oonissa on the Bond, and on the 14th of March, 1850, a decree was made against her for the payment of the sum of Rs. 426 and costs. On the 4th of April, 1853, an auction sale, in execution of this decree, of the right and share of Ruheem Oonissa was made; and Motee Lall, one of the decree-holders, by his Gomashtah, became the Purchaser for the price of Rs. 211. 6a., which was set off against the amount of his decree. Subsequently, on the 17th of May, 1853, a Bill of sale was made to Motee Lall, of the property or [373] right sold of Ruheem Oonissa in the Pergunnah Soorjapoor.

No further proceedings were taken by Motee Lall until the 21st of Assur, 1265, when he, by deed of that date, in consideration of Rs. 6500, transferred to the Respondent, Sumeerchand, what he had purchased at the auction sale of the 4th of April, 1853, with mesne profits.

On the 1st of March, 1859, Sumeerchand instituted a suit against the Appellant and others, being the majority of the heirs of Rajah Deedar Hossain, for possession of the share of Ruheem Oonissa in Pergunnah Soorjapoor (being 18 g., 2 c., 2 k.), with mesne profits.

The Appellant, by his answer, denied the right of the Respondent, Sumeerchand, and pleaded that his suit was barred by limitation. The majority of the other Defendants, the co-heirs of Rajah Deedar Hossain, also put in their answers, denying the right of the Respondent, Sumeerchand, to sue them, and admitting the validity of the deed of gift and Will. Ruheem Oonissa, by her answer, also admitted the validity of the deed of gift and Will, and her own acquiescence in the provisions thereof, and the receipt by her of allowances in conformity therewith.

The principal issue recorded by the Judge of the Civil Court of Zillah Purneah was, whether limitation has been incurred in the suit of the Plaintiff, or not.

On the 2nd of October, 1860, Abdool Azeel, the Principal Sudder Ameen of the Civil Court of Purneah, gave judgment in the suit as follows:—"The suit which the Plaintiff has instituted for the possession [374] of the rights and share of the Debtor in the entire zemindary for 18 gs. 2 cs. and 2 kts. is fully barred by limitation. Because it is manifest from the proceedings, dated the 19th of November, 1842, that after the decease of Rajah Deedar Hossain, the Appellant did, according to the purport of the deed of gift and Will executed and delivered by his Father, prefer a suit under Act, No. XIX. of 1841, and by a decision of the Judge, the Appellant obtained possession of the entire zemindary, and that possession continues up to this day. Upon inquiry from the Pleaders of the Defendants, it appears that Ruheem Oonissa is older than Rajah Enayet Hossain, and from the date of the possession of the Appellant, this suit is preferred after twelve years. And when the claim of Ruheem Oonissa must, in consequence of limitation, be dismissed, the Plaintiff, who is the representative of Ruheem Oonissa, cannot in that event be entitled to possession and mesne proceeds of the share. Therefore, by reason of limitation, the investigation of any other matter is unnecessary. It is accordingly ordered, that the claim of the Plaintiff be dismissed with costs."

On appeal, the High Court of Judicature at Calcutta, consisting of Messrs. Bayley and Campbell, on the 13th of April, 1863, gave judgment over-ruling the decree of the lower Court on the question of limitation. The material part of the judgment was in these terms: "It may be very much regretted that under the old system rights and interests in action, and not in possession, should be absolutely sold; but since they have been sold under the system then existing, we cannot think that in the present case the purchasers are debarred from trying their rights [375] by time. We, therefore, order that the case be remanded to the Court of original jurisdiction, to be tried on its merits."

The appeals were from both these decrees, and as the same point was involved, they were directed to be heard together.

There was no dispute about the facts, the question turning upon the operation of the Bengal Regulation III. of 1793, sec. 14, as a bar to the suits.

In both appeals—Mr. Field, Q.C., and Mr. Pontifex, appeared for the Appellant, and Sir R. Palmer, Q.C., and Mr. Leith, for the respective Respondents.

With respect to the first appeal, it was submitted, on the part of the Appellant, that Bahadoor Hossain, as one of the heirs of Rajah Deedar Hossain, had not in his lifetime disputed the deed and Will, but, on the contrary, had, with a majority of the heirs of Rajah Deedar Hossain, accepted the allowance under the Will, and that he took no step to set aside the summary decision in 1842; that Motee Lall having had personal dealings with Bahadoor Hossain, was acquainted with the fact of his acquiescence in the validity of the deed and Will, and, as it would have been impossible for him to bring a suit against the Appellant with any chance of success, the transfer by him to the Respondent was resorted to. That more than twelve years had elapsed from the date of the Bond before the institution of the suit, without any proceedings being instituted or claim made against Bahadoor Hossain or any persons claiming under him [376] in respect to Rajah Deedar Hossain's estate; and, as to the second appeal, that Ruheem Oonissa had also confirmed the provisions of the deed of gift and Will, and accepted her allowance under the Will, and that more than twelve years had elapsed from the date of the judgment in the summary proceedings in which Ruheem Oonissa was a party, and from the date of her confirming the deed and Will, before the institution of the suit.

For the Respondents it was contended, that the rule laid down by the Courts in India, in giving effect to the Regulations of limitation, was that when fraud is charged, the period of limitation is not reckoned from the time when it is committed, but only from the time when it was discovered; and that the period of twelve years, prescribed by Ben. Reg. III., 1793, sec. 14, had not expired when the present suit was brought, inasmuch as the Respondents were, from "good and sufficient cause, precluded from redress," as the Appellant had acquired and held possession of the immoveable property of his Father, Rajah Deedar Hossain, by "fraud or other unjust or dishonest means," and therefore, under Ben. Reg. II. of

1805, sec. 3, the Respondents were entitled to the extended period of six years: that the Appellant had not held "quiet and unmolested possession" of the estate during a period of twelve years antecedent to the claim being preferred in a competent Court, so as to bring him within the exception contained in Ben. Reg. II. of 1805, sec. 3, or to authorize the Court to apply the twelve years rule of limitation, and lastly, that, being decree-holders at an execution sale, the Regulations did not apply.

[377] Judgment in both appeals was delivered by—

The Right Hon. The Lord Justice Selwyn.—These are appeals from the decision of the High Court, which has reversed the decision of the Court below, and has in substance held, that the Regulations of limitation does not apply to this case.

It appears that the property in question is claimed under a deed of gift, which applies to one-third of it, and under a Will, which applies to the remaining two-thirds. Very shortly after the death of the Testator, which took place in the year 1841, and in consequence of disputes which had arisen in the family with respect to the validity of the deed of gift and the validity of the Will, proceedings were instituted, which resulted in a decree, not of a final character, but which was made in the presence of all the parties on the 19th of November, 1842, and under which the eldest Son of the Testator was put in possession of the property, in which he has remained ever since. It would thus appear to be beyond doubt, that the Regulations, at all events, commenced to run from the 19th of November, 1842, and it is, therefore, incumbent upon those who have taken these proceedings, under the plaint filed on the 18th of February, 1859, to show some circumstances which would take the case out of the operation of the ordinary rule, much more than twelve years having elapsed between those two dates.

Now, the claim which is filed is not, as has been argued at the Bar, a claim founded upon the notion of the person under whom the Claimant claims being a *cestui qui trust* of the eldest Son, under a deed or Will, but a claim under an intestacy distinctly alleging the Mahommedan law, and praying for the division of the estate of an intestate under that Mahommedan law, and a specific claim of the share to which the person under whom the Plaintiff claimed, would have been entitled in the case of an intestacy.

In answer to that, the Regulations of limitation is set up. It appears, that the particular person under whom the Claimant in the first of the appeals now before us derives his title, although he was an infant at the time when the suit of 1841 was instituted, and when the petition, which has been referred to was filed by him in support of the deed of gift and of the Will, became of age in the year 1842, and before the date of the decree, and he must be taken to have had full cognizance of all the facts and matters which were in dispute at and after that time. Although a second suit was instituted by other members of the family in the year 1852, it does not appear that in the subsequent proceedings any new questions have been raised, or that any new facts have been elicited, or that any new discovery of any fraud has been made; and their Lordships are of opinion, that there has not been in this case any such discovery of fraud as can be held to have postponed the operation of the Regulations of limitation.

There is another point which appears to have been taken by the learned Judges of the High Court, and which seems to have been founded on the supposition that there was some distinction to be made in favour of a person claiming under an execution sale, as contradistinguished from the representatives of any [379] person claiming under an ordinary assignment or conveyance.

In the opinion of their Lordships, there is no foundation, in principle or authority, for any such distinction; but the person who comes here as the Plaintiff, and who is the Respondent in the first appeal must stand in the same position as Bahadoor would have stood, if he had been the Claimant, and as the Daughter would have stood in respect to the other share, if she had been the Claimant. With respect to both of them, the Daughter was of age at the time of the proceedings in 1842; the Son, Bahadoor Hossain, became of age in 1842; and they have had full notice of all the facts. Their Lordships have already said, that there has been no subsequent discovery of any fraud, nor indeed, as far as appears, any new matter whatever brought in issue between these parties, beyond that which was raised in the proceedings in 1841 and 1842. The learned Counsel who argued the case

on the part of the Respondents has been unable to produce any authority in support of any such distinction as has been supposed to exist between a person standing in the position of a claimant under an execution sale, and a Claimant under any other conveyance or assignment.

It appears, therefore, to their Lordships that in this case the time must be taken to have begun to run, at all events from the date of the decree, on the 19th of November, 1842, and that there is nothing whatever to bring this case within any of the exceptions to the Regulations of limitation; and consequently, that the decisions of the Zillah Court were right, and that the High Court ought to have dismissed the appeal from that decision with costs.

[380] It is admitted, that the second appeal now before their Lordships, raises precisely the same questions as the first.

The Order, therefore, which their Lordships will humbly recommend Her Majesty to make, will be to reverse the decisions of the High Court, and to declare that that Court ought to have dismissed the appeals before them with costs. We think that the costs of both these appeals should follow the event.

RADHA JEEBUN MOOSTUFFY.—*Appellant*; TARAMONEE DOSSEE.—*Respondent* * [Feb. 23, 1869].

On appeal from the High Court of Judicature at Calcutta.

Under the terms of a Soluhnamah, compromising a suit brought to obtain possession of a share in a family ancestral estate, it was provided (*inter alia*), that S., the elder Brother, should, in consideration of the rents of a specified part of the family estate, estimated to cover the expenses, perform the Deb Sheba (worship of the family Idols) and other religious ceremonies for the family. This compromise was sanctioned by the Court, and a decree made thereon. On a motion by S. to enforce the decree on an allegation that R., his Brother, had not performed his part of the compromise by putting him in possession, the Court decreed execution of the decree, and awarded mesne profits; R. also obtained a further Order for execution on the ground that S. had not performed the trust, and that he had been compelled to perform the religious ceremonies at his own expense. This the Court refused to enforce, as the omission was caused by his default in not putting S. in possession of the lands. Held, that proof of the non-performance of the religious ceremonies by S. was not a condition precedent to the enforcement by S. of the decree.

In a suit brought by R. against S. to recover moneys alleged to have been expended by R. in the performance of the Deb Sheba, in consequence of B. neglecting to perform the trust as to the family worship, the Plaintiff's witnesses having failed to prove any damages, he called the Defendant as a witness, who gave evidence to the effect, that the Plaintiff had no claim; and the Court refused to allow the Plaintiff to cross-examine him. Held, that although the refusal to cross-examine was not justifiable, yet, from the other evidence in the suit, it was clear, that the Plaintiff had sustained no damage or had, in the circumstances, a right of action.

There were two appeals in this case from decrees of the High Court at Calcutta.

The Appellant and Surbessur were Brothers, and the question involved in the first of these appeals, was the right of the Respondent, as representing her deceased Husband, Surbessur, to sue out execution under a decree made by the Court sanctioning a [381] Soluhnamah, compromising a suit, respecting the ancestral estate, and allotting the rents of part of the family estate to Surbessur for the performance by him of the Deb Sheba (worship of Idols) of the family. Surbessur claimed posses-

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

sion and mesne profits of such estate in consequence of the Appellant keeping him out of possession of the share so assigned to him for the religious observances. The Appellant contended, that Surbessur had not performed the trusts in performing the worship of the Idols for him.

The second appeal was brought against a decree of the High Court made in a suit by the Appellant against Surbessur for damages by reason of the non-performance by him of the Deb Sheba for the Appellant. In this decree the Court refused the Appellant leave to cross-examine the Defendant, whom the Appellant had called as a witness to support his case, and dismissed his suit as the Court considered he had no right of action.

These appeals arose under the following circumstances:—

[382] On the 12th of March, 1850, the Appellant instituted a suit in the Court of the Principal Sudder Ameen of Zillah Nuddea against his elder Brother and Guardian, Surbessur, and against Lucky Doss Mitter Moostuffy, the Son and heir of another Brother, Cassissur Mitter Moostuffy, and thereby sought to obtain possession of his share of the ancestral property, and the mesne profits during the period of his minority. At that time there were other suits pending between the same parties, and ultimately a compromise was entered into and a Soluhnamah executed on the 24th of August, 1853, of the matters in litigation. The fourth article of which provided, that Surbessur should perform at his own expense the Deb Sheba (worship of the Idols), and other religious ceremonies for the three, the cost of which was fixed at Rs. 2900 a year, and that, in consideration of his so doing, he should hold possession for his life of a specified part of the joint property estimated to produce that amount. This compromise received the sanction of the Court on the 24th of August, 1853, and it was ordered, that both parties should carry out the terms of the compromise.

It appeared that, in respect to the family worship, this part of the compromise was not carried out, and, in 1860, Radha Jeebun obtained an Order for the execution of the decree of the 24th of August, 1853, against Surbessur, for failure in complying with the terms of the compromise in other respects. Surbessur alleged, that he had never received possession of the property set apart by the deed of compromise to answer the expenses of the Deb Sheba, and claiming a right to set-off the mesne profits of this property against Radha Jeebun's judg-[383]-ment, and prayed that the execution of the decree might be stayed. On the 13th of July, 1860, the Principal Sudder Ameen considered these objections, and ordered that the execution sought for by Radha Jeebun should be carried out, and declared that Surbessur was at liberty to take out execution for the recovery of any amount that might be due to him under the decree. Accordingly, on the 20th of July, 1860, Surbessur filed a petition in the Court of the Principal Sudder Ameen of Nuddea, praying for possession of the property, and that the mesne profits from the date of the compromise might be set off against Radha Jeebun's judgment. By another petition, filed on the 18th of August following, Surbessur alleged the amount to which he was entitled to be Rs. 9463, per annum, with interest. As this amount exceeded the amount due to Radha Jeebun under his judgment, Surbessur, on the 27th of August following, prayed that the balance might be realized by attachment and sale of Radha Jeebun's property.

Notice of this application, and requiring him to bring forward his objections, was served on Radha Jeebun, who filed his petition of objection, and alleged that Surbessur had not performed the Objector's share of the family religious rites and ceremonies, in consequence of which, the Objector had to defray them at his own expense, and consequently that Surbessur, not having performed his part of the compact, was not entitled to call upon the Objector to perform his part. Surbessur answered, that he had performed a part of the worship of the deities in accordance with the terms of the compromise, and was prevented from performing the residue by the want of the necessary funds, Radha Jeebun having [384] kept him out of the lands assigned for that purpose. The Principal Sudder Ameen at Maherpore, to whose Court the case had been transferred, by a proceeding of the 29th of November, 1861, admitted Surbessur's claim, and directed that execution should proceed as prayed, on the ground that the Order of the Principal Sudder Ameen of the 13th of July, 1860, was conclusive as to his right to obtain possession of the lands and the mesne profits claimed.

Radha Jeebun appealed from this Order to the High Court at Calcutta, but on the 30th of August, 1862, that Court, consisting of Mr. Justices Steer and Morgan, dismissed the appeal, on the grounds, first, that as the decree confirming the terms of the compromise had not been complied with, the Court had power to put the decree in force; second, that the alleged breach of trust could not be inquired into in this proceeding, but that the Appellant could prefer his claim in a regular suit; and, third, that as Surbessur had not been put in possession of the lands, he was entitled to mesne profits.

Nothing further took place until the 19th of May, 1864, when Taramonee Dossee, the Widow of Surbessur, who had died in the interval, filed a petition, asking for a revivor of the execution case, and to recover the mesne profits and interest from the date of the compromise, amounting to Rs. 16,575. 2. 6. Radha Jeebun filed objections to this petition, and Taramonee Dossee put in her answer, in which she alleged, that the Order of the Principal Sudder Ameen of Maherpore of the 29th November, 1861, and the Order of the High Court on appeal therefrom, dated the 30th of August, 1862, were conclusive.

[385] On the 8th of April, 1865, the case came on before Baboo Juggobundhoo Bundopadhya, the Principal Sudder Ameen of Zillah Nuddea, who decided that the Orders relied on by Taramonee Dossee were final, and overruled Radha Jeebun's objections, with costs.

Radha Jeebun appealed against this Order on the following grounds:—First, that Surbessur, the late Husband of the Applicant for execution, having been a mere Trustee for the entire family, with respect to family worship and other charities, and the properties, wasilat of which was claimed, having been agreed to be left in his hands only in the character of a Trustee, and she not being the representative of her late Husband as regarded the matter of the trust, was not entitled to claim wasilat with respect to the property. Second, that the main question which was before the High Court on the former occasion was, whether her late Husband was entitled to take out execution at all, therefore, any opinion pronounced with respect to the other points could not be considered as conclusive between the parties. Third, that there being no provision in the ruffanamah for wasilat, as admitted by the High Court in its judgment of the 30th of August, 1862, the mere declaration by it on that occasion, that wasilat was realizable in the shape of damages made, as the same was in the execution department, whose legitimate province was to interpret the decree as it stood, could not have the legal effect of supplementing the decree itself. Fourth, that there being no provision for interest or wasilat in the decree, and the High Court having pronounced no opinion on that point on the former occasion, the Lower Court is wrong in awarding the [386] same, under an erroneous impression that all the points in dispute between the parties have been settled by the High Court's judgment of the 30th of August, 1862; and, lastly, that there being cross decrees between the parties, the same ought to have been allowed to be set off, under the provisions of section 209 of the Code of Procedure.

On the 27th of July, 1865, the appeal was heard by the High Court. The judgment of the Court, consisting of Messrs. Loch and Glover, after stating the facts of the case, proceeded as follows:—"The Principal Sudder Ameen has allowed the Widow of Surbessur to take out execution against the judgment Debtor, on the ground that, as representative of her Husband, she is entitled to his property. This Order would, under ordinary circumstances, be correct, but in the present case the Principal Sudder Ameen appears to us to have altogether ignored the special point at issue. He assumes, that the objections regarding the alleged breach of trust on the part of Surbessur were disposed of by the High Court in the latter's favour; but this is not the case, this Court simply decided the general principle, that a person dispossessed unjustly was entitled to recover not only possession, but mesne profits likewise; it did not take into consideration the special grounds of the Widow's present claim. It declined to go into the question, and referred the parties to a regular suit. The point, therefore, as to whether Surbessur did or did not expend the endowment money in the services of the Idols is still undisposed of. In the present case, it is manifest, that the judgment Creditor, in order to take out execution against her late Husband's Brother (one only of the [387] two appears to have resisted the Widow's demand, the other having paid his *quota*), must show,

that during the time of his alleged dispossession, he kept up the religious services out of his own funds. On no other supposition can the Widow have any claim. Surbessur had no right to the endowment moneys personally, he was a mere Trustee bound to expend all that he received in the service of the Idols, and if for any reason the whole, or any part, of those moneys remained unexpended, the surplus would not belong to Surbessur's estate, but to the endowment. Now, we can find no proof whatever on the record, that the services of the Idols were kept up by Surbessur out of his own resources, it is a mere plea advanced by the judgment Creditor, but unsupported by any evidence whatever. The circumstances of the case have been so altered since the High Court's decree, that we find it impossible to give the judgment Creditor the benefit of it. That decree proceeded entirely on Surbessur's right to recover possession of the lands. At the time it was passed, Surbessur had that right, but his Widow is not in the same position. The right was personal to the Husband, as Trustee of the endowment, and did not descend to his heirs. The Widow can neither execute the decree for possession nor for wasilat, as the usufruct of the land would be the property of the endowment. As it stands, the decree, so far as she is concerned, is absolutely unfructuous. Under these circumstances, we have no alternative but to decree this appeal with costs on the Respondent, and reverse the Order of the Principal Sudder Ameen. It is still open to the Widow to show, in a regular suit, that during the time of her Husband's dispossession, he, notwithstanding [388]-ing the failure of the trust fund, paid the expenses of the Idol services at his own costs. If she can prove this, she will be entitled to whatever sums Surbessur so paid, and can recover them from the judgment Debtor."

Taramonee Dossee presented a petition for a review of this judgment, and, with the view of proving the payment of the cost of the worship by Surbessur out of his own funds filed a judgment of the High Court delivered on the 2nd of February, 1864, and which judgment is the subject of the second appeal hereinafter mentioned.

This petition was admitted, and on the 10th of January, 1866, the High Court, consisting of Messrs. G. Loch and F. S. Glover, after observing that they were not satisfied that the new evidence tendered ought not to have been within the Petitioner's knowledge at the time the case was heard in appeal, nevertheless decided to admit the evidence, and held, that that judgment was decisive on the question of payment of the cost of the family worship by Surbessur, and amended their previous judgment by affirming the Order of the Principal Sudder Ameen of the 8th of April, 1865.

From this decision the first appeal was brought.

The suit out of which the second appeal arose, was instituted by Radha Jeebun in the Court of the Principal Sudder Ameen of Zillah Hooghly, the plaint disclosed the same facts, and the Plaintiff sought to recover Rs. 966. 10. 8. per annum, being one-third of Rs. 2900, as stipulated in the deed of compromise, as the cost of the Deb Sheba, and other ceremonies, which he had been compelled to perform at his own expense, contrary to the terms of the com-[389]-promise. This sum, for the nine years during which he contended Surbessur had left Radha Jeebun's part of the ceremonies unperformed, amounted, with interest, to Rs. 12,388. 10. 9.

Surbessur, in his answer, submitted, first, that as Radha Jeebun's objections had been disallowed by the Principal Sudder Ameen of Maherpore on the 29th of November, 1861, he was no longer entitled to insist upon his present claim; and, secondly, that there was no mention in the compromise rendering him liable to pay the expenses of any ceremonies performed by Radha Jeebun, under the existing circumstances. Surbessur also alleged, that jointly with his co-sharer, Lucky Doss Moostuffy, he had regularly performed certain family religious ceremonies which he specified.

The Court fixed the following issue:—"According to the terms of the Soluh-namah (deed of compromise), can the Plaintiff get the amount claimed or not?"

The Defendant called three of his servants as witnesses, who deposed, that after the deed of compromise, Surbessur solely performed the whole of the religious ceremonies specified therein for one month, and that subsequently Surbessur and Lucky Doss Moostuffy had jointly performed their share of the ceremonies, and that Radha Jeebun had performed his share separately at his own expense. The Appellant examined one witness, whose evidence failed to establish his case. The other

witnesses summoned for the Plaintiff did not appear, and he filed a petition praying that the case might be decided by summoning the Defendant in person and taking his deposition. The Defendant was accordingly summoned, and was asked by the Court the following question:—"The Plaintiff has made a claim to get [390] money for the performance of rites and ceremonies relating to his share of the Deb Sheba, together with interest, whether the same is justly due by you or not?" The Defendant answered:—"In my opinion the Plaintiff's claim is not due by me. I am not liable for the claim."

The Plaintiff then submitted that he had not intended to abide by the answer of the Defendant, and asked leave to cross-examine him. The Principal Sudder Ameen Nazirooddeen, refused to put any further questions to the Defendant, or to allow any to be put on behalf of the Plaintiff, and, on the ground, that there was no proof of the Plaintiff's claim, and that his claim had not been proved from the deposition of the Defendant, dismissed the suit with costs.

From this decision the Appellant appealed to the High Court of Judicature at Calcutta, and Surbessur, having died before the hearing, Taramonee Dossee, his Widow, was made Respondent in his stead.

The appeal came on for hearing on the 2nd of February, 1864, when the Judges, Mr. Morgan and Sumbhoonath Pundit, although disapproving, as the judgment stated, of "that portion of the case which has resulted in the Defendant coming into Court and giving a statement without any cross-examination, or without any other question being asked him by the Court," and admitting, that in some respects the investigation was not full and satisfactory, nevertheless dismissed the appeal and affirmed the decision of the Lower Court with costs, on the ground, that the remaining evidence, in the absence of the Plaintiff's witnesses, and of the evidence of the Defendant on which he relied for his proof, failed, in their opinion, to support the case. And the Court further declared, that it seemed to them doubtful, [391] under the terms of the Order, whether even if the Plaintiff had shown an expenditure by him on account of the family worship he could, under the circumstances, have brought a suit against the Defendant to recover the money so expended.

Against this decision the second appeal was brought.

As the Respondent did not appear in either appeal, the same were heard together *ex parte*.

Mr. Cave for the Appellant, in both appeals.—In the first appeal, he contended, that the original judgment of the High Court was right, as although the Order of the 30th of August, 1862, was final, the Respondent, Taramonee Dossee, was not entitled to the execution sought for, except on proof that her Husband, Surbessur, had performed the religious rites for him at his own expense, and that no evidence of that fact was given; and,

In the second appeal he submitted, that there had been a miscarriage of justice, as the Appellant was entitled to cross-examine the Defendant, and to put to him all such questions as were material to the issue raised between the parties, although the Plaintiff's claim was sufficiently proved from the other evidence.

The Right Hon. Sir James W. Colville.—Their Lordships are of opinion, that no ground has been laid for prolonging this unfortunate litigation by the allowance of these appeals.

It is unnecessary to state the earlier proceedings in the first suit. It seems sufficient to begin with the Order of the 30th of August, 1862, which Mr. Cave has admitted to be final. By that Order it was held, that Surbessur has established his right to [392] take out execution for the mesne profits claimed by him, as well as for the possession of the land included in the fourth article of the compromise; and that it was no bar to his execution that it had been alleged that he had broken trust, inasmuch as he had not carried out the terms in accordance with which it was agreed that he should hold possession.

This Order was neither the subject of appeal, nor, in their Lordships' opinion, could have been successfully made so. There is no ground, as it appears to them, for saying, that the proof of the performance of the religious ceremonies was a condition precedent to the enforcement of the claim for the rents which the fourth article of the compromise gave to Surbessur. And without inquiring, whether

many of the points which are now taken might not have been raised in the litigation which led to the Order in question, or are concluded by it, it is sufficient to state, that its effect was, that as between the two Brothers, Surbessur was entitled to take out the execution which he claimed to take out, and that the Respondent, if he had any claim by reason of the non-performance of the religious ceremonies, or any other breach of the agreement, was bound to prefer that claim in a regular suit.

In anticipation of that Order, the younger Brother (the Appellant) had commenced the suit out of which the other appeal has arisen. It will be convenient to consider the nature of that suit, and the right of the party to have the decree that has been made in it reversed or altered, before we proceed to the subsequent proceedings in the original suit.

The suit which was so instituted was not exactly such a suit as that suggested by the judgment of the 30th of August, 1862. What the Judges of the [393] High Court said was, that if the Appellant, on the ground of any breach of agreement, claimed a right to dispossess the Respondent's Husband, Surbessur, he might prefer that claim in a regular suit. But the suit really instituted was of this nature. It was a suit in which the party alleged, that by reason of the non-performance by Surbessur of the duty which he had undertaken under the fourth article of the compromise, he, the Plaintiff, had been compelled to perform certain religious ceremonies at his own cost, and that he had a right of action over against Surbessur for the moneys expended in the performance of those ceremonies. It was, therefore, essential, in such a suit, that he should show that he really had that right of action; that there not only had been the breach of duty alleged, but that by reason of it he was entitled to recover the damages which he had sustained from his Brother. And he had, of course, to prove the amount of those damages.

Now, as to the proof of the damages, that failed altogether. He produced only one witness, who proved nothing; he called the Defendant, who denied generally that the claim was well founded. Upon that the Judge of first instance made a decree against him, and dismissed the suit.

The case was carried, by appeal, before the High Court, and they affirmed the decision. They remarked on the miscarriage of the Judge in refusing to allow the Plaintiff to cross-examine the Defendant when called, and their Lordships fully concur in the propriety of that censure. Nevertheless, if the Defendant had been cross-examined, all he could have proved would have been so much of the Plaintiff's case as rested on the performance of the religious ceremonies, and by possibility, though that was not [394] very probable, the cost to which the Plaintiff had been put in the performance of them; but that, in their Lordships' opinion, would not have made out that he had any right of action. For the existence of that right of action you must go back to the original compromise, and, in their Lordships' opinion, the Plaintiff had wholly failed to prove that he had such a right of action, because, upon the compromise and the acts of the parties, the case stood thus:—The compromise gave certain lands, and the rents of those lands, to the elder Brother, coupled, we may admit, with the performance of a trust, but a trust of that nature which is constantly vested in the managing or elder Brother of a Hindoo family, a trust which implies some considerable beneficial interest. If the non-performance of that trust, or the non-performance of those ceremonies, could, by any possibility, give such right of action to the Appellant as that asserted in his suit, it surely was necessary for him to show that it was not by reason of any default on his part that the non-performance of the trust took place.

Now, the undisputed facts of the case are, that the younger Brother did not perform his part of the agreement, that he retained his share of the rents of the land; and that the elder Brother was put to take out execution under the decree founded on the compromise, in order to get the funds which that compromise gave to him.

Therefore, it seems to their Lordships, that this suit, brought by the Appellant, substantially failed upon the ground which is suggested by the Judges in their Judgment of the 2nd of February, 1864, viz. that there was no cause of action at all, and in these circumstances it would be unreasonable to send down [395] that case for a new trial, because the Judge did not allow the cross-examination of a witness, whom, moreover, by reason of his subsequent death, it is now impossible to examine.

These observations, therefore, dispose of the second appeal, and I now revert to the proceedings in the original suit. Surbessur died pending the second suit, and without having taken out execution under the decree of the 30th of August, 1862. His Widow then applied to take out execution, and as she merely sought to take out execution for that which had been adjudged to belong to her Husband, and was, therefore, part of his estate, there seems no ground whatever for disputing her right, or imposing upon her the obligation of proving something which Surbessur had not been called upon to prove.

The principal Sudder Ameen seems, therefore, in their Lordships' opinion, to have taken a right view of the question. He overruled the objections to the execution, which had been urged by the Appellant.

The case then went by appeal to the High Court, and two of the learned Judges of that Court then took the view which I have just alluded to as being, in their Lordships' opinion, erroneous, saying that she could not stand in her Husband's shoes: that it lay upon her to prove, that Surbessur had actually expended his own moneys in performance of the ceremonies, and they, therefore, in the first instance, overruled the Order and judgment of the Principal Sudder Ameen. There was, then, an application for review before the same learned Judges; and upon their being referred to the decree in the other suit, and to some additional evidence, but principally to the decree in the other suit, they came to the con-[396]-clusion, that the Widow must be taken to have established, chiefly, if not wholly, by that decree, that of which they had required proof from her, viz. that Surbessur had expended his own moneys in the performance of the ceremonies, that, therefore, their former Order was wrong, and that the final Order to be made was, that she should be entitled to issue execution,—in fact, to affirm the Principal Sudder Ameen's Order. A subsequent Order was made, declaring her entitled to interest on the amount for which the original execution had been sued out.

Their Lordships are unable to assent to the reasoning of the learned Judges of the High Court. They think, for the reasons which I have given, that the original Order, reversing the Principal Sudder Ameen's Order, was wrong; but if that Order had been properly made, they would have been unable to adopt the reasoning of the learned Judges, as to the effect of the decree in the suit of the Appellant, which certainly does not prove that Surbessur expended his own moneys in the performance of ceremonies. The utmost which that decree can be taken to prove is, that the Appellant had failed to show that he had performed separate ceremonies upon his own account, or that he was entitled to recover the sum claimed in that suit in respect of those ceremonies.

The effect, however, of the final Orders of the High Court is to give to the Widow that to which their Lordships consider she is entitled; and, therefore, the Order which they will humbly recommend Her Majesty to make is, that both these appeals be dismissed, and that the Orders of the Courts below, which are the subjects of them, be affirmed.

[397]

FIRST APPEAL.

THE COLLECTOR OF MADURA,—*Appellant*; MOOTTOO RAMALINGA SATHUPATHY,—*Respondent*.

SECOND APPEAL.

ANANDAI, *alias* RANEE KUNJARA NACHEAR, and MANGALASWARA NACHEAR,—*Appellants*; RANEE PARVATA VARDANI NACHEAR, MOOTTOO RAMALINGA TAVER, and THE COLLECTOR OF MADURA,—*Respondents*.

THIRD APPEAL.

RANEE PARVATA VARDANI NACHEAR,—*Appellant*; ANANDAI, *alias* RANEE KUNJARA NACHEAR, and MANGALASWARA NACHEAR,—*Respondents*.*

[Feb. 26, 27, 28, 29, 1868.]

On Appeal from the High Court of Judicature at Madras.

According to the law prevalent in the Drávada Country, in the Madras Presidency, a Hindoo Widow, not having her Husband's authority, may, if authorized by the consent of his kinsmen, adopt a Son to him [12 Moo. Ind. App. 440].

What constitutes consent of the kinsmen must depend on the circumstances of the family. In a joint family, where by the Hindoo law of the District the Widow has only a right to maintenance, if she adopts a Son without her Husband's authority, it is necessary, if her Husband's Father is alive, to obtain his permission, or if he is dead, the consent of all her Husband's surviving Brothers; but where the Widow takes by inheritance the separate estate of her Husband, then the consent of her Husband's nearest kinsmen is sufficient [12 Moo. Ind. App. 442].

Exposition of the effect of the doctrines of Hindoo Law contained in the Treatises, the Mitâcsharâ received in Southern India, the Mayucha and Koustubha in the Mahratta Country, and the Daya-Bhaga in Bengal, as laid down by Commentators and received as the governing law in India, regarding a Widow's right to adopt a Son to her Husband without his express authority [12 Moo. Ind. App. 435].

The ruling in the case of *Veerapermall Pillay v. Narrain Pillay* (1 Strange's Mad. Cases, p. 121), that it is indispensable, that the Widow should have the authority of her Husband to adopt, examined and questioned [12 Moo. Ind. App. 433].

The duty of a Judge administering Hindoo Law, is not so much to inquire, whether the doctrine disputed is fairly deducible from the earliest authorities, as to ascertain whether it is one that has been received by the particular School of Hindoo Law, which prevails in the District in which the case arises with which he has to deal, and whether such doctrine has been sanctioned by usage; as by the Hindoo system of law clear proof of usage will outweigh the written opinion of text writers [12 Moo. Ind. App. 436].

The *quantum* of maintenance to be allowed a Widow is peculiarly within the province of the Court below, and there must be strong grounds to justify any interference of the appellate Court with the exercise of such discretion [12 Moo. Ind. App. 447].

In the Court below, sworn translations of Sanscrit works, little known, embody-

* Present: Members of the Judicial Committee,—The Right Hon. Lord Westbury, the Right Hon. Lord Romilly (Master of the Rolls), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Edward Vaughan Williams. Assessor,—The Right Hon. Sir Lawrence Peel.

ing Hindoo Law, as to the custom in the different Schools in respect to the Law of adoption, were admitted and acted on by the Courts in India. On special application, the Judicial Committee ordered such translations to be sent by the Registrar of the High Court in India, and to form part of the record, to be used on the hearing of the appeal [12 Moo. Ind. App. 410].

These appeals were brought from a decree of the High Court, made in two suits, the one brought by [398] the Appellants in the second of the above appeals, the Widow and Daughter of Moottoo Vijaya Raganadha Sathupathy, a former Zemindar of Ramnad, to establish their reversionary right to the zemindary of Ramnad against the first Respondent in the same appeal, then in possession of the zemindary; to obtain an annual allowance of Rs. 24,000 for maintenance, and to have declared null an adoption made by that Respondent as unauthorized, and in prejudice of their reversionary rights. In which suit the adopted Son, and the Collector of Madura were by order of the Provincial Court made parties. The other suit was brought by the Respondent in the first of the above appeals, as the adopted Son of Ranee Parvata Vardani Nachear, the first Respondent in the second appeal, and the Collector of Madura, to establish [399] affirmatively the adoption made by her, and to have declared illegal a declaration of the Collector, that on her death the property would escheat to the Government.

In the former of these suits the Civil Judge made a decree declaring that the reversionary right there claimed was not in the Plaintiffs, and ordered that the Zemindar in possession should pay maintenance at the rate of Rs. 300 per month to the Widow, the first Plaintiff, and Rs. 100 per month to her Daughter, the second Plaintiff; and in the latter suit the Civil Judge decreed for the Respondent in the first appeal (the adopted Son), on the ground, that the Zemindar, his adopted Mother, had a right to alienate during her life, and that the Collector had no right to escheat the property of a person whom he admitted to have heirs.

The Collector of Madura, a Defendant in both suits, and Ranee Kunjara Nachear and her Daughter, the Plaintiffs in the first suit, both appealed to the High Court against the above decrees of the Civil Judge. These appeals were heard together by the High Court, and on the 17th of November, 1864, that Court passed decrees dismissing the two appeals, subject to a modification, by granting a sum of Rs. 10,000 to Ranee Kunjara Nachear, the first Plaintiff in the first of the suits above mentioned, for her maintenance. The appeals to Her Majesty in Council were from these decrees, and were brought by various parties in the suits, against [400] the decrees of the High Court. The Appellant in the first appeal being the Collector of Madura, and Ranee Parvata Nachear, the adopted Mother, the Appellant in the third appeal and Respondent in the second. The question raised and contested was the validity of the adoption of the Respondent in the first appeal by the Widow of the last Zemindar, without his authority, or, as it was alleged, the consent of his kindred and relations.

The circumstances which gave rise to these suits were as follows:—

Prior to the year 1795, Mootoo Ramalinga Sathupathy was the owner of the zemindary of Ramnad, in the Presidency of Madras. In that year he rebelled against the Government, who, in consequence, declared his zemindary forfeited. At the time of such forfeiture he had a Daughter, Sevagamy Nachear, and a Sister, Ranee Mangalswara Nachear, whose Husband, Ramasamy Taver, was then alive. The Government by their proceedings, dated the 3rd of July 1795, determined the succession to the zemindary in favour of Ranee Mangalswara Nachear.

Ramasamy Taver, her Husband, died in the year 1797, but on the 14th of May in that year, before his death, he and his Wife, Ranee Mangalswara Nachear, executed an instrument of agreement to the effect, that upon some future occasion, if they had no child born to them, they should adopt a Son.

On the 22nd of April, 1803, Lord Clive, by virtue of his authority as Governor of Fort St. George, by a Sunnud-i-milkeut Istiṁrar, or deed of permanent tenure, conferred certain rights, and imposed certain duties, on Ranee Mangalswara Nachear. Among such rights was the following [401] power to transfer “without the previous consent of Government, or of any other authority to whomever you may think proper, either by sale, gift, or otherwise, your proprietary right in the whole or in any part

of your zemindary. Such transfers of your land shall be valid and recognized by the Courts and Officers of Government, provided they shall not be repugnant in the Mahomedan and Hindoo laws, or to the Regulations of the British Government." The Sunnud, after providing for the enjoyment and management of the zemindary by Rane Mangalswara Nacheer, concluded in the following terms:—"Continuing to perform the above stipulations, and to perform the duties of allegiance to the British Government, its laws and Regulations, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named, the zemindary of Rannad."

Subsequently to the grant by such Sunnud, the Rane, in 1803, adopted a Son, Moottoo Vijaya Raghanada Sathupathy, alias Annasamy, hereafter called Annasamy, and by a Will, dated the 11th of April, 1807, the Rane made provisions, under the powers vested in her by the Sunnud, entitling him to inherit her estates.

In 1804, one Chinnaasawmy, a Nephew of Ramasawmy Taver, instituted a suit against Rane Mangalswara Nacheer, claiming that the privileges of Annasamy should be conferred on him, Chinnaasamy, by reason of his having been brought up from infancy by the Rane's Husband, Ramasamy Taver, which suit appeared to have been eventually dismissed.

In 1807, Rane Mangalswara Nacheer died, and was succeeded by Annasamy.

[402] Subsequently to the Rane's death, and in or prior to the year 1812, disputes arose about the succession to the Rane's estate, and an investigation with respect to Annasamy's adoption took place before the Collector. In the year 1813, Sevagamy Nacheer, the Daughter of the rebel Zemindar, who had forfeited his state in 1795, instituted a suit against Annasamy in the Provincial Court for the Southern Division claiming the zemindary of Rannad; and that Court, by its decree, dated the 13th of December, 1813, adjudged the zemindary to Sevagamy Nacheer. Against such decree Annasamy appealed, and the Sudder Dewanny Adawlut at Madras, by its decree, dated the 10th of October, 1816, reversed the decree of the Provincial Court, and adjudged that the late Rane was legally competent to adopt Annasamy; that she did adopt him; and that by such adoption she destroyed the presumptive right of inheritance which would appear to have been possessed by Sevagamy Nacheer at the time when the succession to the zemindary was determined by the Government in favour of her Aunt, the late Rane, in 1795. This decree was, in the year 1828, affirmed by His Majesty in Council. Annasamy died in possession of the zemindary, in the month of February, 1820, during the pendency of Sevagamy Nacheer's appeal to the Privy Council, and the zemindary was thereupon placed under attachment pending such appeal. He had seven Wives, one of whom was Moottoo Veroyee Nacheer, but had no issue. On the 26th of January, 1820, he adopted as his Son, Ramasamy (who was the Brother of Moottoo Veroyee Nacheer), [403] and, by his Will of the same date, confirmed such adoption.

After the decision of the above appeal, the Southern Provincial Court, acting under the Order of the Sudder Court, issued a precept to the Zillah Court of Madura, on the 10th of April, 1829, directing the zemindary to be placed in possession of Ramasamy, which was accordingly done. It appeared, that previously to that date, but after the decision of the appeal in favour of Annasamy, and after his death, Sevagamy Nacheer contested, in the Sudder Court of Madras, the validity of Ramasamy's adoption, and that Court directed the Provincial Court to determine the point. This was done, and the result was, that the validity of the adoption was confirmed.

Ramasamy married Rane Parvata Nacheer (the first Respondent in the second appeal), and had issue by her two Daughters only, viz., Mangalswara Nacheer and Dorarajah Nacheer. Ramasamy died in the year 1830, having on the 19th of April in that year addressed an arzi, or petition, to the Collector of Madura, stating his illness, and that he had made an arrangement that his "Mother, Rane Moottoo Veroyee Nacheer, who is my Guardian in every respect, and who holds chief right to this zemindary, should enjoy this zemindary, maintain my royal Wife, my Daughter, Mangalswara Nacheer, of five years old, and a younger Sister--a small child; and when these children shall attain their proper age, to make an arrangement with regard to their right to the zemindary, and continue the same, that my natural

Brother, Moottoo Chella Taver, should manage the affairs of the said zemindary until my children shall attain their proper age."

[404] On the death of Ramasamy, in 1830, his adoptive Mother, Ranee Moottoo Veroyee, took possession of the zemindary, which she held until the 6th of July, 1840.

Ramasamy's elder Daughter, Mangalswara Nacheer, died in the early part of 1840, having previously been married, leaving a Husband, but no issue.

It appeared that, in consequence of a report from the Collector, Ranee Moottoo Veroyee was, on the 7th of July, 1840, removed by the Government from the guardianship of Ramasamy's infant younger Daughter, and from the possession of the zemindary, and Ramasamy's Widow, Ranee Parvata Nacheer, was appointed Guardian to the infant.

Some litigation appeared to have taken place between Ranee Moottoo Veroyee and Ranee Parvata Nacheer after the removal of the former from the guardianship of Dorarajah Nacheer, Ramasamy's infant Daughter.

On the 24th of September, 1845, Ranee Parvata Nacheer's younger Daughter, Dorarajah Nacheer, died. Before her death she and her Husband purported to adopt a Son, Annasamy, and by her Will, dated the 23rd of September, 1845, she directed that after the death of her Mother, the Zemindary should be held by her Husband, and subsequently by such adopted Son; and she gave notice of such adoption to the Collector on the 24th of September, 1845. It was subsequently alleged that, as the zemindary was then under the management of the Court of Wards, and the approval of such Court had not been obtained thereto, such adoption was invalid.

On the 31st of August, 1846, Ranee Parvata Nacheer presented a petition to the Board of Revenue, stating [405] her intention to adopt a Son, in pursuance of the authority given to her by her Husband, Ramasamy, and further stating, that Ranee Moottoo Veroyee had purported to have adopted her Sister's Son, objecting to such adoption, and praying the Board to declare such last-mentioned adoption invalid. The Board refused to interfere in the matter referred to by such petition.

On the 26th of February, 1847, Ranee Moottoo Veroyee, Ranee Parvata Nacheer, and the two Widows of Annasamy, who were also parties to the litigation above mentioned, entered into a Razenamah, whereby it was agreed that the allowances to the Widows should be increased, and portions of the zemindary estate were to be settled on Ranee Moottoo Veroyee and her alleged adopted Son, absolutely. The first clause in the agreement stated, that Ranee Parvata Nacheer should enjoy the zemindary, and might "adopt a Son at her pleasure, as specified in the supplemental rejoinder."

On the 19th of May, 1847, Ranee Parvata Nacheer wrote to the Collector, stating that, according to the Hindoo law, and at the consent of her Brother and relatives, she had determined to adopt her younger Sister's Son, on the 24th instant, as her Son and heir to her estate after her. The Collector, on the 21st of May, 1847, returned an answer, that Ranee Parvata Nacheer must satisfy him of her right to make the adoption according to Hindoo law. Ranee Parvata Nacheer, by a petition, dated the 23rd of May, 1847, stated that, inasmuch as all the preparation for the adoption had been made, it could not be postponed. In such petition she alleged, that she had the authority of her Husband and of her own relatives to the adoption, and that Ranee Moottoo Veroyee, by her execution of the Razenamah of the [406] 26th of February, 1847, was estopped from disputing her right to make an adoption.

On the 24th of May, 1847, Ranee Parvata Nacheer, by petition, informed the Collector, that "With reference to the Razenamah, submitted by my Mother-in-law, the permission previously obtained from my Husband, and the consent of my relatives, Brothers, and others," she had that day adopted Moottoo Ramalinga Sathupathy, the Respondent in the first appeal, as a Son.

On the 21st of May, 1847, Ramasamy Taver, the Husband of Ramasamy's elder Daughter, Ranee Mangalswara Nacheer, presented a petition to the Collector, claiming to be entitled to the zemindary, and praying that the adoption by Ranee Parvata Nacheer might be prevented. Moottoo Chella Taver, the natural Brother of Ramasamy, claiming to be his undivided nearest Cousin in his adoptive family, presented a petition to the Collector, also claiming to be entitled to the zemindary, and praying that the adoption by Ranee Parvata Nacheer might be prevented.

On the 10th of March, 1849, the Board of Revenue issued an Order, that after

Ranee Parvata Nachear's death the zemindary should be considered escheated by reason of the adoption being invalid, and some correspondence thereon took place between Raneer Parvata Nachear and the Collector.

On the 19th of September, 1853, Sevasamy Taver, the alleged adopted Son of Raneer Mootoo Veroyee, instituted a suit against Raneer Parvata Nachear, claiming the immediate right to the zemindary, as undivided co-parcener and heir of Ramasamy Taver, the Husband of the Government donee, in 1795. On the 21st of December, 1853, Raneer Parvata Nachear put in her [407] answer to the plaint, alleging that upon the adoption of Annasamy into another family, all community of interest with his natural family ceased.

The suit of Sevasamy was dismissed by the Civil Judge, with costs. Sevasamy appealed to the late Sudder Court by petition, dated the 17th of October, 1857, in which he stated the grounds of his appeal, and to which he annexed a table of pedigree, purporting to show his relationship to Ramasamy Taver. The Sudder Court, on the 29th of March, 1858, rejected such appeal, as barred by limitation of time.

Against such last-mentioned decree, Sevasamy presented an appeal to Her Majesty in Council; but while such appeal was pending, Sevasamy and Raneer Parvata Nachear executed a Razenanah, dated the 8th of January, 1861, whereby it was agreed, that the village of Idampadel, a part of the zemindary, should thenceforth be the property of Sevasamy, that he should be allowed Rs. 700 per mensem, from the revenue of the zemindary, and that he should be paid from its funds a sum of Rs. 50,000; and that the zemindary should be held by Raneer Parvata Nachear and her adopted Son, the Respondent, Ramalinga, or by those who might hold any authority from Raneer Parvata Nachear, or by her heirs.

In a communication made by the Collector to Raneer Parvata Nachear on the 28th of July, 1855, he stated, "The Government wished me to inform you that they have suspended their former Order to take the zemindary in their management after you: moreover, they are unwilling to give any opinion in regard to the validity of the adoption you allege to have made."

[408] On the 15th of November, 1855, the Collector, by a Letter, informed Raneer Parvata Nachear that on the 29th of October, 1855, the Board of Revenue had cancelled their last-mentioned Order, and had confirmed their former Order of the 10th of March, 1849, directing the escheat of the zemindary after her death.

On the 9th of February, 1858, the first of the two suits in appeal was brought by Raneer Kunjara, as Widow of Annasamy, and Mangalswara, her Daughter, in the civil Court of Madura, against Raneer Parvata Nachear, to establish the future right of Raneer Kunjara to the zemindary, as next heiress, on the death of the Defendant, and for an annual maintenance. Raneer Parvata Nachear, by her answer, insisted that the Plaintiff, Raneer Kunjara, was only a Concubine, and not the Wife of Annasamy.

The second suit was brought on the 15th of February, 1860, by Moottoo Ramalinga Sathupathy, the Respondent to the first appeal, against Raneer Parvata Nachear and the Appellant, the Collector of Madura, claiming to be put into possession of the zemindary, and praying that the Collector's Letter of the 15th of November, 1855, might be cancelled.

Raneer Parvata Nachear, on the 26th of June, 1860, in her answer admitted the adoption by her of the Respondent, Moottoo Ramalinga Sathupathy, and expressed her willingness to give over the zemindary to him.

On the 25th July, 1860, the Collector of Madura filed his answer, pleading, *inter alia*, that a Widow could not adopt without the authority of her Husband, or, failing that, of all his relatives: and that the [409] adoption in question was invalid on both those grounds.

On the 22nd of February, 1861, the Judge of the Civil Court called upon the Appellant, the Collector of Madura, to prove the illegality of the adoption; but the Court, on the 6th of March in that year, on the ground that there being *prima facie* evidence that there were collateral heirs in existence, which debarred the right of the Government to interfere in the matter, refused to admit the documents produced by the Collector of Madura for that purpose, and declared that the examination of the witnesses tendered by the Appellant was unnecessary.

On the 12th of April, 1861, Mr. R. R. Cotton, the Judge of the Civil Court, decreed,

in Raneë Kunjara's suit, that she had no right to succeed to the zemindary after the death of Raneë Parvata Nachear, she being only her stepmother and excluded from inheriting; but the Court directed the Zemindar of Ramnad, for the time being, to pay her and her Daughter Rs. 400 per mensem for maintenance. Raneë Kunjara and her Daughter appealed from this decree to the High Court at Madras.

On the 18th of March, 1861, the same Judge of the Civil Court, in the suit by the Collector of Madura (the second suit in these appeals), decreed that the Order of the Collector, dated the 15th of November, 1855, should be cancelled: and held that Raneë Parvata Nachear could, of her own authority, assign and transfer the zemindary to whomsoever she might think proper, and prohibited the Collector of Madura from summarily seizing the estates as an escheat to the Government, while it appeared that there were heirs.

[410] Against this decree the Appellant, the Collector of Madura, appealed to the late Sudder Dewanny Adawlut, and on the 26th of March, 1863, the Judges of the High Court at Madras, which had been in the meantime substituted for the Sudder Court, by a proceeding of that date, directed the Civil Judge to decide the following issue: Was the adoption made with the authority of Raneë Mootoo Geroyee Nachear, Widow of Annasamy, or with that of any others of the kindred of the late Zemindar, Ramasamy, in whose behalf the adoption was made?

Evidence was taken upon this issue, and on the 4th of September, 1863, the Judge of the Civil Court (Mr. R. R. Cotton) pronounced his judgment on the issue framed by the High Court, to the effect, that the consent of all the then surviving kindred of Ramasamy had been obtained to the adoption; that the adoption was made with the authority of Mootoo Veroyee Nachear, and of many of the kindred of Ramasamy, but that all the kindred of Ramasamy were not at the time consenting parties thereto; that it was clear, that Sevasamy Taver, a relation of Ramasamy's, and adopted Son of Raneë Mootoo Veroyee Nachear, was not a consenting party, nor apparently consulted, when the adoption was made, as his consent was immaterial.

The two appeals were heard together, and twice argued. In the interval between the two arguments a number of the original authorities relating to the law of adoption were collected by Mr. Norton, Her Majesty's Advocate-General for Madras, the Counsel for the Respondent, Ramalinga, and such of them as required translation were handed in, a special Translator being sworn by the Court to translate such authorities, which were made part of the record of the Court, and printed, and copies handed over to the different parties to the appeal. This compilation was entitled "Authorities bearing on the subject of the power of a Hindoo Widow in the Dravada Country to adopt a Son in the absence of authority given to her by her Husband during his lifetime." The authorities were arranged under four heads. First, original Sanscrit works embodying the Hindoo Law; second, authoritative declarations of Law made by Pundits or Hindoo Law Officer; third, the publications of European Writers; fourth, decisions of the established judicial Tribunals. This Book, called the "Green Book," was, by an Order in Council dated the 16th of November, 1866, directed to be transmitted by the Registrar of the High Court at Madras to England, and to form part of the record for reference at the hearing of the appeals.

The works comprised under the first two heads, though extensively used and referred to, as well in the arguments in the Court below as before the Judicial Committee, were not considered by either Tribunal of such a satisfactory character as to enable the High Court or the Judicial Committee to act upon them, and the suits below, and on appeal were decided entirely upon the recognized Indian and European authorities, most of which were included in the third and fourth heads of the above collection.

On the 17th of November, 1864, the High Court, in the suits comprising the first and second appeals, confirmed the decree of the Civil Court of the 18th of March, 1861, and dismissed the appeal of the Collector. On the same day the Court, in the case of the third appeal, confirmed the decree of the Civil [412] Court of the 12th of April, 1861, subject to the modification, that in lieu of the sum of Rs. 400 per mensem, the Zemindar of Ramnad, for the time being, should pay to the Appellant, Raneë Kunjara Nachear, Rs. 10,000 per annum from the date of the

institution of the suit to that date, and further to pay the Appellant, Rancee Kunjara Nachear, Rs. 833 5a. 4p. monthly, as maintenance.

In support of the decrees an elaborate judgment was pronounced by the High Court, consisting of the Justices Frere and Holloway, which was, in substance, as follows:—

The Court first considered, whether a Widow without the authority of her Husband could make an adoption; and stated that on the first argument the affirmative had been assumed, on the authority of the note of Mr. Colebrooke to the *Mitaeshara*, and that it had been assumed, that Mr. Colebrooke in his note meant to include all the followers of the *Mitaeshara*, and consequently the whole of the inhabitants of Southern India, and the Court had felt it impossible to overrule the opinion of a Jurist so eminent as Mr. Colebrooke; but that, when the note was examined, it really only applied to Schools other than those of Southern India: and this point of law was then re-argued. Secondly, that, as to the decided cases, the case of *Veerapermal Pillay v. Narrain Pillay* (1 Strange's Mad. Rep. p. 91) was commented on, and two *dicta* of Sir Thomas Strange contrasted—one, "that the consent of the Husband was indispensable to adoption into his family;" and the other, that, "according to the doctrine of the Benares and Maharashtra schools, prevailing in the Peninsula, it (that is, the consent of the Husband) may be supplied by that of his kindred, her natural Guardians." The Court also referred to the preface of Colebrooke, p. iv., and W. H. Macnaghten, Vol. I. pref. xxi., as to the existence of five different Schools of law, of which the Benares School and the Mahratta were two; and observed, that it was quite clear, that Sir Thomas Strange thought, and stated that adoption by a Widow, with the assent of her Husband's male relations, would be valid, and that such was the rule in Southern India. That in the Bombay Presidency it was clear, that the Widow might, without the consent of the Husband, adopt a child. The Court then referred to the case No. 161 of 1856 (Madras Sudder Decisions for 1858, pp. 5, 6), where the Sudder Court held, that the authorization of the Husband was supplied by that of his Nephew and nearest male relation. Two other cases of inferior Courts were also referred to, one in 1850, before the Civil Court of Trichinopoly, and the other, in 1863, before the Court of the Principal Sudder Ameen of Madura, which declared the assent of a male relation sufficient to authorize the adoption of a Son to the deceased Husband. Three French cases of the appellate Court at Pondicherry were also referred to, in one of which, dated the 15th of June, 1844, that Court declared, that it was the recognized doctrine, that in certain parts of India the consent of the Husband "*peut-etre remplacée par consentement des parents de sa famille, et qu'il paraît certain qu'il est d'usage immémorial à Pondicherry de se contenter de cette dernière autorisation.*" The case of *Raja Haimun Chull Sing v. Koomer Gunsheam Sing* (2 Knapp's P.C. Cases, 203) was relied on as an express decision, showing that there are places governed by the Benares school of law in which no assent but that of the [414] Husband is sufficient to validate a Widow's adoption. The Court then, after commenting on the above cases, came to the conclusion, that there was not such a weight of judicial authority as could exonerate them from scrutinizing the original authorities upon the subject, which the Court proceeded to do in an elaborate manner. The Court considered the *Dattaca Mimamsa* of Nanda Pandita as an authority, that the Widow could neither give nor receive a Son, and referred to the fiction of law which renders the adoption a sort of symbolical begetting, and that the giving and receiving lay under the same prohibition. The Court then referred to the *Smriti Chandrica* and the *Dattaca Chandrica*, works of Devanda Bhatta, and his opinion, that a Son might be given by a Mother, if the gift be authorized by an independent male, and that the assent of the Husband stood upon precisely the same footing in the cases of giving and of receiving. The works of Vidya Narainsamy were next referred to, as having great weight in the Madras school of law, and particularly a work called *Madhavyam*, a commentary upon *Parasara Smriti* of great authority in Southern India; and the Court referred to the analogy derived from the power to the Widow to have a Son actually begotten to her Husband, observing that as the woman in former ages might after her Husband's death procure a natural Son, so with permission she might also procure a given Son, citing the passage, "In the same way the adoption

of a Son by a Widow, with the permission of the Father, etc., cannot be censurable in the Kali age," and that the "et-cetera" in these passages must not be neglected. That Sri Rama Pandita, an authority very generally cited in Southern [415] India, showed historically, that the Widow was permitted when childless, and her Husband dead, or absent on a pilgrimage, to procure the begetting of a Son upon herself and on behalf of her Husband; that this original permission had in the present age been repealed; but that as there was a paramount necessity for a Son, she might, in circumstances formerly authorizing her to procure the begetting of a Son, adopt one; and the result of his opinion unquestionably was, that she was not only authorized, but morally bound, to adopt. The Court declined to attach any weight to Pundits' opinions, and held, that there are material differences between the several subordinate Schools, and that those differences had been always recognized, remarking, that it had been forcibly said, that there was positive judicial authority affirming the Widow's right to adopt without the consent of her deceased Husband, and that for more than forty years that had been the understanding of the profession, and that it would be very mischievous to disturb what had so long been supposed settled. The Court then referred to Menu, ch. IX. secs. 64 to 68, and to the practice which had prevailed before his time, for women of the twice-born classes to have children raised by a Brother or other near relation commissioned for the purpose, and to the Mitacshara, ch. I. s. xi. pl. 5, in which the Wife's Son is defined as the "child begotten by another person, namely by a kinsman (Sapinda) or by a Brother of the Husband," and was prepared to expect, as in other systems of law, that a doctrine, although in itself obsolete, had fructified, and produced visible consequences upon existent law. That as the Brother of the Husband, or Sapinda, was the person entitled so [416] to procreate, looking at the analogies derivable from the ancient law, to admit the assent of a Sapinda to the adoption by a Widow was a perfectly logical inference. The Court was of opinion, that in confirmation of an express decision, it had had the authority of Devanda Bhatta, of Vidya Naramasawmy, and of Sri Krishna, though opposed to that of Nanda Pandita, who, however, in denying the power of the Widow to adopt at all, was opposed to the Writers of all Schools, and whose reasoning showed, that he considered the giving and receiving to rest upon the same footing, and held that the weight of mere authority was clearly in favour of the capacity of the Widow to adopt. The Court considered, that the question of the Sonship to the deceased could in no way depend upon the title or absence of title of others to the reversion, as presumptive heirs were always disinherited by adoption. And the Court referred to the necessity of the permission of an independent male, an account of the woman's dependency, citing the Smriti Chandrica, sec. I. 31, 32, which speaks of the need of an independent male, and does not seem to care who the male is; and also Mr. Ellis's remark, that the genius of Hindoo law allows substitution in almost every conceivable case. As to Authors of other Schools, although the Court denied to them the title of authorities in Madras, yet it thought it important to see how these Authors had developed and applied the rule, and referred to the Author of Datta Kaustubha, and his reasons that, as the act of adoption is one plainly enjoined and obligatory, no dissent of kinsmen could prevent the Widow from doing it, and that their assent was not needed. As to the consent of all the relatives being necessary, the Court held, so far as the weight of authority went, there was no [417] foundation for the doctrine that the assent of all the Sapindas is necessary, and that, founded as the doctrine clearly was upon the old principle of actual begetting by a Brother, or a Sapinda, it would be strange if it were so. The Court further held, that the assent of any one of the Sapindas would suffice, and at all events the will of the majority of individual members must be taken as the will of the whole body. As to the nature of the assent given in this case, the Court held it clearly established, that not only some of the Sapindas, but a majority of them had given their assent. The Court did not dissent from the Civil Judge in finding that Raneé Moottoo Veroyee had assented, but considered that a woman herself dependent could not supply the want of independence upon the part of the Wife. Upon the pedigree, the Court thought that the evidence for the Plaintiff as to pedigree was entitled to more weight than that for the defence: and that a witness, named Ram Rajah, was present at the adoption, and assented to it. That

as to Sevasamy Taver, it was clear that he gave a subsequent assent, if such assent would avail, and referred to the maxim of law adopted in India, that the absence of positive dissent should be taken as assent. The High Court finally held, that the Widow intended to adopt to herself and her deceased Husband, and consequently the conclusions of the Court were, first, that the Widow of the late Zemindar had made a valid adoption. Second, that she made it with the consent of the majority of her Husband's Sapindas. Third, that all the Sapindas then living had been proved to have assented. Fourth, on the question of maintenance to the Widow, the Court thought Rs. 10,000 per annum not excessive; and dismissed the appeals, [418] subject to the modification, as to maintenance, before stated, but without costs (a).

There were three appeals from the decrees founded on this judgment. The appeals were consolidated and heard together.

Mr. Forsyth, Q.C., and Mr. Pontifex, appeared for the Collector of Madura.

Mr. Mellish, Q.C., and Mr. F. C. J. Millar, for Ranees Kunjara and Mangalashwara, the Appellants in the second appeal, and Respondents in the third appeal.

Sir R. Palmer, Q.C., Mr. Coleridge, Q.C., Mr. Mundell, Q.C., and Mr. Mackeson, Q.C., for the Respondent, Ramalinga, in the first two appeals.

In support of the first appeal it was contended, on behalf of the Collector, that by the evidence it was established, that at the date of the alleged adoption there was not any person, who could be capable of inheriting the zemindary upon the decease of Ranees Parvata Nachear, and that it must, therefore, fall by escheat to the Government, on the happening of that event. That according to the Hindoo law applicable to the District where the zemindary is situate, a Widow was incapable of adopting a Son unless expressly authorized by her Husband; and that it was proved, that Ranees Parvata Nachear had not any such authority from her Husband, Ramasamy, and could not, therefore, adopt the Respondent, Ramalinga. That the alleged adoption was originally intended to [419] take effect, and was made so as not to interfere with the life interest of Ranees Parvata Nachear in the zemindary, and that such adoption, even if she had the power to adopt, was insufficient to create any right in the Respondent, Ramalinga, to inherit the zemindary at her death. That Ranees Parvata Nachear had no power to alienate or affect the zemindary beyond her own life estate; and that the conclusions of the Court below taken on the facts were not warranted by the evidence in the suits.

The Appellants in the second appeal, Anandai and Mangalashwara, the Mother and Daughter of the deceased Zemindar, Ramasamy, submitted, that the authority or permission of the deceased Husband was indispensable to a valid adoption being made by any Widow on his behalf, and that in the absence of any such authority or permission, the adoption as alleged by Ranees Parvata Nachear, of the Respondent, Ramalinga, was invalid and of no effect; that even if, in the absence of authority or permission from her deceased Husband, the consent or authority of his relatives was sufficient to render valid such adoption, all the relatives must concur in such consent, either at the time or previously to the adoption being made, which had not been done in this case; and that the whole proceeding by Ranees Parvata Nachear, called an adoption, was not in fact, nor was it intended to be, a *bona fide* adoption of Ramalinga, but was a device and contrivance by Ranees Parvata Nachear, to transfer the zemindary and property in perpetuity to herself and her nominee; that if any adoption was really effected, such adoption was simply an adoption to Ranees Parvata Nachear herself, which could have no influence or effect in the devolution [420] of the property of her deceased Husband. That these Appellants, as the next heirs in succession, were entitled to succeed to the zemindary and property upon the death of Ranees Parvata Nachear, and to have their rights with reference thereto declared.

For the Respondent, Ramalinga, it was urged, that the adoption by Ranees Parvata Nachear of him as Son to her late Husband, and heir to the zemindary, Ramasamy, was valid; that even if the rule, as contended for by the Appellants, had

(a) The judgment was a full and elaborate disquisition on the law prevailing in Southern India, with respect to adoption. It will be found reported in 2 Mad. High Court Cases, 206.

in the earliest stage of Hindoo Law been, that no adoption by a Widow was valid, yet in later times an adoption by the Widow was considered valid, if made by the authority of the Husband, as was the law now received in Bengal; that in the Dravada Country, south of the Peninsula, where Ramnad is situate, the adoption by a Widow, if made with the sanction of the relatives of the Husband, was valid, according to the law prevailing in Southern India. That the adoption of a Son by a Widow was derived from analogy to the obsolete doctrine of a Son procreated to a Widow by a Sapinda as heir; that the Sanscrit authorities in force in the Dravada Country for the last five hundred years were uniformly in favour of such adoptions; that the Futwas of the Pundits of the Zillah and Sudder Courts throughout the Dravada Country were also in favour of such adoptions; that the decided cases in the Madras Courts had upheld such adoptions, the Text and other European Writers agreeing in stating such to be the law and practice in Southern India, which for forty years had been the received opinion of the profession at Madras.

As to the power of a Widow by the Hindoo Law and custom current in the Dravada Country to [421] adopt a Son to her deceased Husband without his authority, either express or implied, given to her in his lifetime, though with the consent of his kindred, and the authorities received in Southern India, the Respondents cited Morley's Dig. Vol. I. pp. clxxxix. cciii. Colebrooke on Inheritance, Intro. p. iv.; Datta Madharinga, or the Dattaka Mimansa of Madhavacharya; Datta-Mimansa of Nanda Pandita; Note by Mr. Ellis in Strange's "Hindu Law," Vol. II. p. 162 [2nd Ed.]; W. H. Macnaghten's "Hindu Law," Vol. I. Pref. xxii.; Elberling on Inheritance, ch. III. secs. 32, 3, 4, p. 16. They also referred to the decrees transmitted with the record, of the French appellate Court at Pondicherry, respectively dated the 15th of March, 1826; the 15th of June, 1844; the 2nd of December, 1848. A decree of the Court at Trichinopoly, dated 21st of June, 1850; of the Court at Pondicherry, dated the 7th of December, 1850. A decree of the Court at Pondicherry, dated the 4th of November, 1856, and of the Court at Tanjore, dated the 19th of March, 1864, allowing a Widow to adopt a Son without the authority of her Husband.

On the general law of adoption the following native authorities and Text writers were cited and relied on by both sides:—The Parasara Madhaviya; the Vyarahara Madhavya by Madhavacharya, referred to in Strange's Manual of Hindoo Law, pars. 72, 73, 353; Mahabharata, ch. 103; the Viramitrodaya, referred to in Sutherland on Adoption, Synopsis, note vi. p. 235; Vyuvuharu Muyookhu, [Trans. by Borradaile,] ch. IV. sec. V. pl. 17; Vyarahara Koustoobha, referred to in Morley's Dig., Vol. I. Intro. p. ccvii.; Strange's "Hindu Law," Vol. I. p. 79; *ib.* Vol. II., p. 92, 3, 9, 96, [422] 115, 168. The Mitacshara of Vijayaneswara by Colebrooke, ch. I. sec. xi. pl. 9, note; *ib.* Stoke's "Hindu Law," p. 415; Subodhini, a Commentary on the Mitacshara, by Visvesvara Bhatta, Colebrooke, ch. I. sec. xi. pl. 9; Morley's Dig., Vol. I. Intro. p. ccxvii.; Ward's "View of the History, etc., of the Hindoos," Vol. I. p. 447; Balam. Bhatta's Comm. on the Mitacshara of Vijayaneswara; Sutherland on Adoption, Synopsis, note p. 236; Colebrooke on Inheritance, pref. p. ix.; W. H. Macnaghten's "Hindu Law," Vol. I. p. 66; Datta Mimansa, by Sri Rama Pandita; *ib.* sec. I. pl. 15, 18, sec. IV. pl. 10; Stoke's "Hindu Law," pp. 415, 534, 5, 573; Dattaka-Chandrika of Devanda Bhatta, sec. I. pl. 31, 32 [Trans. by Sutherland]; Dattaka-Mimansa of Nanda Pandita, secs. 15, 16; *ib.*, Sutherland, Note x. p. 236; Vyavahara Durpanum; Datta Mohodadhi; Datta Grahana Deepika by Narayana Choodamony Deetchita; Datta Pootra Vidhi; Datta Ratnakara, by Dharma Raja Deekshita; Datta Chandrika, by Pattra Achariya; (cited in Sudder Court, Dec., 1854, pp. 42-5); Daya-Krama Sangraha. And, in addition to the above ancient authorities collected and used in the High Court, the following cases and authorities from English and Indian reports were also cited:—*Veerapermall Pillay v. Narrain Pillay* (1 Strange's Mad. Cases, 91); *Raja Haimum Chull Sing v. Koomer Gunsheam Sing* (2 Knapp's P.C. Cases, 203); *Janki Dibeh v. Suda Sheo Rai* (1 Sud. Dew. Ad. Rep. 197); *Raja Shumshere Mull v. Rancee Dirlaj Konwur* (2 Sud. Dew. Ad. Rep. 169); *Atchema v. Rungama* (4 Moore's Ind. App. Cases, 1); *Sreenarain Rai v. Bhya Jha* (2 Sud. Dew. Ad. Rep. 27); *Mussumat Bhoobun Moyee Debia v. Ram* [423] *Kishore Achary Chowdhry* (10 Moore's Ind. App. Cases, 279); *Sree Brijbhoomjee Maharaj v. Sree Gokoolootsaojee* (1 Borr. Bom. Rep. 193); *Huebut Rao Mankur v.*

Gorind Rao Bulwant Rao Mankuz (2 Borr. Bom. Rep. 75); *Appaniengar v. Alemalro Annal* (Mad. Sud. Dec. 1858, pp. 5, 6); *Virbudro Hurreybudra v. Bace Rancee* (2 Morris, Bom. Rep. 1).

As to the effect to be given to the Futwas of the Pundits, as authority where they are apparently irreconcilable with the opinions of approved Text Writers on Hindoo law, the cases of *Myna Boyee v. Ootaram* (8 Moore's Ind. App. Cases, 400) and *The Collector of Masulipatam v. Cavalry Vencata Narrainapah* (8 Moore's Ind. App. Cases, 529) were referred to.

With respect to discretion of the Court in awarding the *quantum* of maintenance to the Widow, *Exp. Janaky Ummah* (2 Strange's Mad. Cases, 285, 288) was referred to.

Their Lordships reserved judgment, which was now pronounced by

The Right Hon. Sir James W. Colville (May 21, 1868).—The principal question raised by these appeals is the validity of an adoption made by the Widow of the last male Zemindar of Ramnad.

His title to that zemindary, which is of great extent, and, like many of the large zemindaries in the south of India, in the nature of a Raj, or Principality, descendible to a single heir, was thus derived. In 1795 the then Zemindar, Moottoo Ramalinga Sathupathy, having rebelled against the Government of the East India Company, was deprived of his zemindary, [424] which in the month of July in that year was granted to his Sister, Rancee Mangalaswara Nachear. Her title was confirmed by a formal Sunnud, executed on the 22nd of April, 1803, by Lord Clive, the then Governor of Madras, which granted the zemindary to her, her heirs, successors, and assigns. She was married to Ramasamy Taver, who died some time between 1797 and 1804; and in the latter year Rancee Mangalaswara Nachear, then a Widow, and professing to act under a written agreement between her and her late Husband, adopted one Annasamy, his Nephew, whose title she afterwards confirmed by a Will executed on the 11th of April, 1807. She died in that year, and was succeeded by Annasamy. He had seven Wives, of whom only his chief Wife, Moottoo Veroyee Nachear, and the Appellant, Rancee Kunjara, need be mentioned, but had no male issue by any of them. And on the 26th of January, 1820, he adopted a Son, Ramasamy, who was the natural Brother of Moottoo Veroyee Nachear, and, by a testamentary instrument of that date, confirmed that adoption, stating it to have been made "by himself and his chief Wife, Moottoo Veroyee Nachear unanimously." He died in February, 1820, and was succeeded by Ramasamy, who died in 1830, without male issue, but leaving a Widow, the Respondent, Rancee Parvata Nachear, and two infant Daughters, Mangalaswara and Doraraja, surviving him. It is unnecessary to notice the unsuccessful suits by which the titles of Annasamy and Ramasamy were impeached during their lives, though some of the proceedings in them help to swell the voluminous record before their Lordships. The title of Ramasamy to the zemindary, as stated above, is the common ground of all the [425] parties to this litigation, and, on the consideration of these appeals, must be taken to be incontestable.

On the death of Ramasamy, without male issue, his successor in the zemindary, according to the course of succession *ab intestato*, was his Widow. He had, however, two days before his death, addressed to the Collector, as the representative of Government, the arzi of the 19th of April, 1830. In that document, after stating that he was suffering from small-pox, and that the issue of his illness was uncertain, he expressed himself as follows: "I have made an arrangement that my Mother, Rancee Moottoo Veroyee, who is my Guardian in every respect, and who holds chief right to this zemindary, should enjoy this zemindary and all other things; pay peishkist to the Cirkar; maintain my royal Wife, my Daughter, Mangalaswara, of five years old, and her younger Sister, a small child; and when these children shall attain their proper age, to make an arrangement with regard to their right to the zemindary, and continue the same; that my natural Brother, Moottoo Chella Taver, should manage the affairs of the zemindary until my children shall attain their proper age; and I have issued necessary orders for the strict observance of the above arrangement."

The affairs of the zemindary seem to have been managed under this arrangement

between 1830 and 1840. The Respondent, Raneé Parvata Nachear, is said to have been herself very young at the date of her Husband's death; her children were infants; and the Mother-in-law was probably the only member of the family with any capacity for business. In 1840, Mangalaswara, the Daughter of Ramasamy, who had previously been married, died after giving [426] birth to a male child, who did not survive her. About that time differences arose between Raneé Parvata Nachear and her Mother-in-law, who appears to have set up some claim to the zemindary in her own right. The Board of Revenue, acting as Court of Wards, intervened; appointed, in April, 1840, Raneé Parvata Nachear Guardian of Dorarajah, her infant Daughter, in the place of Mootoo Veroyee; and assumed the management of the estate, treating apparently Dorarajah as *de facto* Zemindar, either by virtue of the arzi executed by Ramasamy, or by reason of Raneé Parvata Nachear's waiver of her rights in favour of her infant Daughter.

Dorarajah died on the 24th of September, 1845. She had previously been married, and having no children, attempted, on the day before her death, to adopt as a Son a child named Anandai. By the document, called her Will, she declared, however, that this person would only be entitled to the zemindary in succession to her Mother, Raneé Parvata Nachear, whom she calls "the chief heiress to the zemindary." This adoption was communicated to the Collector by a Letter of the 23rd of September, 1845, but was treated by him as invalid under the 25th section of Mad. Reg. V. of 1804, because made by a disqualified landholder without the consent of the Court of Wards. The right of Raneé Parvata Nachear to the zemindary, as heiress either to her Husband or to her Daughter, was, therefore, recognized by the Revenue authorities, who, in April, 1840, put her in possession of it as a qualified proprietor, and relinquished the management of it to her.

In the meantime, and ever since 1840, Mootoo Veroyee had been engaged in active litigation with [427] Raneé Parvata Nachear and others for the enforcement of her alleged rights to the zemindary. The proceedings in her last suit are set forth in the record. For the most part they have no bearing upon any of the questions which their Lordships have now to determine; and it is unnecessary to notice any of them, except the supplemental rejoinder, which was filed by Raneé Parvata Nachear on the 6th of March, 1846; and the Razenamah, or agreement of compromise, by which this litigation was terminated on the 26th of February, 1847. In the former Raneé Parvata Nachear asserted, apparently for the first time, a right to adopt a Son to her Husband, either under an alleged authority from him, in the event, which had happened, of both his Daughters dying without issue, or under the more general power of adoption which is disputed on these appeals. By the latter, Mootoo Veroyee, in consideration of the provision made for her and her Foster-son, Sevasamy, declared that Raneé Parvata Nachear might thenceforward enjoy the zemindary for ever; and, besides, might adopt a Son at her pleasure, as specified in the supplemental rejoinder.

It is clear, therefore, that whatever obscurity and confusion there may be in the history of the zemindary and its management between the death of Ramasamy in 1830, and the month of May, 1847, Raneé Parvata Nachear was at the last-mentioned date in undisputed possession as Zemindar of Ramnad.

In that state of things she made the adoption which is the subject of the present dispute. On the 19th of May, 1847, she gave notice to the Collector of her intention to adopt her Sister's younger Son, and invited him to be present at the ceremony. On [428] the 24th of the same month she formally adopted the Respondent, Ramalinga. It is admitted that all the requisite ceremonies were duly performed, and that the adoption cannot be impeached, except on the ground of the insufficiency of her power to make one. The Board of Revenue, by an Order, dated the 10th of March, 1849, declared that the adoption was invalid, and that on the death of Raneé Parvata Nachear the zemindary would escheat to Government. On the 23rd of July, 1855, the Madras Government set aside this Order, and determined to recognize the adoption until it should be declared invalid by a decree of a Civil Court. But on the 29th of October, 1855, the same Government cancelled its former Order, and confirmed the Order of the Board of Revenue of the 10th of March, 1849; and caused this, its final determination, to be intimated to Raneé Parvata Nachear through the Collector, by a Letter dated the 15th of November 1855.

The first of the suits out of which these appeals arise (No. 3 of 1856) was instituted in that year by Ranee Kunjara, claiming, as the last surviving Wife of Annasamy, and her Daughter, Mangalaswara, against Ranee Parvata Nachear alone. They impeached the validity of the adoption, insisted that on Ranee Parvata Nachear's death Ranee Kunjara, as the next in succession, would be entitled to the zemindary, and claimed maintenance in the meantime. Ranee Parvata Nachear, by her answer, alleged that Ranee Kunjara was not the Wife but the Concubine of Annasamy and could have no title to the zemindary. Various persons afterwards intervened under different titles, and were all, by supplemental plaint, made parties Defendants to this suit. But none of them, [429] except the Respondent, Ramalinga, and the Collector, are parties to these appeals, or have any interest therein.

The second of the two suits (No. 1 of 1860) was brought, in February of that year, by the Respondent, Ramalinga, who had then attained his majority, against Ranee Parvata Nachear and the Collector. Against the latter it sought to have the before-mentioned Order of intimation of the 15th of November, 1855, set aside as illegal; and against the former it prayed that immediate possession of the zemindary might be adjudged to the Respondent, Ramalinga.

The second suit was the first heard, and by his decree, dated the 18th of March, 1861, the Civil Judge ordered, that the Order of the Collector of the 15th of November, 1855, and his Orders to certain subordinate Officers therein referred to, should be cancelled; and that, as he had failed to establish any right to the estate, or to invalidate the acts of Ranee Parvata Nachear in respect to it, he should abstain from all further interference; and that Ranee Parvata Nachear, subject to the provisions of Hindoo law, and section 8 of Mad. Reg. XXV. of 1802, might, without the previous consent of the Collector, or of any other authority, assign and transfer to the Plaintiff (the Respondent, Ramalinga), or whomsoever she might think proper, by sale, gift, or otherwise, her proprietary right in the Ramnad zemindary. The decree further declared, that it was to be without prejudice to the Collector's right to bring a regular suit for the estate, if he conceived that the Government had a superior title to the party in possession, but it prohibited him from summarily seizing it as an escheat whilst there were heirs.

[430] The decree made by the same Judge in the first suit bore date the 12th of April, 1861. It found that Ranee Kunjara Nachear was one of the Wives of Annasamy, but that as such she had no right to succeed to the estate after Ranee Parvata Nachear, being only her stepmother, and, therefore, excluded from inheriting; it further decreed, that the Zemindar of Ramnad, for the time being, should pay to the Plaintiffs (the Appellants, Ranee Kunjara Nachear and her Daughter) maintenance at the rate of Rs. 400 per mensem, with the arrears of such maintenance from the date of the institution of the suit.

Against the first of these decrees the Collector, and against the second Ranee Kunjara and her Daughter, appealed to the High Court of Madras; and on the 26th of March, 1863, that Court made an Order on both appeals, whereby it directed the Civil Judge to try the following issue: "was the adoption made with the authority of Mootoo Veroyee, Widow of Annasamy, or with that of any others of the kindred of the late Zemindar, Ramasamy, in whose behalf the said adoption was made?" It further gave certain directions as to the evidence to be produced on trial of the issue.

This issue was accordingly tried on the 1st of September, 1863; and the findings of the Civil Judge were in effect, that the consent of Mootoo Veroyee, and of all the then surviving kindred of Ramasamy, had been obtained to the adoption. Against this finding the Collector, as well as Ranee Kunjara and her Daughter, again appealed to the High Court, which Court, on the 17th of November, 1864, after two hearings, pronounced an elaborate judgment in favour of Ranee Parvata Nachear's right to adopt, and her [431] exercise of it in the particular case, and in doing so the Court came to the following conclusions:—

First, that the Widow of the late Zemindar had made a valid adoption; that there was no doubt that it was made with the assent of the majority of her Husband's Sapindas; and that though it might be doubtful, whether the Civil Judge was right, there were not sufficient grounds for saying that he was wrong, in thinking that all the Sapindas then living had been proved to have assented.

Second, that, considering the extent of the property and the fact that she was the

last surviving Widow of the Zemindar Annasamy. Raneé Kunjara was entitled to a more liberal maintenance than that awarded by the Civil Judge; and that such maintenance should be at the rate of Rs. 10,000 per annum. Subject to that modification, the decrees below were affirmed, and the appeals dismissed without costs.

From the decrees drawn up in conformity with this judgment, the following appeals have been presented, viz.:—

First, an appeal by the Collector, impeaching the validity of the adoption, and also objecting to so much of the decree of the 18th of March, 1861, as declared, or implied, that Raneé Parvata Nachear had power to alienate or affect the zemindary beyond her life interest.

Secondly, an appeal by Raneé Kunjara and her Daughter, also impeaching the adoption; and further objecting to the decree of the 12th of April, 1861, in so far as it declared that Raneé Kunjara had no right of succession to the zemindary.

Thirdly, a cross appeal by Raneé Parvata Nachear and Ramalinga, objecting to the maintenance awarded [432] by the High Court as exorbitant; and insisting that the decree of the Civil Judge ought not to have been varied in that respect.

All these appeals have been heard together; and their Lordships have now to dispose of them.

The principal contest has been upon the broad and general question, whether by the Hindoo law, as current in what is known as the Drávada Country (wherein Ramnad is situate), a Widow can adopt a Son to her Husband without his express authority? and if so, by whose assent that defect of authority must be supplied.

Their Lordships think it will be convenient to consider in the first place how this question really stands, upon the authority of Mr. Colebrooke and Sir Thomas Strange.

Mr. Colebrooke's note on the Mitacshara (chap. I. sec. XI., art. 9), which has been much discussed, clearly involves three propositions: First, that the Widow's power to receive a Son in adoption, subject to some conditions, is now admitted by all the Schools of Hindoo law except that of Mithila. Second, that the Bengal (or Gaura) School insists, that the Widow must have the formal permission of her Husband in his lifetime. Third, that some at least of the other Schools admit the adoption to be valid, if made by the Widow with the assent of her Husband's kindred. The first two propositions are admitted; but it has been argued for the Appellants, that on the true construction of this note, Mr. Colebrooke's authority for the last proposition is limited to the Mahratta School, in which the treatise called "The Muṣookhu" is the predominant authority. Balam-Bhatta, however, whom he cites as an authority for a power of adoption [433] in the Widow wider even than that expressed in the third proposition, was a Commentator of the Benares School. And the several notes of Mr. Colebrooke, at pp. 92, 96, and 115 of the second volume of Strange's "Hindu Law," seem to their Lordships to show conclusively, that he considered the doctrine embodied in the third proposition to be common to the followers of the Mitacshara in the Benares as well as in the Mahratta School, and as such to be receivable as the law current in the Zillah Vizagapatam, which lies within the northern, or Andra division of the Dravada Country.

Again, Sir Thomas Strange's statement of the law in his work, Vol. I. p. 79, is clear and unambiguous. He says: "Equally loose is the reason alleged against adoption by a Widow, since the assent of the Husband may be given, to take effect (like a Will) after his death; and, according to the doctrine of the Benares and Maharashtra Schools, prevailing in the Peninsula, it may be supplied by that of his kindred, her natural Guardians; but it is otherwise by the law that governs the Bengal Provinces."

Their Lordships entertain no doubt, that the term "the Peninsula," as used here, and other passages by the same Author, denotes that part of India which is south of the line drawn from Ganjam to the Gulf of Cambay, and includes the whole of the Dravada District. The learned Counsel for the Appellants, however, appeal from Sir Thomas Strange as a text writer to Sir Thomas Strange as a Judge, and cite his *dictum* in *Veerapermall Pillay v. Narraín Pillay* (1 Strange's Mad. Cases, pp. 103 and 121), as opposed to this passage. In that case, Sir Thomas Strange, after citing the text of Vasishtha, says: "Hence it [434] may be inferred, what appears confirmed by opinions of living Hindoo Lawyers, and by every case of the kind we are acquainted with, that the consent of

the Husband is indispensable to adoption into his family." But this passage does not alter the view which their Lordships have already expressed as to the effect of the matured authority of Sir Thomas Strange. The precise question which is now under consideration, was not in issue in that case, where there was a written authority from the Husband, and where the real issue was, whether the Widow could adopt a boy not designated in that written authority. Again, the case was decided in 1801, at a time when the ancient authorities of Hindoo law were far less accessible to an European Judge than they have since become. And Sir Thomas Strange, in his work composed twenty years later, says of this very case of *Veerapermall Pillay v. Narrain Pillay*, that it was discussed on comparatively imperfect materials; that the public was not then possessed of the extensive information contained in Mr. Colebrooke's translation on the law of inheritance, and the Treatises on adoption since translated by Mr. Sutherland, to say nothing of the MSS. materials that came subsequently to his own hands, and which had contributed largely to every chapter of his work. There can, therefore, be no doubt but that the passage in his Book contains the matured opinion of Sir Thomas Strange, and that it must be treated as an authoritative declaration of that opinion controlling his *dictum* in *Veerapermall Pillay v. Narrain Pillay*.

Having thus ascertained what was the opinion of two of the highest European authorities upon this question of the Hindoo law current in the South of [435] India, their Lordships have next to consider, whether any sufficient reason has been assigned for treating that opinion as unfounded.

The remoter sources of the Hindoo Law are common to all the different Schools. The process by which those Schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent Commentaries. The Commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India; Schools with conflicting doctrines arose. Thus the Mitacshara, which is universally accepted by all the Schools, except that of Bengal, as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the Daya Bhaga in those points where they differ, was a commentary on the Institutes of Yajñawalkya; and the Daya Bhaga, which, wherever it differs from the Mitacshara, prevails in Bengal, and is the foundation of the principal divergences between that and the other Schools, equally admits and relies on the authority of Yajñawalkya. In like manner there are glosses and commentaries upon the Mitacshara which are received by some of the Schools that acknowledge the supreme authority of that Treatise, but are not received by all. This very point of the Widow's right to adopt is an instance of the process in question. All the Schools accept as authoritative the text of Vasishta, which says, "Nor let a woman give or accept a Son unless with the assent of her Lord." But the Mithila School apparently takes this to mean that the assent of the Husband must be given at the time of the adoption, and, therefore, that a Widow [436] cannot receive a Son in adoption, according to the Dattaca form, at all. The Bengal School interprets the text as requiring an express permission given by the Husband in his lifetime, but capable of taking effect after his death; whilst the Muzookhu, and Koustubha, Treatises which govern the Mahratta School, explain the text away by saying, that it applies only to an adoption made in the Husband's lifetime, and is not to be taken to restrict the Widow's power to do that which the general law prescribes as beneficial to her Husband's soul. Thus upon a careful review of all these Writers, it appears, that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the Husband, than to the authority to adopt being independent of the Husband.

The duty, therefore, of an European Judge who is under the obligation to administer Hindoo Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindoo system of law, clear proof of usage will outweigh the written text of the law. The Respondent, Ramalinga, insists that, tried by either test, the proposition for which he contends, will be found to be correct.

The industry and research of the Counsel in the Courts below have brought to-

gether a catena of texts, of which many have been taken from Works little known, and of doubtful authority. Their Lordships concur with the Judges of the High Court in declining to allow any weight to these. But the highest [437] European authorities, Mr. Colebrooke, Sir Thomas Strange, and Sir William Macnaghten, all concur in treating as works of unquestionable authority in the South of India the *Mitaeshara*, the *Smriti Chandrika*, and the *Madhavyam*, the two latter being, as it were, the peculiar Treatises of the Southern or Dravada School. Again, of the *Dattaca Mimansa* of Nanda Pandita, and the *Dattaca Chandrika* of Davanda Bhatta, two Treatises on the particular subject of adoption, Sir William Macnaghten says, that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the Provinces of Mithila and Benares. The *Dattaca Mitmansa*, by the Author of the *Madhavyam*, is also recognized as of high authority in the South of India by Mr. Ellis in his note at page 168 of the second volume of Strange's "*Hindu Law*."

Of these Treatises, the *Mitaeshara* is silent on the point in question. The *Dattaca Mimansa* of Nanda Pandita (sec. 1, Articles 15 to 18, and Articles 27 and 28) is opposed to the Respondent's view of it; but it seems equally opposed to an adoption by a Widow, under any circumstances. The *Dattaca Chandrika* (sec. 1, Articles 31 and 32) allows a Widow to give a Son in adoption where her husband has not forbidden her to do so, implying his assent from the absence of prohibition. The *Smriti Chandrika* also permits a Mother to give her Son, if she be authorized to do so by an independent male. And it is argued, that what these last two authorities lay down concerning a Widow's right to give, must, by parity of reasoning, be taken to be laid down concerning her [438] right to receive a Son in adoption. The *Madhavyam* (if that term is confined to the *Parasara Madhaviya*, and does not embrace all the works of Vidya Narainsamy) seems also to contain no direct determination of the point in question; but the *Dattaca Mimansa* of that Author clearly and explicitly declares the right of the Widow to adopt with the authority of her Father-in-law, and whatever other kinsmen of her husband may be comprehended under the *et cætera*. It cannot, therefore, be said, that the proposition laid down by Mr. Colebrooke, and adopted by Sir Thomas Strange, is not supported by at least one of the original Treatises of undoubted authority in Dravada. The *Dattaca Mimansa* of Sir Sri Rama Pandita, who is stated by the Judges of the High Court to be an authority very generally cited in the South of India, also confirms the proposition.

Their Lordships have excluded from their consideration of what is the positive law of the Dravada country the peculiarly Maharatta Treatises (the *Muyookhu* and *Koustubha*), and also the *Viromitrodaya*, which is a Treatise of especial authority at Benares. It must, however, be admitted, that the fact of the reception of the doctrine in question by Schools so closely allied to that of Dravada is in favour of the hypothesis that it also obtains in the latter, and strengthens the authorities which directly support that hypothesis.

The evidence that the doctrine for which the Respondents contend has been sanctioned by usage in the South of India consists partly of the opinions of Pundits, partly of decided cases. Their Lordships cannot but think that the former have been too summarily dealt with by the Judges of the High Court. These opinions, at one time enjoined to be followed, [439] and long directed to be taken by the Courts, were official, and could not be shaken without weakening the foundation of much that is now received as the Hindoo law in various parts of British India. Upon such materials the earlier works of European writers on the Hindoo law, and the earlier decisions of our Courts, were mainly founded. The opinion of a Pundit which is found to be in conflict with the translated works of authority may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the Country. A considerable body of these *futuas*, or opinions, is collected in the third part of what has been called throughout the argument in this case the "*Green Books*." It is not necessary to consider, whether they can all of them be supported to the full extent of what they affirm. But they show a considerable concurrence of opinion, to the effect that, where the

authority of her Husband is wanting, a Widow may adopt a Son with the assent of his kindred in the Dravada Country.

The decided cases, exclusive of those in the Bombay Presidency, which may be taken to be governed by the *Muyookhu*, are certainly not many. But there is at least the case *G. (Apponiengar v. Alemaloo Ammal*, Mad. Sud. Dec., for 1858, pp. 5, 6), decided by the late Sudder Court of Madras, and there are the French cases, which ought not, their Lordships think, to be wholly disregarded as recognitions of the law prevailing in the South of India. They are to be relied on in this case as affording evidence of a long continued series of opinions officially given, and judicially received, which [440] were adopted as the grounds of decision, showing a continued and recognized existence of a doctrine, which suffices to remove from the opinions of the Pundits in this case every suspicion of being opinions given to support the interests or judgments of others. Against these authorities the Appellants have invoked that of the case of *Raja Haimun Chull Sing v. Koomer Gunsheam Sing* (2 Knapp's P.C. Cases, p. 203). But what was, in fact, decided by the very guarded judgment delivered by the late Lord Wensleydale in that case? It was that, according to the native text-writers—including probably *Vasishita*, certainly including the *Dattaca Mimansa* of *Nanda Pandita*—the authority of the Husband was a requisite to a valid adoption; that the strictness of the law had been in many districts, and particularly in the Mahratta States, relaxed or modified by local usage, but that it had not been established to their Lordships' satisfaction that that relaxation had extended to the particular District of Etawah, in Upper India. Disclaiming, therefore, the intention to decide what was the law in other parts of India, their Lordships held, that they could not say that the law in that District did not require the direction of the Husband in order to the validity of an adoption, which it was necessary for them to do in order to reverse the judgment of the Court below. It is clear that that decision was not intended to govern, and cannot be taken to govern, a case arising in the South of India.

Upon the whole, then, their Lordships are of opinion, that there is enough of positive authority to warrant the proposition that, according to the law prevalent in the Dravada Country, and particularly [441] in that part of it wherein the *Ramnad zemindary* is situate, a Hindoo Widow, not having her Husband's permission, may, if duly authorized by his kindred, adopt a Son to him. And they think that that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindoo law, or upon analogies, real or supposed, between adoptions according to the *Dattaca* form, and the obsolete practice, with which that form of adoption co-existed, of raising up issue to the deceased Husband by carnal intercourse with the Widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient Treatises above referred to, and in particular by the *Dattaca Mimansa* of *Vidya Narainsamy*, the Author of the *Madhavyam*: but as a ground for judicial decision these speculations are admissible, though as explanatory arguments to account for an actual practice they may be deserving of attention.

It must, however, be admitted that the doctrine is stated in the old Treatises, and even by Mr. Colebrooke, with a degree of vagueness that may occasion considerable difficulties and inconveniences in its practical application. The question who are the kinsmen whose assent will supply the want of positive authority from the deceased Husband, is the first to suggest itself. Where the Husband's family is in the normal condition of a Hindoo family—*i.e.* undivided—that question is of comparatively easy solution. In such a case the Widow, under the law of all the Schools which admit this disputed power of adoption, takes no interest in her Husband's share of the joint estate, except a right to maintenance. And [442] though the Father of the Husband, if alive, might, as the head of the family and the natural Guardian of the Widow, be competent by his sole assent to authorise an adoption by her, yet, if there be no Father, the consent of all the Brothers, who, in default of adoption, would take the Husband's share, would probably be required, since it would be unjust to allow the Widow to defeat their interest by introducing a new co-parcener against their will. Where, however, as in the present case, the Widow has taken by inheritance the separate estate of her Husband, there is greater

difficulty in laying down a rule. The power to adopt when not actually given by the Husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindoos. Their Lordships do not think there is any ground for saying, that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think, that the consent of the Father-in-law, to whom the law points as the natural Guardian and "venerable protector" of the Widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no Father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the Widow in the proper and *bona fide* performance [443] of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question, that the consents were purchased, and not *bona fide* attained. The rights of an adopted Son are not prejudiced by any unauthorized alienation by the Widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption.

Again, it appears to their Lordships that, inasmuch as the authorities in favour of the Widow's power to adopt with the assent of her Husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the Husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supercession of heirs on the ground of religious obligation to adopt a Son in order to complete or fulfil defective religious rites.

Their Lordships having thus stated the conclusions to which they have come upon the general question of law involved in these appeals, will now consider whether the High Court of Madras has correctly applied that law to the facts of the present case.

They are of opinion, that both the Courts below were right in holding that the collateral kinsmen of Ramasamy were to be found in the Taver family, of which the printed pedigree forms part of the record. [444] According to Hindoo law, Ramasamy was the Son, though by adoption, of Annasamy; and he again was the Son, though by adoption, of the first Ramasamy, who was a Taver; and the heirs of Ramasamy, in the absence of descendants, were traceable upwards through these two persons, as if they had been his natural Father and Grandfather. There is no ground for saying that this, the legal consequence of the successive adoptions, was affected by the assumption of the name of Sathupathy, the family name of the ancient Zemindars of Ramnad and of Mangalaswara, the Grantee of the zemindary. It is to be observed, however, that this line affords none but very remote kinsmen, if their relationship to Ramasamy be calculated on the principle just stated. The nearest of them, Mootosamy, would on that principle stand in a degree of relationship to Ramasamy which, according to the rule of the Mitacshara (cap. 2, sec. v., art. 6), would exclude him from the category of Sapindas, and place him in that of Samanodacas, or those connected only by a libation of water and a common family name. He was, however, the natural Brother of Annasamy, and that circumstance might strengthen his title to be considered, in the absence of nearer connections, the natural male protector of Ramasamy's Widow. Again, the person who really filled the office of Protector, and that by the express appointment of Ramasamy, was, up to the time of her quarrel with her Daughter-in-law, Mootoo Veroyee. Nor is it by any means unusual in a Hindoo family to find the Mother-in-law occupying a position of considerable power and importance. Moreover, she was unquestionably the heir to the property next in succession to Raneé Parvata Nachear, after the failure of Rama-[445]-samy's descendants. It, therefore, appears to their Lord-

ships, that in this state of the family the assent of Mootoo Veroyee, of Mootoosamy, and of the other persons who are proved beyond all question to have assented, was sufficient to legitimate the adoption, even if the evidence has failed to prove the consent of the yet remoter kinsman, Ramrajah Taver.

It has been argued, however, that even if this adoption would have been regular had Ramasamy died childless and intestate, his arzi relating to the management and descent of the zemindary contains an indication of his intention that his Daughters and their descendants should be his successors and representatives, which ought to be taken to imply a virtual prohibition of the act of adoption by his Widow. Their Lordships cannot accede to this argument. Ramasamy, no doubt, intended to be represented by his Daughter's line, should that line continue. But he made no express provision for its failure, and the same reasons which justify a presumption of authority to adopt in the absence of express permission are powerful to exclude a presumptive prohibition to adopt, when on a new and unforeseen occasion the religious duty arises. His Widow has not claimed a power to adopt, except on the happening of the contingency for which her Husband omitted to provide. And her power so limited, not having been qualified by his disposition, must be determined by the general law.

Another argument for the Appellants was founded on the attempted adoption of a Son, Annasamy, by Dorarajah. That person is not a party to either of these suits; he has not impeached the adoption of the Respondent, Ramalinga; he has, on the contrary, [446] supported it as a witness. Nothing decided by the decrees under appeal can prejudice his rights, if he has any, under an adoption which the Revenue authorities at the date of it seem to have treated as illegal. Their Lordships have not before them the necessary materials for determining, whether that adoption was in fact valid or invalid; or whether, if valid, it would have any, and what effect on the title of the Respondent, Ramalinga. In that state of things neither of the present Appellants can be allowed to insist on this supposed *ius tertii* as an objection to the decrees which they impeach.

Their Lordships have, therefore, come to the conclusion, that these decrees, and the judgment on which they proceed, are substantially right, in so far as they affirm, as between the parties to this litigation, the validity of the adoption by Rane Parvata Nachear of the Respondent, Ramalinga.

They also think that there is no foundation for the other and minor objection taken by the Collector to the decree of the 18th of March, 1861, on the ground that it asserts a power in Rane Parvata Nachear to alienate or affect the zemindary beyond her life interest. Her power of alienation is expressly stated to be "subject to the provisions of Hindoo law;" and the only object of that part of the decree was to affirm her right to exercise that power within the limits prescribed by the Hindoo law, free from the control of the Government or its Revenue Officers.

Their Lordships are further of opinion, that there are no grounds for impeaching the decree of the 12th of April, 1861, in so far as it found that the Appellant, Rane Kunjara, stood in the relation only of stepmother to Ramasamy, and, therefore, could have [447] no right to inherit his estate. They think, that this conclusion is supported by the Will of Rane Mootoo Veroyee, dated the 20th of January, 1820, which expressly states that Ramasamy was adopted by Annasamy and Rane Mootoo Veroyee unanimously.

Upon the cross appeal their Lordships have only to observe, that the *quantum* of maintenance is a question with which the Courts of India, having local knowledge, and being conversant with the habits of native families, are peculiarly competent to deal with; and that strong grounds should be shown to justify any interference by this Committee with their discretion in that matter. And their Lordships see no reason for questioning the soundness of the discretion exercised by the High Court of Madras in the present case.

Being, therefore, of opinion, that the decrees under appeal are correct, and ought to be affirmed, their Lordships will humbly recommend to Her Majesty that the two appeals and the cross appeal be each dismissed, with costs.

[See note to *Raja Haimun Chull Sing v. Koomer Gunsheam Sing*, 1834, 2 Knapp. 224; and *Girdhari Lall Roy v. Bengal Government*, 1868, 12 Moo. Ind. App.

166; *Sri Raghunadha v. Sri Brozo Kishoro*, 1876, L.R. 3 Ind. App. 154; *Bhagwan Singh v. Bhagwan Singh*, 1899, L.R. 26 Ind. App. 164.]

[448] GRIDHARI LALL ROY,—Appellant; THE BENGAL GOVERNMENT.—
Respondent * [June 29, 30, 1868].

On appeal from the High Court of Judicature at Fort William in Bengal.

The Crown has, under the 21st and 22nd Vict., c. 106, only the same right that the late East India Company possessed previous to the passing of that Statute [12 Moo. Ind. App. 454].

In ejectment, the Government can only recover by strength of its own title [12 Moo. Ind. App. 454].

So held in a suit by the Government claiming lands by escheat, in which it was admitted, that the Defendant's possession was as heir; the *onus* being on the Government, to show that the last proprietor died without heirs.

The enumeration of Bandhoos (cognate kindred) capable of inheriting, in preference to the right of the King to succeed, contained in the translation of the Mitacshara by Colebrooke, ch. II., sec. 7, held to be illustrative and not exhaustive [12 Moo. Ind. App. 465].

A translation of a passage by Yajnyawalkya (the Author of the Mitacshara), enumerating the preferential heirs, including among Bandhoos the Father's maternal Uncle, not contained in Colebrooke's translation, received and acted upon in determining the law of succession of a Hindoo governed by the Mitacshara [12 Moo. Ind. App. 466].

The Viromitrodaya by Mitramisira, is an authority to be looked to, of what may have been left doubtful by the Mitacshara, and as declaratory of the law of the Benares school [12 Moo. Ind. App. 466].

A Hindoo, whose succession was regulated by the Mitacshara, and the law of the Benares school, died without leaving any nearer relative than the Brother of his Grandmother, *ex parte paterna*. He performed the Stradh to the deceased. Held (reversing the decree of the High Court at Calcutta), upon the construction of the Mitacshara as expounded by the Viromitrodaya, that the maternal Uncle of the Father is a Bandhoo, a cognate or kindred relation of the Father, and, failing nearer Bandhoos of the deceased, was entitled to inherit, as a relation of the deceased, by a title preferable to that of the Crown, claiming by escheat for want of heirs.

In this appeal the suit was brought by the Bengal Government against the Appellant, to establish [449] the title of the Government, first, on the ground of an escheat, to a zemindary situate in the Zillah Rungpore, as well as the moveable property which had belonged to one Woopendro Chunder Roy, who had died without issue, and also, as it was alleged by the Government, without leaving any other person who was by the Hindoo law entitled to succeed as heir to his immoveable and moveable estate; and, secondly, to eject the Appellant from possession of the zemindary.

The principal question raised in the Court below and on appeal, had reference to the construction and effect to be given to the undermentioned passage in the Mitacshara, and involved the point, whether the Appellant, as the maternal Uncle of the deceased Father of Woopendro Chunder Roy, was excluded from the line of succession, although he was a Bandhoo, a cognate relation of the deceased, and although it is laid down generally, that Bhandoos after Sapindas and Samanodacas

*Present: Members of the Judicial Committee,—Lord Romilly (the Master of the Rolls), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and Sir Fitz-Roy Kelly (the Lord Chief Baron of the Exchequer). Assessor.—The Right Hon. Sir Lawrence Peel.

do succeed as heirs, yet that the Father's maternal Uncle and the maternal Uncle are not specifically named in the Mitacshara, ch. II., sec. 6, while the Son of each of those relations is therein expressly named as included among heirs.

The passage of the Mitacshara in question is as follows:—

“ ‘On failure of Gentiles (that is, the Samanodacas, to the fourteenth generation), the cognates are heirs.’ Cognates are of three kinds:—related to the person himself, to his Father, or to his Mother, as is declared by the following text:— ‘The Sons of his own Father's Sister, the Sons of his own Mother's Sister, and the Sons of his own maternal Uncles, must be considered as his own cognate kindred. The Sons of his Father's paternal Aunt, and Sons of his Father's [450] maternal Aunt, and the Sons of his Father's maternal Uncle, must be deemed his Father's cognate kindred. The Sons of his Mother's paternal Aunt, the Sons of his Mother's maternal Aunt, and the Sons of his Mother's maternal Uncle, must be reckoned his Mother's cognate kindred ’” (Mitacshara, ch. II. sec. 6; translated by Colebrooke in his *Treatise on Inheritance*, p. 352).

Two other questions were also raised: first, whether the Government, who claimed by escheat, was not estopped from disputing the title and legal possession of the Appellant by reason of the Board of Revenue having formally recognized his title after investigation thereof, and recording his name as proprietor of the zemindary in succession to, and as legal heir of, Woopendro Chunder Roy; and second, whether an adopted Son of the Appellant was entitled to succeed as such heir, the Son of the maternal Uncle of a Father being named in the list of Bandhoos entitled to inherit in the above passage of the Mitacshara, in case it should be held, that the Appellant himself was not to be considered entitled to succeed as heir, on the ground that the maternal Uncle of a Father was not expressly mentioned in the passage above-mentioned.

It appeared from the evidence, that on the death of Woopendro Chunder Roy, the Appellant claimed to succeed to the inheritance, according to the law received in the Benares School, as standing in the relation to the deceased of Father's maternal Uncle, and as such, being the nearest male relative, he performed the Stradh, or funeral ceremonies of the deceased as next heir, and obtained possession of the zemindary.

The Appellant's degree of relationship was admitted by the Government, the Board of Revenue [451] having, upon an application for mutation of names, recognized his title to possession, and recorded his name as proprietor of the zemindary in the Collector's Books, and it appeared that he had continued to pay the Government revenue assessed upon the zemindary from that time until the institution of the suit which led to this appeal. There were two other Claimants to the succession, named Sohun Loll Lall and Mohun Lall, who represented themselves to be maternal Grand-mother's Sister's Sons. The spiritual preceptor of the deceased also set up a title as heir.

The suit was in the nature of an action of ejectment. By the plaint the Government claimed possession from the Appellant of the immoveable estate and moveable property of Woopendro Chunder Roy as an escheat, on the ground of the deceased having died without heirs, and stated, that there was no other means than by such suit to obtain possession, as the Appellant, claiming as the maternal Uncle of Ram Chunder Roy, the Father of the deceased, held and kept possession of the property under that title.

The Appellant by his answer insisted, that the zemindary and other property could not escheat while there were heirs in existence; that he and his adopted Son were legally entitled as heirs of the deceased, and submitted, that even if it were not so, Government was estopped from disputing his right by the recognition of his title as before stated.

There was evidence, that the religious ceremonies of the Family were performed according to the Mitacshara and the Viromitrodaya Shastras.

By the decree of Mr. F. C. Fowle, the Judge of the Zillah Rungpore, dated the 28th of September, 1864, it was decided that, according to general rule of law, the *onus* of proving a failure of heirs of Woopendro [452] Chunder Roy, deceased, the late proprietor, and a consequent vacant possession, lay on the Government, as claiming the property under an escheat from failure of heirs, and that their title could not

arise while there was any person entitled to succeed by consanguinity to the deceased; that, it being admitted on the pleadings, that the Appellant was the grand-Uncle of Woopendro Chunder Roy, and as the order of succession laid down in the before set out passage of the Mitacshara was entirely based on, and governed by affinity or consanguinity, the Appellant was, according to the spirit of the text of the Mitacshara, to be considered the next heir of the deceased, and as such, legally entitled to hold possession of the property: and the decree accordingly dismissed the suit of the Government, with costs.

There was an appeal from this decree to the High Court at Calcutta, and that Court, consisting of Messrs. C. B. Trevor and G. Campbell, by their judgment, dated the 30th of August, 1865, reversed the decree of the Zillah Judge, deciding against the Appellant's title as heir in succession, on the ground of the omission from the passage in the Mitacshara of the name of the Father's maternal Uncle. The Judges of the High Court, in delivering judgment, admitted, that there was no decision of the Courts on the point in question. They referred, however, to the following authorities, regarding a Sister's Son and a Brother's Daughter's Son, who were admitted to be Sapindas in the sense used in the Mitacshara, and Bandhoos also, as applicable to the question at issue, *Nagalinga Pillai v. Vardilinga Pillai* (Dec. of Sud. Court, 1860, p. 245); *Doe Dem Kalammal v. Kurppas* (1 Mad. High Court Reps. p. 85 to 91); *Chotee Lall v. Goordyal* (Rep. of the Sud. Dew. [453] Ad. (N.W.P.) for March, 1865, p. 200; *Kias Koomar v. Agund Roy* (7 Sel. Reps. p. 37 to 40); *Jowahir Rahoo v. Mussumat Koilasse* (1 Weekly Rep. 74); *Bissumbhur Sahoo v. Bhyrub Sahoo* (Legal Remembrancer for 1864, pp. 168, 169); *Jumun Bibee v. Mussumat Golab Debee* (1 Agra Law Journ. 17). The High Court, by its judgment, reversed the decree of the Zillah Court, and decreed possession of the property to the Government as an escheat, on an entire failure of legal heirs.

Sir R. Palmer, Q.C., and Mr. Leith (with whom was Mr. E. P. Wood), for the Appellant, and Mr. Forsyth, Q.C., and Mr. Merivale, for the Bengal Government.

On the opening of the appeal a preliminary objection was taken by the Appellant to the right of the Government to sue. It was submitted, that the suit being in the nature of ejectment, the *onus* was upon the Government, to establish a clear title by escheat by showing an entire failure of legal heirs of the late Woopendro Chunder Roy, the Zemindar last seised, according to Hindoo Law, and a consequent vacant succession, which, it was contended, the Government failed to do, and was not entitled to rely on the weakness of the title of the Appellant, who had been put in possession by the Government.

The Lord Chief Baron.—In this country in a Writ of intrusion, or Ejectment, the Crown must, to take lands by escheat, prove that there was an entire failure of heirs, and so also a Lord of a Manor with respect to Copyholds on the death of a Tenant without heirs, and cannot rely upon the want of title of the party [454] in possession. The Government must show a good title. Here they have shown none.

For the Bengal Government it was contended, first, that by the Hindoo Law, the Appellant, the maternal Uncle of the Father of the party last seised, had no title as heir, and that the Government was not bound to prove a negative that there were no heirs; and secondly, that there were other parties claiming as heirs, citing *The Collector of Masulipatam v. Cavalry Vencata Narraïnappah* (8 Moore's Ind. App. Cases, 500). [Sir Lawrence Peel.—The Crown has not under the Statute, 21st and 22nd Vict. c. 106, transferring the Government of India to the Crown, a higher title than the late East India Company had. If the East India Company had claimed lands upon the ground of the extinction of the immediate tenantry, they must have proved their title in the same manner as a party claiming under a remote remainder would have to prove extinction of the previous heirs. There appears to be other parties who are entitled.] A judgment against the Appellant would not operate as a bar to a party who claimed, showing a title as heir. It is admitted that the Government had not given affirmative evidence of the non-existence of heirs.

Lord Romilly.—Their Lordships wish to ask the Appellant's Counsel, whether they have anything to say to the judgment they are prepared to pronounce, namely, that without deciding the rights of the parties, to dismiss the appeal from the Zillah Court and to reverse the judgment of the High Court at Calcutta, liberty being given

to the Respondent to institute fresh proceedings for the purpose of establishing the right of the Crown by escheat.

[455] Sir R. Palmer declined to accede to the proposed judgment, and claimed the right to be heard on the merits.

Upon the question, whether the Hindoo law received in the Benares School, the Appellant, as Father's maternal Uncle, was entitled as a Bandhoo to succeed as heir to Woopendro Chunder Roy, in preference to the claim of the Crown by escheat; the following authorities were cited: The Mitacshara (Trans. by Colebrooke), ch. II. sec. vi.: Stokes' "Hindoo Law," p. 448; The Viromitrodaya (a); Stokes' [456] "Hindu Law," pp. 176-8; The Daya-Bhaga, ch. XI. sec. vi. pl. 12; Stokes' "Hindu Law," p. 346, 352-3; The Daya-Krama-Sangraha, ch. II. sec. vi.: Stokes' "Hindu Law," p. 499; Strange's "Hindu Law," Vol. I., pp. 147-8, 317 [2nd Ed.]; Dattaka Mimansa of Nanda Pandita, sec. II. p. 29 (Trans. by Sunderland); Morley's Dig., Vol. I. Pref. ccxxi.; Elberling on Inheritance, pp. 81, 2, 3; and an English translation of the principal maxims of Mitacshara Grunthoo (b): *Amreto Kumari v. Lukhyarayan*

(a) The passage quoted from the Viromitrodaya, p. 209, is translated in Mr. Justice Bayley's judgment, in the case of *Amreto Kumari v. Lukhyarayan* (*Chuker-buty*) (9 Sevestre's Sel. Cases, 547-552), as follows:—"In default of Samanodakas, Bandhoos (cognates) are heirs. Cognates are of three kinds,—related to the person himself, to his Father, or to his Mother. According to the following text: "The Sons of his own Father's Sister, the Sons of his own Mother's Sister, and the Sons of his maternal Uncle, must be considered as his own cognate kindred. The Sons of his Father's paternal Aunt, the Sons of his Father's maternal Aunt, and the Sons of his Father's maternal Uncle, must be deemed his Father's cognate kindred. The Sons of his Mother's paternal Aunt, the sons of his Mother's maternal Aunt, and the Sons of his Mother's maternal Uncle, must be reckoned his Mother's cognate kindred. Then, by reason of near affinity, the cognate kindred of the deceased himself, in the first instance; then the Father's cognate kindred, and next his Mother's cognate kindred, succeed." This is the order of succession. In the text of Menu: "Then the distant kinsman shall be the heir, or the spiritual preceptor, or the pupil"; the term Sakulya comprehends the persons descended from the same family (Sagatra), and the kinsman allied by common libation of water (Samanodaka); the maternal Uncles and the rest; and the three kinds of cognates. The term cognate (Bandhoos) in the text of Jageeshwara or Jagyavalkya must comprehend also the maternal Uncles, and the rest; otherwise the maternal Uncles and the rest would be omitted, and their Sons would be entitled to inherit and not they themselves, though nearer in the degree of affinity. A doctrine highly objectionable."

(b) This document, described as an English translation of the principal maxims of the Mitacshara Grunthoo, was put in evidence by the Defendant, and received and acted upon by the Courts in India and on appeal. As it differs in some respects from the translation by Colebrooke, it is set out entire:—

"The Wife and the Daughters also, both Parents, Brothers likewise, and their Sons, gentiles, a pupil, and fellow-student. On failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven (died), leaving no male issue. This rule extends to all persons and classes. (See Colebrooke's "Translation of the Mitacshara," ch. II. sec. i. pl. 1, p. 324.)

"On failure of gentiles, the cognates (Bandhoos) are heirs. Cognates are of three kinds,—related to the person himself, to his Father, or to his Mother, as is declared by the following text:—"The Sons of his own Father's Sister, the Sons of his own Mother's Sister, and the Sons of his own maternal Uncle must be considered as his own cognate kindred. The Sons of his Father's paternal Aunt, the Sons of his Father's maternal Aunt, and the Sons of his Father's maternal Uncle, must be deemed his Father's cognate kindred. The Sons of his Mother's paternal Aunt, the Sons of his Mother's maternal Aunt, and the Sons of his Mother's maternal Uncle, must be reckoned his Mother's cognate kindred."—(Colebrooke's "Translation of the Mitacshara," ch. II. sec. vi. pl. 1, p. 352).

"Here, by reason of near affinity, the cognate kindred (of the deceased himself) are his successors, in the first instance: on the failure of them, his Father's cognate kindred: in default of them, his Mother's cognate kindred. This is the order of

[457] *Chukurbutty* (9 Sevestre's Reps. of Select Cases, 547), referring to a passage in the *Mitaeshara* (*a*) not translated by Colebrooke : *The Collector* [458] of *Masulipatam* v. *Carely Venkata Narainapah* (8 Moore's Ind. App. Cases, 525); *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (*ante* [12 Moo. Ind. App.], p. 397); *Venageek Anundrow* v. *Luramechace* (9 Moore's Ind. App. Cases, 520); *Nagalinga Pillia* v. *Vardilinga Pillia* (Dec. of Sudder Court, 1860, p. 245); *Surja Kumari* v. *Gaudhrap Singh* (6 Ben. Sud. Dew. Ad. Rep. 142); and *Lakhi Priya* v. *Bhavirah Chandro Chandhuri* (5 Ben. Sud. Dew. Ad. Rep. 315).

Their Lordships reserved the consideration of their judgment, which was now pronounced, as follows, by

The Right Hon. Sir James W. Colvile (July 17, 1868).—The facts on which the determination of this appeal depends are few and undisputed. Woopendro Chunder Roy, the owner of the zemindary and other property in dispute, died on the 7th of August, 1860, an infant, and unmarried. He was of a family which had formerly come from the Upper Provinces, and, though settled in Lower Bengal, where the zemindary is situated, is admitted to have retained the ceremonial and other law of its original habitat. There is, [459] therefore, no dispute that any question touching

succession. (Translation of the annexed passage of the *Viromitrodaya*, copied from the Book which is in the library of the Government Sanscrit College.)

The term *Sakulya* (distant kinsman) used in the following text of Menu.—“Then the distant kinsman shall be the heir, or spiritual preceptor, or the pupil,” comprehends the persons descended from the same ancient sage (*Sa Gutra*), and the kinsmen, allied by common libation of water; the maternal Uncles and the rest, and the three kinds of cognates. The term ‘cognate’ (*Bandhoo*) in the text of *Jagishwara* or *Janavalkya*, must comprehend also the maternal Uncles and the rest; otherwise the maternal Uncles and the rest would be omitted, and their Sons would be entitled to inherit, and then they themselves, though nearer in the degree of affinity; a doctrine highly objectionable.—*Viromitrodaya*. (Translation of the annexed passage of the *Viromitrodaya*, copied from the Book which is in the library of the Government Sanscrit College.)

“Therefore, the summary of the above-mentioned heirs is this:—First, the Son; on failure of him, the Grandson; in his absence, the Grandson's Son; on failure of him, a chaste wife; in her default, the Daughters; in their absence, the Mother; in her default, the Father; and in his default, the Daughter's Son; and in default of him, the Brother; in his default, the Brother's Son; and on his death, the nearest kinsmen; in default of them, the remotest kindred, according to their order; in default of all these, the nearest *Sakulya*; on failure of them, the remotest *Sakulya*; in their absence, maternal Uncles and others.

“But on failure of all these heirs, the King inherits, except the property of a Brahmana, which goes to another Brahmana.—*Vivada Chinta Chintamani*.—(*Vide* Baboo Prossono Coomar Tagore's translation of the *Vivada Chintamani*, p. 299).

“A true translation of the annexed Sanscrit paper.

“(Signed) Shama Churn Sircar,

“Chief Interpreter and Translator, High Court.”

(*a*) This passage was as follows: “When one having gone to a Foreign country dies, let the descendants, cognates (*Bandhoo*s), gentiles, or his companions take the goods. In their default, the King. When of those who are associated in trade, any one, having gone to a Foreign country dies, then his share shall be taken by his heirs, *i.e.* the Son and other descendants, cognates, *Bondhava*, *i.e.* the Mother's side relatives, the maternal Uncles and others, the Gentiles, *i.e.* the *Sapindas*, besides the Son and other descendants, and those who are come, *i.e.* those associated in trade who come from a Foreign country. In their default, *i.e.* in default of descendants, etc., let the King take. By the word *ba*, (or) [the Sage] shows their right severally. The rule as to the order contained in [the text] the Wife, Daughters, etc., is also understood for this place. The necessity for the text is to exclude the Pupil, the fellow Students, the Brahmin, and to include the Trader.”—(*Mitaeshara*, p. 322, Ed. 1829). This translation is taken from the judgment of Mr. Justice Bayley, in the case of *Amreto Kumari* v. *Lukhynarayan Chukurbutty*, 9 Sevestre's Sel. Cases, p. 551.

the succession to Woopendro Chunder Roy is determinable by the law of inheritance current at Benares.

On Woopendro Chunder Roy's death the Appellant, as the nearest male relative surviving him, performed his Stradh, claimed his property as heir, and shortly afterwards applied to have his own name substituted for that of the deceased as owner of the zemindary on the Collector's register. He is, however, but a remote kinsman of the deceased, being only the Brother of his Grandmother *ex parte paterna*, or, to use the phraseology of the Mitaeshara, his Father's maternal Uncle. And accordingly, at the time of this application for mutation of names, some question, whether the Appellant was entitled to inherit, and whether the property did not pass for want of heirs to the Crown, was raised. Thereupon the Board of Revenue consulted their adviser, the Legal Remembrancer, and on his opinion, fortified by that of a Pundit which he had procured through the Registrar of the High Court, determined to recognize the title of the Appellant, who accordingly was put into possession, or left in possession of the property, recorded as proprietor of the zemindary in the Collector's Books, and continued to pay the Government revenue assessed upon it up to the date of the institution of this suit.

In 1863, the Government authorities appear to have changed, for reasons which have not been explained, their view of the Appellant's title; and on the 3rd of August in that year the suit out of which this appeal has arisen was commenced against him in the name of the Government of Bengal, as representing the Crown, for the recovery of the real and [460] personal property of Woopendro Chunder Roy, on the allegation, that upon his death it had escheated, for want of heirs, to the Crown.

By a decree, dated the 28th of September, 1864, the Zillah Judge dismissed the suit, holding that the Government was not entitled to oust the Appellant. The precise grounds of his judgment it is unnecessary to examine.

On appeal to the High Court, this decision was reversed by two of the Judges of that Court, and the present appeal has been preferred against their decree.

The points ruled by the judgment of the High Court were,—

First, that the Government was not estopped by the acts of its Officers in 1861, when the Appellant applied for and obtained the mutation of names, from bringing this suit.

Second, that upon the true construction of the section in the Mitaeshara, which will be hereafter considered, the Appellant, as the maternal Uncle of the Father of the deceased, was excluded from the class of Bandhoos capable of inheriting; and that consequently, as between him and the Government, he had no title to the property sued for.

Upon these findings the Court decreed, that the Government should obtain possession of all the real property admittedly in the Appellant's possession, with a certain specified exception, but that, for want of proof as to its value, their claim to the moveable property should be dismissed; and the judgment then proceeded as follows:—"This decree of the Government against Gridhari is final, but it does not become absolute until the claim of Sohun Lall and Mohun Lall, who represent themselves to be maternal Grandmother's [461] Sister's Sons, and that of Harro Bhoja Misser, the spiritual preceptor of the deceased, have been inquired into. The last-named person has filed no evidence, but his claim cannot be determined until that of Sohun Lall and Mohun Lall has been set at rest, and they have filed no evidence at all. They, as well as the Acharjee, or spiritual preceptor, do not oppose the Defendant, Gridhari's claim, but only prefer a claim in case his is declared to be invalid; and if they prove themselves to be what they allege that they are, they are undoubtedly entitled to succeed as enumerated Bandhoos. The case must, therefore, be remitted to the Judge, with instructions that he will, without delay, take up the case, and call on these parties and any others who may appear to claim the property of the deceased minor, within a reasonable time to file their evidence. He will then examine it thoroughly, and, guided by his estimate of it, and by Hindoo Law, he will either confirm the present Order in favour of Government as against them also, or pass in their favour whatever decree the law of the case seems to require."

The able arguments before this Committee have been principally addressed to the question raised by the second of the above findings, viz., whether under the law current at Benares the Appellant has not a title to inherit the property preferable to

the claim of the Government by escheat ; and that question their Lordships will first consider.

Its determination will ultimately be found to depend on the construction to be given to the first article of the sixth section of the second chapter of the Mitacshara. The absolute exclusion of the Father's maternal Uncle from the list of possible heirs, for [462] which the Respondent contends, can rest on no other ground.

Mr. Forsyth, indeed, argued strongly against the right of the Appellant to inherit, on the assumption that he was not entitled to offer the funeral oblations. But is this assumption well founded ? There is evidence, the uncontradicted evidence of the family Priest and others, that the Appellant did, in point of fact, perform the Stradh of Woopendro Chunder Roy, and he seems, in the judgment of the Priest, properly to have performed that function in the absence of any nearer kinsman. It is, however, unnecessary to determine whether this act of the Appellant was regular or not. The issue in this case is not between two competing kinsmen, but between a kinsman of the deceased and the Crown. Let it be supposed, for the sake of argument, that the nearest existing relative of Woopendro Chunder Roy at the time of his death had been, not the Appellant but a natural-born Son of the Appellant. It is admitted that, on the strictest interpretations of the Mitácshará, such a person is a Bandhoo ; that the three classes of Bandhoo must be exhausted before the King can take for want of heirs ; and, therefore, that the title of the Appellant's Son would prevail against the Crown. Now, such a Bandhoo either is competent to perform the Stradh of the deceased, offering some kind of funeral oblation, or he is not. If he be incompetent, it follows that his right to inherit is wholly independent of the doctrine of spiritual benefits derivable from funeral oblations, and is determined solely by kinsmanship. If he be competent, it follows *à fortiori*, that his Father, who would have been one degree nearer akin to the deceased, would also have been competent ; and that [463] his exclusion from the line of inheritance, if it exists, depends upon some other principle.

It is impossible to read the second chapter of the Mitacshara without remarking the extreme jealousy with which the Hindoo law regarded the right of the King to take on a failure of heirs. The seventh section refuses altogether to recognize that right where the property was that of a Brahmin. Admitting it as to the property of the other castes or classes, it expressly says, " if there be no relations of the deceased, the Preceptor, or, on failure of him, the Pupil " ; and again, " if there be no Pupil, the fellow-student is the successor." It thus exhausts the relatives and then interposes between them and the King three classes of heirs not connected with the deceased by blood, or participation in funeral oblations. The title of the King is afterwards stated in pl. 6 affirmatively, thus, " The King, and not a Priest, may take the estate of a Cshatriya, or other person of an inferior tribe, on failure of heirs down to the fellow-student." So Menu ordains : " But the wealth of the other classes, on failure of all (heirs), the King may take." So far, then, the law would seem to be clear that the King cannot take the property to the prejudice either of a maternal Uncle, or a maternal Grand-uncle, each of whom is obviously " a relation " of the deceased. What grounds, then, does the sixth section afford for the hypothesis that these two relations are arbitrarily excluded from the list of possible heirs ? The sixth section begins by stating broadly, " On failure of gentiles, the Bandhoo (rendered by Mr. Colebrooke ' cognates ') are heirs." Much has been said about this word " Bandhoo." It seems (see note at page 350 of Colebrooke's translation of the Mitacshara) to be [464] sometimes used as equivalent to " kinsmen " generally. But in this particular section it may be taken, as defined elsewhere by the Mitacshara itself, to import kinsmen springing from a different family (and therefore opposed to " gotraya " or " gentiles ") and connected by funeral oblations. From this class the maternal Uncle, or the Father's maternal Uncle (assuming their connection with the deceased by funeral oblations) can be excluded only by some arbitrary definition. Such a definition the Respondents contend is found in the passage which immediately follows the last citation from the Mitacshara. But is that necessarily so ? The Author of that Treatise goes on to state, in sec. VI., " Cognates (Bandhoo) are of three kinds : related to the person himself, to his Father, or to his Mother, as is declared by the following text." And then follows, as a quotation, a more ancient text, the authorship of which seems, from Mr. Colebrooke's note, to be uncertain, which says,

“The Sons of his own Father's Sister, the Sons of his own Mother's Sister, and the Sons of his own maternal Uncle, must be considered as his own cognate kindred. The Sons of his Father's paternal Aunt, the Sons of his Father's maternal Aunt, and the Sons of his Father's maternal Uncle, must be deemed his Father's cognate kindred. The Sons of his Mother's paternal Aunt, the Sons of his Mother's maternal Aunt, and the Sons of his Mother's maternal Uncle, must be reckoned amongst his Mother's cognate kindred.”

This subdivision of Bandhoo into three classes is possibly a consequence of that part of the definition already referred to, which treats them as kinsmen connected by funeral oblations. It may be, that the Bandhoo of the parent, though connected with him [465] by funeral obligations, would, by reason of remoteness of kinsmanship, not be so connected with the Son.

If, for the determination of the question under consideration, their Lordships were confined to the four corners of the Mitacshara, they would feel great difficulty in inferring, from the omission of “the maternal Uncle” and “the Father's maternal Uncle” from the persons enumerated in this text, that either of those relatives is incapable of taking by inheritance the property of a deceased Hindoo in preference of the King. Such an inference, in the teeth of the passages which say that the King can take only if there be no relatives of the deceased, seems to be violent and unsound. For the text does not purport to be an exhaustive enumeration of all Bandhoo who are capable of inheriting, nor is it cited as such, or for that purpose, by the Author of the Mitacshara,—it is used simply as a proof or illustration of his proposition, that there are three kinds or classes of Bandhoo; and all that he states further upon it is, the order in which the three classes take, viz., that the Bandhoo of the deceased himself must be exhausted before any of his Father's Bandhoo can take, and so on.

Again, further doubt is thrown upon the theory of exhaustive enumeration by the passage of the Mitacshara, which is not found in that portion of the Treatise which was translated by Colebrooke, but has been translated for the purposes of this suit, and is stated in the record (see *ante* [12 Moo. Ind. App.], p. 456). The general effect of that passage is to introduce, in the case of a Trader dying abroad, a new class of [466] remote heirs, viz., his returning co-traders. But this provision is preceded by an enumeration of preferable heirs, which includes among Bandhoo the maternal Uncle. Here, then, is a passage, written by the Author of the Mitacshara himself, which treats the maternal Uncle as capable of inheriting. The learned Judges of the Court below meet this authority by suggesting that the heirship of the maternal Uncle, as well as that of the co-trader, may be exceptional, and confined to the case of the Trader dying abroad. Their Lordships, however, cannot admit the reasonableness of this hypothesis, and think that even on the Mitacshara the question under consideration is at least uncertain. That question, however, is not to be governed by the Mitacshara alone. Adhering to the principles which this Board lately laid down in the case of *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (*ante* [12 Moo. Ind. App.], p. 397 and 438), their Lordships have no doubt that the Viromitrodaya, which by Mr. Colebrooke and others is stated to be a Treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the Mitacshara, and declaratory of the law of the Benares school.

The passage cited from that Commentary in the record, and more fully in *Amreto Kumari v. Lukhyarayan Chakraborty*, (9 Sevestre's Reports of Cases in the High Court, p. 552), is explicit. After stating that the term Sakulya, or distant kinsman, found in the text of Menu, comprehends the three kinds of cognates, the commentator goes on to say,—“The term cognates (Bandhoo) in the text of Jagushwara, or Jagyawalkya, must comprehend also the maternal [467] Uncles and the rest, otherwise the maternal Uncles and the rest would be omitted, and their Sons would be entitled to inherit, and not they themselves, though nearer in the degree of affinity: a doctrine highly objectionable.” The passage, as translated in the record, has “then they themselves” in place of “not they themselves.” If this be the correct reading, it would follow that even if the exclusion of the maternal Uncle and others not mentioned in the text relied upon by the Respondent from the list of Bandhoo were established, they would still, as relations, be heirs, whose title would

be preferable to that of the King. But the passage on either view of it declares that they are not so excluded; and it is, therefore, unnecessary to consider whether the title of any remote relation who could not be brought within the category of Bandhoo, or other class of heirs specified by the Mitacshara would prevail against that of the Crown. The learned Counsel for the Respondent remarked that this passage of the Viromitrodaya goes no further than to affirm the right of a maternal Uncle, and that it says nothing of a maternal Grand-uncle. But to say nothing of the use of the term "and the rest," the text is at least an authority for the proposition that a maternal Uncle is a Bandhoo. The maternal Uncle of the Father is, therefore, a Bandhoo of the Father, and it is admitted that, failing the Bandhoo of the deceased, the Bandhoo of the Father are entitled to inherit.

This view of the law is confirmed by the majority of the consulted Pundits; it seems also to make the law of the Benares school consistent on [468] the point in question with that of Bengal; and the concurrence of opinions of Mitra-misra, the Author of the Viromitrodaya, with Jimuta Vahana, the author of the Daya Bhaga, is not unimportant, since they are stated by Mr. Colebrooke (Pref., p. viii.) to differ on almost every disputed point of Hindoo law.

Their Lordships do not think it necessary to consider at any length the decided cases which are cited in the judgment under review. It is admitted that there is no case precisely in point; and the authority of those cited, in so far as they go to support the theory that the enumeration of Bandhoo, in the text quoted in the Mitacshara, is to be taken as exhaustive, has been shaken, if not altogether overruled, by the decision which, we are informed, has been recently passed by the High Court of Bengal in the case of *Amreto Kumari v. Lukhnarayan Chukurbutty* (7 Sevestre, Sel. Cases, 547). The question under consideration must, therefore, be held to be an open one even in the Courts of India.

Their Lordships, then, have come to the conclusion that, according to the law by which this case is to be governed, the Appellant was capable of inheriting the property in dispute, and that his title thereto is preferable to that of the Crown; and therefore, without adopting the reasons given for his judgment, they think that the Zillah Judge did right in dismissing the suit. This conclusion necessarily disposes of this appeal. Their Lordships, however, deem it right to add that, even had they agreed with the learned Judges of the [469] High Court in their view of the law of inheritance, they could not have concurred in the decree under appeal. Their Lordships do not impugn the correctness of the conclusion to which both the Courts below came on the question, whether the proceedings in 1861 estopped the Government from bringing this suit. But the effect of these proceedings was to determine, if it were previously doubtful, the fact of possession. The Respondent, therefore, was in the position of a Plaintiff in an ordinary suit in the nature of an ejectment. The Government could only recover by the strength of their own title. Accordingly, it lay upon the Plaintiff to prove, at least *prima facie*, that Woopendro Chunder Roy died without heirs; and, on the other hand, the Appellant was entitled to defend his possession not only by proof of his own title, but by setting up any *jus tertii* that might exist. By an alternative plea he did set up such a bar to the Respondent's suit; and the title of those persons who, he says, are, failing himself, the heirs to Woopendro Chunder Roy, has never yet been determined. The decree under appeal would remit the cause to the Judge, in order to allow those persons who, according to the practice in India, have intervened as Objectors, to litigate their title with Government, casting, apparently, the burden of proof on them. But it seems to deprive the Appellant of his right to defend his possession, on the ground of an existing *jus tertii*.

It is unnecessary, however, to say more on this point, since the conclusion to which their Lordships have come on the Appellant's own title obliges them humbly to recommend to Her Majesty, that [470] the decree of the High Court be reversed, and that in lieu thereof it be ordered, that the appeal to the High Court from the decree of the Zillah Judge be dismissed with costs. The Respondent must pay the costs of this appeal.

[See *Muthuswami Mudaliyar v. Sunambedu Muthukumarasawmi*, 1896, L.R. 23 Ind. App. 83.]

SREEMUTTY DOSSE and Others.—*Appellants*: RANEE LALUNMONEE and Others.—*Respondents* * [Feb. 19, 1869].

On Appeal from the High Court of Judicature at Calcutta.

Where a Defendant has by his answer put his defence upon a certain ground, and issues for trial are framed by the Court to meet the case so pleaded, the Judicial Committee, as the final Court of appeal, will not determine the appeal upon any other issues or grounds, which have not been taken or considered in the Courts below.

This suit, in the nature of an action of ejectment, was brought to oust the Appellant, Sreemutty Dossee, from possession of a portion of alluvial land.

The suit was instituted in the Zillah Civil Court of the Twenty-four Pergunnahs by Jogendrochunder Roy, the Husband of the Respondent, Ranee Lalunmonee, and his Brother, Promoochunder Roy, the [471] Sons and heirs of one Hurrishchunder Roy, as the Zemindars of a ten annas share of Kismut Pergunnah Mahomudinapoor against the Appellants and Ramkoomar Doss and Issurchunder Santra to obtain possession of fifty-six beegahs of chur or alluvial land, which they alleged formed a portion of a still larger quantity of chur resumed by Government for revenue purposes, and which had been permanently settled with them as being within their zemindary, and of which they alleged they had been forcibly dispossessed by the Appellants, and also for mesne profits with interest.

The question raised by the suit and upon the appeal was the identity of these fifty-six beegahs. The material issue recorded by the Principal Sudder Ameen was, whether these beegahs were included in the permanently settled chur of Ramkristopore belonging to the Respondents, or were part of a garden belonging to Sreenath Mullick, and afterwards purchased by the Appellant, Sreemutty Dossee, at a sale under a decree of the late Supreme Court at Calcutta. Both Courts in India decreed possession to the Respondents. It was from the judgment of affirmance by the High Court at Calcutta that the present appeal was brought.

Mr. Field, Q.C., and Mr. Leith, for the Appellants, contended, that the Respondents' right to recover possession of the alluvial land, depended on their establishing by evidence their proprietary right that the land was an accretion and annexed to their Mouzah Ramkristopore, which fact they insisted, the Respondents had failed to prove.

[472] Sir R Palmer, Q.C., and Mr. Gainsford Bruce, for the Respondents, were not called upon.

Judgment was delivered by

The Right Hon. Sir James W. Colville.—The suit out of which this appeal arises was brought by the Respondents, or those whom they represent, to recover possession of the land in question from the principal Defendant, whose title to it is founded on a purchase of some property formerly belonging to a family of the name of Mullick, which was mortgaged to Muttyloll Seal, and sold under a decree of the late Supreme Court.

It is perfectly clear, and, indeed, it has been fairly admitted at the Bar, that one principal question, if not the only question tried in the Courts below, and on which both Courts have found in favour of the Respondents, was, whether the alluvial land, which is the subject of the suit, had been the subject of certain revenue proceedings under Bengal Regulation II. of 1819 for the resumption and assessment of some alluvial land, in which a final decision was passed in the year 1833, or whether, on the other hand, they were part of certain lakhiraj lands forming part of the mortgaged property, and which, having been the subject of their resumption proceedings, had been decreed to be lakhiraj lands belonging to the Mullicks?

* Present: Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Joseph Napier, Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

The principal question, therefore, which was tried, was a question of identity of parcels, and it is difficult to conceive a question which, having been very carefully tried and determined on the banks of the Hoogly, is less proper to be retried on the banks of the [473] Thames. That seems to have been the feeling of the learned Counsel for the Appellants, who have very candidly abandoned any attempt to shake the concurrent judgment of the Courts below upon that point. They have, however, raised a question whether, assuming the lands in question to have been properly found to have been part of those which were the subject of the resumption proceedings in 1833, the Respondents can be said to have established their title thereto, inasmuch as the settlement for the lands in question was improperly made by the Government with those whom the Respondent represent, whereas that settlement ought to have been made with the Mullicks.

The effect of the resumption proceedings in 1833 was this. The Government had claimed to resume and assess 117 beegahs of land; of those 117 beegahs of land it was found that 45 beegahs were, as contended by the Mullicks, who appeared on that proceeding, Lakhiraj land, part of their garden which had been washed away and reformed, and they accordingly released those lands. The remainder of the 117 beegahs, in round numbers 72 beegahs, were held to be subject to resumption and assessment of revenue, and it was directed that the revenue should be assessed upon them according to the Regulations.

That proceeding, it is admitted, was final as between all the parties to it. The usual proceedings were subsequently had. The revenue appears to have been assessed upon these lands in the ordinary way. The Appellants now contend, and it is substantially the only argument urged at their Lordships' Bar, that those 72 beegahs, and whatever land may have been added to it by subsequent accretion, [474] is to be treated as an accretion upon their 45 beegahs of Lakhiraj land, and as land for which the Government was bound to settle with them and with no other person.

A question has been raised, by way of preliminary objection, whether such a case is open to them upon this record, and their Lordships having considered the pleading, are clearly of opinion, that it is not. The principal issue is:—"Whether it is true, that the disputed land is included in the permanently settled chur Ramkristopore belonging to the Plaintiffs, was in their possession, and they were dispossessed of the same by the Defendant, Muttyloll Seal; or that the said land, as part and parcel of the garden belonging to Sreenath Mullick, being according to the Order of the Supreme Court decreed and sold in auction, it was purchased by Sreemutty Dossee, and is in her possession?"

Their Lordships, construing that issue as it stands, would certainly be disposed to hold, that it assumes that, whatever was included in the permanently settled chur Ramkristopore did belong to the Plaintiffs, and that the question was, whether the disputed lands were within that permanently settled chur, or whether it was to be treated as part and parcel of the garden which belonged to Sreenath Mullick? But if there could be any reasonable doubt on the subject, their Lordships think that doubt is wholly removed, if the issue be construed and considered by the light of the principal Defendant's answer, in which we find this passage: "Specially when Sreenath Mullick was alive, with reference to the 133 beegahs, 2 cottahs, of Lakharij chur, appertaining to the said Ramkristopore, a suit for resumption was instituted by Govern-[475]-ment, as Plaintiff; and it was at first decided in favour of Government, in the Collectorate of this Zillah. Afterwards, on appeal by the deceased Mullick, the claim of Government was dismissed, and his appeal decreed in the Court of the Special Commissioner. The disputed land is comprised within that." That is an assertion, that the land in dispute was not included in the subject of the revenue proceedings in 1833, but was the subject of the other revenue proceedings, which resulted in a decree in favour of the Mullicks, affirming the land claimed by them to be Lakhiraj.

But then the meaning of the issue is made still clearer by paragraph 6, which states that: "For the purpose of showing their rights, the Plaintiffs have alluded to the decision, No. 101 of the Special Commissioner's Court, and to that No. 279 of this Court; but those allusions are merely allusions. In fact, there is nothing said in those decisions, that they are with reference to the disputed lands." There-

fore, there is, on the one hand, an affirmance that the land was the subject of other proceedings: and, on the other hand, a denial that they were the subject of the proceedings of 1833.

Their Lordships cannot but feel that it would be most mischievous to permit parties who had had their case upon one view of it fairly tried, to come before this Board, and to seek to have the appeal determined upon grounds which have never been considered, or taken, or tried in the Court below. It is obvious, that if they wished to make the case which they now make, they would, by their answer, have put the case in the alternative—viz., that assuming the land in question to have been the subject of those proceedings of 1833, the title which they now set up [476] was a title under which they might fairly claim to hold. Whether that title could be substantiated, it is needless for their Lordships to consider, because they are clearly of opinion, that the question cannot be litigated upon this appeal, and, therefore, they abstain from doing so. They would only point out, that considering what was done in the first suit in the Zillah Court of the Twenty-four Pergunnahs, considering the lapse of time since the settlement was made, and considering what the revenue law, with respect to the claims of parties claiming to have a preferable right of settlement, may be, it appears to them that the Appellants would have very considerable difficulty in establishing their case. They do not feel that it would be right to make any special reservation, which would invite further litigation by the raising of such a case. It might have been raised in this suit, and has not been so. If having rested their defence on a false issue they are precluded by the decrees of the Courts below from hereafter raising the case now made, their Lordships do not feel that it would be right to open the door to them. If they are not so precluded, the dismissal of this appeal will not create a bar to them.

Upon the whole, their Lordships feel that the only Order which they can advise Her Majesty to make upon this record is, that the decrees of the High Court of Calcutta in the two appeals, Nos. 721 and 722, affirming the decree of the Principal Sudder Ameen of Zillah Twenty-four Pergunnahs be now affirmed, and this appeal dismissed with costs.

[Followed *Gajapati Radhika v. Vasudeva Santa Singaro*, 1892, L.R. 19 Ind. App. 179.]

[477] THOMAS ALEXANDER WISE.—Appellant; JUGGOBUNDHOO BOSE.—Respondent* [Feb. 23, 1869].

On appeal from the Sudder Dewanny Adawlut of Bengal.

Suit to recover principal and interest on a Tumasook, or Bond, dismissed under Ben. Reg. XV., 1793, sec. 9, on the ground of usury.

A granted a Bond to B to secure an advance of money. C acted as B's Agent. A Lease was afterwards granted by A to D, a servant of C, at a colorable rent, and, subsequently, an Under lease was made by D to E, a relative of A, the consideration for which was also colorable, and made with a view to elude the Usury Laws.

Held, that the Bond, Lease and the Under-lease, formed one entire transaction, which was tainted with usury, and, therefore, void under Ben. Reg. XV. of 1793, secs. 8 and 9.

The suit out of which this appeal arose was brought by the Appellant, as personal representative of William Wise, late a Captain in the service of the East India Company, against the Respondent, to recover from the estate of Kishen Koomar Bose, deceased, his Father, the balance of principal moneys and interest at the

* Present: Members of the Judicial Committee.—The Right Hon. Sir James W. Colville, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

rate of 12 per cent per annum, secured under a Tumasook (Bond) which was granted by Kishen Koomar Bose. The Bond secured the repayment of Rs. 20,000, with interest, borrowed by, and paid to, Kishen Koomar Bose, by two cheques or drafts drawn by William Wise, in his own name, on his Bankers in Calcutta, and which were delivered through his Brother, Josiah Patrick Wise, the latter acting at the time as it appeared as the Agent of William Wise.

[478] The Principal questions raised by the suit were, whether the moneys so lent to Kishen Koomar Bose were the moneys of William Wise, and whether the sums were advanced through J. P. Wise acting as his Agent; or whether the moneys belonged to the latter, and were advanced by him on his own account, as Principal, and not as Agents; and further, whether, if the moneys belonged to William Wise, and were lent through J. P. Wise as his Agent, the Appellant, as his personal representative, was entitled to recover the balance of principal money remaining due on the loan, either alone, or with legal interest thereon, notwithstanding the provisions of Ben. Reg. XV. of 1793, section 9, which was pleaded in bar to the suit by the Respondent.

The Appellant's case was, that the Tumasook was a genuine instrument, and not tainted by usury, and in no way connected with the Lease and Sub-Lease.

It was insisted by the Respondent, that a Lease and a Sub-Lease hereinafter mentioned, were made, and entered into by J. P. Wise and Kishen Koomar Bose, or another person on his behalf, as a device for providing for the payment of interest beyond the legal rate of 1 per cent provided by the 9th section of the above Regulation. The Respondent maintained, that there was no privity between William Wise and the Appellant as his representative on the one part, and Kishen Koomar Bose and the Respondent on the other part, and that the *onus* of proving that J. P. Wise was the Agent of William Wise was on the Appellant, and that on that point he gave no proof whatever; that if that privity between Captain Wise and the Respondent, or his Father, had been [479] proved, still Captain Wise was bound to adopt the transaction in its entirety. That he could not adopt the Bond without adopting the Lease and Sub-Lease, and the attendant transactions; that such transaction was usurious and an attempt to evade the Usury laws, and that the Bond and the Lease and Sub-lease were void, so that no other decree but that of dismissal could have been under the above Regulation made in the suit.

The following is the history of the transactions out of which the suit arose:—

In the year 1831, the Respondent's father, Kishen Koomar Bose, applied to Josiah Patrick Wise for a loan of S. Rs. 20,000, to be paid off in six years. J. P. Wise was a British subject, and a Brother of the Appellant, and of the late Captain William Wise. He was at that time carrying on business at Dacca as a Merchant. After some negotiation a loan of S. Rs. 20,000, bearing interest at 36 per cent per annum, or 3 per cent per mensem, was arranged between Kishen Koomar Bose and J. P. Wise.

The statute, 13th Geo. III. c. 63, sec. 30, was in force when this transaction was entered into. It prohibited British subjects in the East Indies from taking directly or indirectly interest above 12 per cent per annum, and it declared all Bonds and contracts whatsoever for payment of principal, or for any usury, above 12 per cent per annum utterly void.

The material sections of Ben. Reg. XV. of 1793 which affected this case were to the following effect:—

IV. If the cause of action should have arisen on or after the 1st of January, 1793, the Courts are not to decree any interest on any sum whatsoever above the rate of 12 per cent per annum.

[480] V. If a lower rate of interest should have been stipulated no higher rate than the rate so stipulated was to be decreed.

VI. No accumulations of interest beyond the amount of the principal.

VII. And no compound interest was to be decreed.

VIII. The Courts are not to decree any interest whatsoever in any case where the Bond or instrument given for the security and evidence of the debt shall have been granted on or subsequent to the 28th of March, 1780, and should specify a higher rate of interest than is authorised by the Regulation to have been given and received subsequent to that date.

IX. Nor to decree any interest whatsoever in favour of the Plaintiff, in any case where the cause of action shall have arisen on or subsequent to the 28th of March, 1780, where a greater interest than is authorized by the Regulation shall have been received, if it be proved, that any attempt has been made to elude the rules prescribed in the Regulation by any deduction from the loan, or by any device or means whatsoever, "nor to give any judgment but for the dismissal of the suit, with costs to be paid by the Plaintiff."

It appeared, that to take the case out of the Usury laws, and yet obtain interest, at a rate exceeding 12 per cent per annum, it was arranged that Kishen Koomar Bose should give a Tumasook (Bengallee Bond) for payment to J. P. Wise of the Rs. 20,000 with interest, on the face of it at one per cent. per mensem, within six years, that Kishen Koomar Bose should give an Izarah or lease of certain estates to a Servant of J. P. Wise, named Moneeram Sircar, and [481] that afterwards the property should be Under-leased to Kishen Koomar Bose in the name of his relative, Subchunder Ghose, and that the interest in excess of one per cent. per mensem should be taken from the allowance called Rupoom, of the Lease and the profits of the Under-lease.

Accordingly, in June, 1831, S. Rs. 20,000, were advanced by J. P. Wise to Kishen Koomar Bose, and the latter then delivered to him the Tumasook, by which he agreed to pay J. P. Wise S. Rs. 20,000, with interest at one per cent. per mensem by the month of Cheyt, 1243, or March, 1837. At the same time Kishen Koomar Bose also signed an Izarah or Lease of his interest in certain zemindaries to Moneeram Sircar for a term of six years from 1238, (or April, 1831,) to 1243. This document was not in the record, but Moneeram Sircar executed and delivered to Kishen Koomar Bose an Izarah Kaboolat or counter-part Lease, which was in evidence. In this document the collections from the zemindaries were stated to amount to S. Rs. 14,933. 11. 2. 0; the expenses of collection to S. Rs. 1160. 13. 10. 2; the fees of the Lease S. Rs. 1200; the proprietor's expenses of collecting the wages of legal Agents, and expenses incidental to the payment of the Government assessment S. Rs. 300; the Government assessment S. Rs. 6117. 9. 5. 0. The balance, amounting to S. Rs. 6155. 4. 5. 0, was reserved as the annual rent which Moneeram Sircar agreed to pay Kishen Koomar Bose during the term of six years by certain specified monthly instalments. By a memorandum endorsed on the counter-part Lease signed by J. P. Wise, he became bound as surety for Moneeram Sircar.

Kishen Koomar Bose at the same time delivered to [482] Moneeram Sircar a Borratnamah, by which he directed Moneeram Sircar to pay J. P. Wise, during the term of six years, the sum due to him for allowance, and to take upon himself to pay off the Bond debt, which, with interest at one per cent. per mensem, would amount to S. Rs. 27,438. 2a. 3g. 2c. from the net rent for the property, during the whole term.

Moneeram Sircar was thereupon let into possession of the property, and collected the rents from Bysack, 1238, corresponding with the middle of April, 1831, a little more than a month anterior to the loan, and he continued in possession and collected rents for about nine months.

On the 15th of January, 1832, Moneeram Sircar executed an Izarah or Under-lease of the property leased to him to a relative of Kishen Koomar Bose, named Subchunder Ghose, for the identical term of the Lease commencing from the year 1238, at a profit of Rs. 850 a year, which sum was reserved to be paid to Moneeram Sircar annually during the whole term, according to the instalments at foot. Kishen Koomar Bose also bound himself to Moneeram Sircar as security for Subchunder Ghose, in respect of the Sub-lease, and took possession of the zemindaries.

According to his arrangement, J. P. Wise became entitled to receive during the six years the amount of net rent reserved in the Sub-lease at Rs. 7150 per annum, of which Rs. 5100 was specifically appropriated to the principal and interest at 1 per cent., under the assignment, Rs. 42,900; the Rupoom Izarahdaree, or fees for Lease, which was at first fixed at Rs. 1200, and afterwards by the Sub-lease at Rs. 1035; 6210, amounting in the whole to S. Rs. 49,110, whereas [483] the amount of the Bond with legal interest, if paid at the end of the term, only amounted to S. Rs. 21,672.

Kishen Koomar Bose having fallen into arrears in the payment of his rent, Moneeram Sircar, on the 25th of April, 1834, instituted a suit in the Court of the

Principal Sudder Ameen of Zillah Dacca, to recover from Subchunder Ghose, as Sub-lessee, and from Kishen Koomar Bose, as his surety, S. Res. 14,969. 12. 2, which was made up as follows:—Rent at Rs. 7150 per annum from Bysack, 1238, to Maugh, 1240, being 2 years and 10 months, according to the instalments of the Sub-lease, S. Rs. 19,675, less paid on account, 6510. 13. 18. 1. Interest from Maugh, 1238, to Maugh, 1240, at 1 per cent. per mensem, Rs. 1805. 10. 1; making together Rs. 14,969. 12. 2.

Kishen Koomar Bose by his answer, after stating at length the particulars of the translation, contended, that the Sub-lease in question was part of the loan transaction between J. P. Wise and himself, that it was a device to elude the Usury laws, and that under sec. 9. of Ben. Reg. XV. of 1793, the suit ought to be dismissed.

Shortly afterwards, and on the 29th of May, 1835, Moneeram Sircar, on the ostensible ground that he could not pay the expenses of litigation, assigned the Lease, and the suit for recovery of the rent and his rights under the counterpart Lease, to J. P. Wise, and by a proceeding, dated the 12th of June, 1835, founded on a petition by J. P. Wise, his name was substituted as the Plaintiff in the suit, in lieu of that of Moneeram Sircar.

J. P. Wise as the substituted Plaintiff, filed a rejoinder to the effect, that Moneeram Sircar had been the actual Lessee, that though the rent had been [484] made applicable to the liquidation of the Bond, it was in fact a separate transaction, that the Sub-lease was also a distinct transaction, and denied that the Sub-lease was a cloak to screen a usurious transaction; and submitting that, as he then stood in Moneeram Sircar's place, he was entitled to recover.

The suit came on for hearing before Mr. John Cooke, acting Judge, who found that the Bond, Lease and Sub-lease formed, in effect, one and the same transaction between J. P. Wise and Kishen Koomar Bose, and that Moneeram Sircar and Subchunder Ghose were mere tools; that the transaction was usurious, and he ordered, that the suit should be dismissed, with costs, under the provisions of sec. 9. Ben. Reg. XV. of 1793.

J. P. Wise appealed to the Sudder Court against this decree, and after a separate consideration of the case by four Judges, consisting of Messrs. Edward Lee Warner, David Smith, Thomas P. B. Bonell Biscoe, and Charles Tucker, that Court, the fifth Judge (A. Dick) presiding, on the 8th of September, 1840, ordered that the appeal of J. P. Wise should be dismissed, and the decree affirmed with costs.

J. P. Wise appealed to Her Majesty in Council, but the appeal was dismissed, and the decision of the Sudder Court affirmed (see case reported 4 Moore's Ind. App. Cases, 201).

On the 8th of April, 1849, the Appellant, claiming as the administrator of the estate of Captain Wise, instituted a suit in the Court of the Principal Sudder Ameen of Dacca against the Respondent, as the administrator of Kishen Koomar Bose, who had died, and J. P. Wise. The plaint stated, that Captain Wise wishing to return [485] to England, authorized J. P. Wise, if any respectable person wished to take a loan of money at one per cent. per mensem, to make a loan out of his funds; that Kishen Koomar Bose applied to J. P. Wise for a loan of Rs. 20,000, bearing interest at one per cent. per mensem, J. P. Wise agreed to make such loan, and lent that sum to Kishen Koomar Bose, who, on the 17th Jeyt, 1238, on his Tumasook agreed to pay the same with interest at one per cent. per mensem, in Cheyt, 1243. That the advance was out of the moneys of Captain Wise, and that for the repayment of the sum lent, Kishen Koomar Bose gave an Izarah to Moneeram Sircar and an order was made for payment of the advance and interest out of the rents. That the Lessee took possession, and nine months afterwards Kishen Koomar Bose took from Moneeram Sircar, an Under-lease of the same estate in the name of his Agent, Subchunder Ghose, on his own security; that Kishen Koomar Bose did not pay the rent, that Moneeram Sircar sued for the rents due, and while the suit was pending, he transferred all his benefit under the Izarah to J. P. Wise. That such suit was unsuccessful, that of the fact of the Izarah and due Izarah Captain Wise knew nothing. That the decision in the rent suit could be no bar to his proceeding in the suit, as neither were the parties to nor was the subject matter of the two suits identical. That Captain Wise died in November, 1847, leaving two Brothers, the Appellant and J. P. Wise his heirs. That the Appellant alone obtained from the Supreme

Court probate of his Will, and that he had, therefore, the right to collect the money. That Rs. 1966. 9. 14. 3, for principal, and Rs. 4544. 4. 3. 2, for interest, making together Rs. 6510. 13. 13. 1, had been paid, leaving a balance of Rs. 18,033. 6. 3. 1, for [486] principal, and that as the amount due for interest had accumulated to a sum equal to the principal he sued to recover, Rs. 36,066. 12. 10. 2, equivalent to Rs. 3847. 1. 3. 15, from the Respondent, who on his Father's death became liable to pay the same out of his property.

The Respondent by his answer pleaded, in effect, that his Father was never indebted to Captain Wise, and that Captain Wise had never made any claim, and that the moneys advanced were not his: that, on the contrary, J. P. Wise had made the advance out of his own funds and by means of the Izarah had made a usurious bargain, and that he had attempted to evade the Usury laws and received usurious interest: and that the claim ought to be dismissed under section 9 of Ben. Reg. XV. of 1793: and he submitted, first, that the claim had already by the several decisions in the former suit been pronounced inadmissible, and secondly, that the suit was a fraud concocted between the Appellant and J. P. Wise to get rid of the former adjudication.

The issues in the suit were, first, was Captain Wise or Mr. J. P. Wise the owner of the money lent? Secondly, was the Plaintiff authorized to sue for the money? And thirdly, had Juggobundhoo Bose repaid the money? A further issue in bar to the suit was, whether or not, the former suit decided on the 1st of June, 1837, by the Judge of Dacca, and appealed to the Sudder Court and to the Privy Council, rendered the last suit liable to dismissal under sec. 16, of Reg. III. of 1793, without going into the merits.

On the 29th of November, 1851, the suit came on for hearing upon these issues, when Mr. H. V. Bayley, and the then additional Judge of Dacca [487] held, that the matter had already been adjudicated by the decrees in the former suit, and dismissed the claim with costs.

Against this judgment the Appellant appealed to the Sudder Court. The appeal was heard on the 26th of June, 1852: and that Court (Mr. C. Steer presiding), considered that the additional Judge was in error in ruling that the suit was barred from even a hearing by section 16, of Ben. Reg. III., of 1793, as in his opinion it was a *de novo* action to be decided on its merits, although all due weight should be given to the intent and effect of the final decree of the Privy Council on the rent claim," and he ordered the decision of the additional Judge to be reversed, and the case remanded for a hearing and judgment on its merits.

On the 22nd of September, 1854, the additional Judge of Dacca fixed the following issues in bar:—First, that the decision of the Sudder Court of the 8th of September, 1840, bar the suit? and, secondly, did the decision of Her Majesty's Privy Council of the 12th of February, 1847, bar the suit? and certain issues on the merits, together with a supplementary issue whether cl. 4, sec. 4, Reg. XXVI. of 1814, and sec. 9, of Ben. Reg. XV. of 1793 admitted of any decree but the dismissal of the suit?

The Appellant, to support his claim, examined witnesses and produced some documents, the greater part of which were not proved. He was not himself examined as witness, nor did he take any steps to procure the evidence of J. P. Wise to prove that he had acted in the transaction as Agent for Captain Wise, and show by Letters and accounts what was the extent and nature of his authority.

On the 30th of June, 1854, judgment was [488] pronounced by Mr. H. V. Bayley, the additional Judge of Dacca. The effect of his judgment was, that the first and second issues had been already disposed by the Sudder Court, when it remanded the case as a *de novo* action, to be decided on the merits, although all due weight was to be given to the intent and effect of the final decree of the Privy Council on the rent claim. On the eighth issue, looking at the substance of the transaction, he considered that the Bond was one of three instruments executed as mere shifts for usury, and to elude the Usury laws: that there was no proof that Captain Wise was the lender: that the substance of the contract showed, that the lender of the money under the Bond was J. P. Wise, whether J. P. Wise drew the money from Captain Wise or not: and that the suit admitted of no other judgment but dismissal under section 9 of Ben. Reg. XV. of 1793. That even if Captain Wise had been the lender, yet, the

attempt to elude the usury law being proved, the contract was his, and this suit on the Bond would have been repudiated by the Court : and he ordered the suit to be dismissed with costs.

Against this decree the Appellant appealed to the late Sudder Dewanny Court at Calcutta. While such appeal was pending, proceedings were taken to obtain security for the costs of the appeal, in consequence of the Appellant having proceeded to England. The Sudder Court, in consequence of no security being deposited within six weeks, dismissed the appeal by an Order dated 21st of August, 1855. The Appellant applied unsuccessfully to obtain a review of this Order. He then appealed to Her Majesty in Council against the Order dismissing his appeal. By an Order in Council, dated the 29th of July, 1859, the [489] Order of the Sudder Court, dated the 21st of August, 1855, was reversed, and his appeal against the decision of the additional Judge of Dacca was restored (see case reported on this point 7 Moore's Ind. App. Cases, 431).

On the 7th of April, 1862, the appeal came on for hearing before Messrs. C. B. Trevor, H. V. Bayley, and C. Steer, three of the Judges of the Sudder Court. The material portion of their judgment was as follows:—"That the Bond executed by Kishen Koomar Bose was in J. P. Wise's favour, and that the whole transaction was ostensibly carried on by that person is equally clear. The allegations then in the present plaint are, interpreting it in the only way that will give the Plaintiff a right to sue the Defendant, not only that the money was Captain Wise's, for that alone would, as before remarked, give Captain Wise no right to sue the Defendant, but that J. P. Wise was the Agent of Captain Wise, that is, the Agent of an undisclosed Principal, and that he, J. P. Wise, entered, either in his own name or that of others, into certain transactions as to the Lease and Sub-lease with the Defendant's Father, beyond the authority vested in him : that he, Captain Wise, the principal, is at liberty to repudiate these unworthy transactions, and to sue a third party for so much of the transaction as was done by his Agent, J. P. Wise, within the authority conferred upon him. As the Defendant denies the agency or privity of any sort with the Plaintiff, it is necessary first to inquire, what is the evidence of the alleged agency of J. P. Wise for Captain Wise. It appears from an office copy of an account between Messrs Mackintosh and Wise, and [490] other evidence before us, that the two cheques of Rs. 10,000 each, were drawn on the firm of Mackintosh and Co. by Captain Wise, in favour of J. P. Wise, on the 24th of May, 1831, and were debited to the former in the account of the firm severally on the 21st of June, 1831, and the 6th of July, 1832, that with these cheques J. P. Wise purchased hoondies on Calcutta and sold them in the Dacca Bazaar, and from the proceeds made the payment to Kishen Koomar Bose. Now, admitting this evidence as true, it only goes to prove, that J. P. Wise borrowed the money from his Brother, Captain Wise. It does not show that J. P. Wise acted in this transaction as the Agent, either by express or implied authority, of his Brother, or that, in short, the relation of Agent and Principal, as regards the Rs. 20,000, existed between them, and on failure of proof on this point the plea of the Defendant, confined to the state of the Bond itself, stands good. It follows, that the present action, which in order to be successful must be founded on proved agency, either expressed or implied, necessarily fails. But, even admitting the agency, we would remark, though the point is not necessary to our decision of the case, that whilst, as Principal, Captain Wise is entitled to all the advantages and benefits of the contracts of his Agent, considered in its entirety, he must take them with all the attendant trade transactions, and subject to all the attendant just counter-claims and defences of the other contracting party : and if the contract entered into by J. P. Wise was impeachable for a fraudulent attempt to evade the Usury laws, Captain Wise, as a general rule, would be affected with all the consequences thereof, and could not avail himself of his own [491] innocence arising from ignorance, to support what would otherwise be a defective title. It follows, from the view which we adopted before, that the present suit, founded on the agency of J. P. Wise, necessarily fails. The decision of the Lower Court is affirmed, with costs."

The Appellant, dissatisfied with the decree founded on this judgment, brought the present appeal.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—Neither William Wise nor the Appellant, his personal representative, was made a party to the former

suit (see *Wise v. Kishen Koomar Bose*, 4 Moore's Ind. App. Cases, 201), to enforce the terms and conditions of the under-lease, which was rightly treated by the Plaintiff in that suit as made long subsequent to and entirely distinct and separate from the transaction of the loan; that decision is not *res judicata* and is in nowise binding on, and ought not to be used in the present suit to affect prejudicially the rights and interests of William Wise, or his estate. We submit, that the Tumasook is *prima facie* valid, and, therefore, the *onus* of proving that the subsequent transactions were a shift to evade the law respecting usury lay on the Defendant, and that he failed to prove that the original loan was usurious. No subsequent reservation of illegal interest will taint or invalidate the original claim. There was no evidence of any agreement by J. P. Wise at the time of the execution of the Tumasook, or of effecting the loan, that the Sub-lease should be thereafter executed as part of the original transaction, or to secure the payment of more than [492] legal interest on the loan, or that William Wise ever received any usurious interest in respect to the loan, or that any profits was derived by the Lessee which could be applied to the payment of interest in excess of legal interest. The Ben. Reg. XV. of 1793, sec. 9, upon which the Court below founds its judgment, contains no declaration that the principal money should be forfeited, nor that the original contract of loan or the Bond to secure the repayment is null and void, even if such a device as therein mentioned should be proved. Such enactment being a penal one, cannot be extended by mere implication to affect such forfeiture.

Mr. Cave, for the Respondent, was not called on to address their Lordships.
Judgment was delivered by

The Right Hon. the Lord Justice Giffard.—Their Lordships are unable to entertain any doubt upon this case, either with respect to the facts, or with respect to the law which is applicable to those facts.

The facts are simple and plain. It is perfectly clear, that the original Lease was connected with the Bond, and that that Lease was a beneficial Lease. But the matter does not stop here, because, when you come to the under-lease, although it was subsequent in point of date, it has reference back to the date of the original Lease; and if you look at the assignment from the Servant at the time when the Servant ceased to be in the service of Mr. J. P. Wise, that assignment deals with the whole as one entire transaction. Their Lordships, therefore, can come [493] to no other conclusion than that the transaction was one entire transaction, and that it was a transaction which was tainted with usury.

Then, with respect to the argument, that Captain Wise had no knowledge of what took place, it appears, that to all intents and purposes, Mr. J. P. Wise was his Agent. It is not alleged, and still less is it proved, that the Native who lent his money was at all aware, that there was any distinction between one part of the transaction and the other. In point of fact, Mr. J. P. Wise was acting for an undisclosed Principal, the loan being a lending upon one transaction, which transaction was clearly usurious; therefore, Captain Wise is in this position: either he must go against his Agent and repudiate the transaction altogether, or if he does not repudiate the transaction, he must take it with all its consequences.

That being so, brings us to the terms of Regulation XV. of 1793. There are two sections affecting the question, the 8th and the 9th. The 8th section deals with the case in which the usurious interest is disclosed on the face of the instrument, and is different to the 9th section. There might be a very good reason for that. There might well be, where there was no fraud, and where the whole thing was disclosed, a right to recover the principal, whereas, in a case where there was fraud, that right might be taken away. The terms of the 9th section appear to their Lordships to be perfectly clear, because the Court is not "to decree any interest whatsoever in favour of the Plaintiff, in any case where the cause of action shall have arisen on or subsequent to the 28th of March, 1780, where a greater interest than is authorized by this Regulation [494] shall have been received, or stipulated to be received, if it be proved, that any attempt has been made to elude the rules prescribed in it by any deduction from the loan, or by any device or means whatever"; and then there comes this: "nor to give any other judgment but for the dismissal of the suit," and we cannot conceive that that means anything but the dismissal

of the suit, so far as it has relation to that usurious contract, though of course it would be different, if there was one count on one transaction, and another count upon another and a totally different transaction; in point of fact this matter, if not actually concluded by the judgment, is virtually concluded by the expression of opinion in the former case of *Wise v. Kishen Koomar Bose*, for in 4 Moore's Ind. App. Cases, 219, we find this sentence: "If, therefore, in this case, we were to pronounce a judgment whereby the principal should be recovered, without interest, such a judgment would be in complete defiance of that Regulation, by which we are bound." We have nothing to do but to repeat these words, in which we fully concur: therefore, on both grounds, first, because the transaction was usurious, and, second, because of the terms of the Regulation, their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed with costs, and the decree appealed from affirmed (see *Shah Mukhun Lall v. Baboo Sree Kishen Singh*, ante, [12 Moo. Ind. App.], p. 157).

[495] KATCHEKALEYANA RUNGAPPA KALAKKA TOLA OODIAR.—*Appellant*:
KACHIVIJAYA RUNGAPPA KALAKKA TOLA OODIAR.—*Respondent* *
[Feb. 24, 1869].

On appeal from the High Court of Judicature at Madras.

In a suit against a Zemindar by a member of his family for maintenance out of the zemindary, no issues as directed by the Code of Civil Procedure (Act, No. VIII. of 1859, secs. 139-141) were recorded by the Primary Judge. Held (1) that such omission was not fatal, as the Court could proceed to decision in the manner indicated by section 351 of the Code; and (2) as the Court had directed an inquiry as to maintenance, which was to be deemed equivalent to issues.

It is in the discretion of the Judge in a maintenance suit, in estimating the amount to be awarded, to fix the place of residence [12 Moo. Ind. App. 506].

The Letters Patent of 1862, creating the High Court of Judicature at Madras, section 42, provide, that the reasons given by the Judges of their decision should, on appeal to England, be transmitted with the record for the information at the hearing by the Judicial Committee of the Privy Council, which direction it is the bounden duty of the Judges to comply with [12 Moo. Ind. App. 502].

This was an appeal by the Zemindar of Oodiar Poliém, from a decree of the High Court of Madras, rejecting a regular appeal from a decree of the Civil Court of Trichinopoly. The question being, whether the Civil Court's decree awarding to the Respondent maintenance, marriage expenses, and residence out of the proceeds of the zemindary of Oodiar Poliém was correct.

The circumstances out of which this question arose were these:—

[496] By an Istimrar Sunnud, dated the 23rd of December, 1817, the zemindary of Oodiar Poliém was granted to Katchi Rungappa Oodiar, the Father of the Appellant and Respondent, as his self acquisition. Katchi Rungappa Oodiar, the first Zemindar, died before the year 1834, leaving Moottoo Vizia, his eldest Son and heir surviving, who became the second Zemindar. Moottoo Vizia died in 1836, leaving Katchi Rungappa, an infant Son and heir, surviving, who became the third Zemindar. He died in the same year, leaving his Uncle, the Appellant, the heir to the zemindary.

On the 13th of December, 1860, the Respondent filed a plaint in the Principal Sudder Ameen's Court at Trichinopoly, against the Appellant, to recover Rs. 9999 for his maintenance, accommodation, and marriage expenses. The plaint stated,

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colville, and the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.

that the Plaintiff was the third and the Defendant the first of the three Sons of Plaintiff's Father, then living; that the Defendant was in possession of real and personal property of the Plaintiff's Father, namely, the zemindary of Oodiar Poliem, capable of yielding an annual income of Rs. 40,000; Jewels, and ready cash received by the Defendant from the Circar at the time of his installation, valued at Rs. 61,393 3a. 3p., and two villages, situate in the Zillah of Combaconum, capable of yielding Rs. 1000 a year; that the Plaintiff was entitled to one-third of the income, both under Hindoo Law and local usage, and prayed, first, a decree for an annual sum of Rs. 3000, or Rs. 250 per mensem for his maintenance; and secondly, that the Building known by the name of Niddaraikoodum, lately occupied by his Mother, and situate at Oodiar Poliem, and valued at Rs. 3000, might be made [497] over to him; or, in the alternative, to pay him Rs. 2999 for erecting a House for his residence; and a further sum of Rs. 4000 for the expenses of his marriage.

The Appellant by his plea stated, first, that more than twelve years having elapsed since the Plaintiff's maturity, his claim was barred by the Statute of Limitation. Secondly, that the income from the zemindary was not sufficient to cover his expenses. Thirdly, that the Plaintiff's Mother was in the receipt of a monthly maintenance of Rs. 40, under a decree of the Court, and that the Plaintiff being a member of her family, was not entitled to a separate maintenance. Fourthly, that Rs. 7 a month was sufficient for a man to support himself on. Fifthly, that the Defendant was not bound to pay for the expenses of the Plaintiff's marriage, nor to erect a building for his residence.

Two documents were given in evidence by the Plaintiff, exhibits A and B. The first (A.) was a decree of the Sudder Court, dated the 23rd of December, 1837, in a former suit for maintenance out of the same zemindary, which was dismissed on the ground, that the zemindary was the self acquisition of the Zemindar, the Defendant, under the before-mentioned Istimrar Sunnud, dated the 23rd of December, 1817, but that the then Plaintiff, Katchi Oodiar, who claimed through an illegitimate Son, and the Zemindar under the Istimrar Sunnud, being Grandsons of a former Zemindar, the Plaintiff, whether legitimate or not, would (the family being Soodras) have otherwise been entitled to maintenance. The second (B.) was a petition by the Appellant, dated the 18th August, 1836, praying either for possession of the zemindary as heir, or for maintenance [498] at Rs. 700 a month, stating that "the aforesaid zemindary and my kavil (moniam) lands, situate in the Arcot Suba, yield an income of Rs. 50,000 a year." No other evidence was then adduced.

The Principal Sudder Ameen by his decree dismissed the plaint on the ground that the zemindary was self-acquired.

The Respondent appealed to the Civil Court of Trichinopoly urging that the zemindary was ancestral property, and not the self-acquired estate of the Appellant; that by the deed of permanent assessment with the late Zemindar, Father of both the parties, the zemindary was vested in him, his heirs, successors, and transferees; that the Government, on the death of the late Zemindar, allowed the property to pass to the Appellant, after receiving from the latter a muchilka (agreement) to the effect, that he should maintain the Respondent, at the time an infant, and the other members of the family; that evidence of the Respondent had been rejected; and lastly, that the Appellant and the other members of the family had been in receipt of maintenance from the zemindary.

The Civil Court by its decree affirmed the decree of the Principal Sudder Ameen on the like grounds.

In the special appeal preferred by the Respondent, the High Court by its decree, dated the 19th of December 1862, overruled both the decrees of the Principal Sudder Ameen and the Civil Court, declaring that the zemindary was ancestral, and the Respondent entitled to maintenance from it, and the suit was remanded to the Civil Court with instructions "To ascertain the means of the Appellant and the other facts of the case, and to proceed to a decision in the manner indicated in section 351 of the Code of Civil Procedure."

[499] The suit was accordingly remanded to the Civil Court of Trichinopoly, and heard as an original suit, without any further proceedings being taken in the subordinate Court of the Principal Sudder Ameen.

No issues were framed in the Civil Court.

Evidence was given by the Respondent of a petition, filed in the year 1817 by the then Zemindar for maintenance to his Son, and Orders by the Collectors awarding maintenance to members of the family. The Appellant was not permitted to give any evidence, the Court considering it unnecessary to examine any witnesses, although, as the Appellant alleged, among the documents which he might have produced, if he had not been prevented by the absence of issues, and by the decision of the Civil Judge, was a Sunnud of the Collector, dated the 20th of June, 1849, showing that the income of the zemindary was then reduced by the income from the Kavil lands, amounting to more than Rs. 26,000 per annum.

On the 29th of October, 1863, the Civil Judge (Mr. T. J. P. Harris) made his decree which stated, that the Defendant urged, that Rs. 35 a month were sufficient for the support of the Respondent; that the Defendant admitted the exhibit B, and as the zemindary yielded annually Rs. 50,000, the Appellant was in a position to allow the Respondent a proper maintenance; that document D, showed that Rs. 250 were formerly awarded to a member of the family as maintenance; therefore, the Court directed the Defendant to pay the Plaintiff monthly, Rs. 200 as maintenance, together with arrears from the date of plaint, and Rs. 2000 for marriage expenses, and part of the Defendant's House to be given up as a place of residence for the Plaintiff, and to pay the costs.

[500] From this decree the Appellant filed a memorandum of appeal on the following among other grounds:—first, that the claim was barred by the Statute of Limitation; second, that the Istimrar Sunnud granted to the first Zemindar was not produced to show the nature of the property; third, that the Respondent's Mother was entitled to be maintained by her Son, and the Appellant ought to be relieved, at least, to the extent of her maintenance. Fourth, that the Civil Judge's estimate of the income of the zemindary was erroneous. Fifth, that the Civil Court had not correctly estimated the wants of the Respondent. Sixth, that it had misconstrued the document B. Seventh, that documents D and E, which were Orders from the Collector in reply to claims made by the Respondent's elder Brother for maintenance and for housing, were not evidence against the Defendant, nor was there any evidence of their having been acted upon. Eighth, that the maintenance awarded being more than liberal, no separate allowance was necessary for the marriage of the Respondent, and, even if necessary, the amount awarded was exorbitant; and ninth, that after allowing maintenance, the Appellant was not bound to provide the Respondent with lodging, and to allow him to live in the Palace would be inconvenient both in principle and practice.

On the 28th of May, 1864, a decree was passed by the High Court of Madras, consisting of Mr. Justice Phillips, and Mr. Justice Frere, dismissing the appeal, on the ground, that it was of the nature of a special appeal. No grounds were given for the decree, nor were the reasons of the Judges for their judgment transmitted to England with the record.

[501] The appeal was from this decree.

As the Respondent did not appear, the appeal was heard *ex parte*.

Sir R. Palmer, Q.C., and Mr. Mackeson, Q.C., for the Appellant.—In the first place, the proceedings in the Civil Court were wholly irregular. No issues or points were framed or recorded as directed and required by the Code of Civil Procedure (Act. No. VIII. of 1859), secs. 139, 140-1. That is a fatal objection; *Srimut Moottoo Vijaya Gowery Vallabha Perria Woodea Taver v. Rany Anga Natchiar* (3 Moore's Ind. App. Cases, 278), *Baboo Rewun Pershad v. Jankee Pershad* (10 Moore's Ind. App. Cases, 25). Secondly, evidence was improperly rejected. The Appellant was debarred from calling witnesses, or giving in evidence a Sunnud of a Collector which would have shown the real income of the zemindary, the very point in issue. That was a denial of justice, and the suit ought, therefore, to be remitted to India, since no satisfactory decision can be arrived at on the merits: *Jeswunt Sing-jee Ubbay Sing-jee v. Jet Sing-jee Ubbay Sing-jee* (2 Moore's Ind. App. Cases, 424). Thirdly, no maintenance can be awarded out of a zemindary, but even if it could be by the Hindoo Law, the amount of such maintenance out of an indivisible family property must depend on a properly ascertained amount of the net income: *Exp. Janaky Ummah* (2 Strange's Mad. Cases, 285, and see note

to *ib.*, p. 288). Here maintenance was awarded on an assumption, that the net income of the zemindary was [502] above Rs. 50,000 per annum. The plaintiff only assessed it at Rs. 40,000, but after paying taxes, interest, and instalments of family debts, and other necessary expenses, it was shown that such annual income did not exceed Rs. 2000. Lastly, no separate allowance ought to have been made for the Respondent's marriage, for the Appellant was not bound to provide the Respondent with a residence in addition to maintenance.

Judgment was delivered by

The Right Hon. the Lord Justice Selwyn.—Their Lordships have considered this case, and they must in the first place express their regret, that the record contains no statement of the grounds of the decision of the High Court which is now under appeal. The Charter of the High Court of Judicature, section 42, expressly requires, that the reasons of their decisions should be recorded by the Judges, and transmitted for the information of this Court, and it is the subject of great regret, especially in a case which comes before their Lordships *ex parte*, that the grounds of the judgment appealed from should be wanting in the record. But in the absence of any such information, their Lordships must deal with the case as it appears on the record in this present suit.

The first objection which is taken is, that in this case no issues were directed in the manner which has been prescribed by the practice of the Courts in India. But the decree of the 19th of December, 1862, which directs that the matter shall be referred to ascertain the amount of maintenance, which may appear to be justly and properly payable with reference to the means of the Defendant, and the other facts of the [503] case, and to proceed to the decision in the manner indicated in section 351 of the Code of Civil Procedure, removes any such objection, because, that is, in substance, an Order for inquiry, and an Order for inquiry raising the very points upon which the Appellant has relied in the arguments before this Court; for it is a direction to ascertain the amount of the maintenance which may appear to be justly and properly payable with reference to the very point which it was urged ought to have been taken into consideration, viz. the means of the Defendant, in connection with the other facts of the case. It appears to their Lordships to be impossible to object to such an inquiry as that, upon the ground of its not being sufficient. It is, therefore, equivalent to issues, and rendered any further issues entirely unnecessary. The first ground of objection, therefore, fails.

We proceed, then, to the second ground, namely, that there was in this case an improper rejection of evidence. Now, it appears to their Lordships that, under an inquiry such as that to which I have alluded, it was obviously competent to either party to produce evidence in support of his case during the conduct of that inquiry; and if evidence had been properly tendered on the part of the Appellant, and had been improperly rejected by the Judge, such improper rejection of evidence would have constituted a valid ground for appeal. But we find that, in fact, there was an appeal from the decision of the Judge,—a decision arrived at in the prosecution of that inquiry,—and the eleven grounds for the appeal from that judgment are stated. In considering these eleven grounds, we find, in the first place, that the Appellant raised the objection that the Plaintiff's case was [504] barred by the Statute of Limitation; and secondly, the Plaintiff not having produced nor given notice to the Defendant to produce the Istimrar Sunnud of the Zemindar, no judgment could be passed as to the nature of the property. Now, that appears to be again raising the same question which had been decided before, namely, as to whether this property was acquired property, or whether it had been inherited? It appears to have been originally acquired by one Zemindar, but it had descended to the then Zemindar, and, therefore, it could not then be properly considered as acquired property. That had been already decided, and that point, once before decided, seems to be intended to be raised again by the second ground of appeal. The third ground proceeds to raise the objection as to the Plaintiff's Mother being entitled to maintenance, and then the fourth is, "The Civil Judge's estimate of the income of the zemindary is erroneous, and even opposed to the plaintiff's own allegation." The fifth is, "The

Civil Court has not correctly estimated the wants of the Plaintiff." We need not go at length into the other grounds, but it is to be observed, that these grounds, proceed mainly upon an insufficiency of the evidence produced by the Plaintiff, and that they do not in the least degree point to any evidence having been tendered by the Appellant, or having been improperly rejected by the Judge; and under these circumstances, even if the Appellant had any such ground of appeal, if he did not think fit to produce it before the Court, where such an appeal might regularly have been prosecuted, and where such a ground would have afforded a sufficient ground for such an appeal, in the opinion of their Lordships, it is not [505] competent for him to maintain it now; and it appears to have been raised for the first time in the petition of the 6th of August, 1864, where it is said, "Because your Petitioner was not permitted to prove what the net income of the zemindary was." Their Lordships, therefore, are of opinion that that second ground of complaint also fails.

Then it is said, that the decision is erroneous, inasmuch as it is based upon an assumption that the income of the zemindary was Rs. 50,000, which is more than has been alleged in the original plaint, which only claimed maintenance as against an income of Rs. 40,000. But in the opinion of their Lordships, this is a misconception of the terms of the judgment. The judgment appears to have proceeded upon this. The Claimant alleges, that the income of the zemindary is Rs. 40,000, but the Judge finds, that upon a former occasion, many years ago, it is true, the Appellant had admitted the income to be Rs. 50,000; and that on a former occasion, also many years ago, in the year 1831, a sum of Rs. 250 per mensem, or Rs. 3000 a year, had been awarded to another Brother of the Zemindar for maintenance. The Judge, proceeding upon that, says, "I find an allegation of Rs. 40,000 on the one side, an admission of Rs. 50,000 on the other, and a former Order allotting for maintenance Rs. 3000; and, in the absence of any evidence to the contrary, the fair inference to be drawn from these documents is, that Rs. 2000 is a reasonable sum for maintenance, with the addition of a house." Under these circumstances, their Lordships are of opinion, that it cannot with justice be said that the Judge has proceeded upon the foundation of the income being Rs. 50,000, and, [506] therefore, in excess of the allegation made by the Plaintiff.

It remains only to notice the other point with respect to the residence. It may, we think, be fairly assumed, that this question was taken into consideration by the Judge in fixing the amount of the maintenance. It was a matter for the discretion of the Judge, and a matter with which this Board would be very reluctant to interfere, unless it could be shown that the Court below had miscarried in some very gross and striking manner. Now, in the opinion of their Lordships, there is no such miscarriage in this judgment, having regard to the documents which were proved, and to the absence of any other evidence. It appears to their Lordships not to be unreasonable to award the sum which has been awarded by the Judge, with the addition of the residence, and, therefore, their Lordships will feel it their duty humbly to advise Her Majesty that this decree should be affirmed, and the appeal dismissed.

[507] IKBALOODOWLAH,—Appellant; SAH BUNARSEE DOSS and MOOK-RUMOODOWLAH,—Respondents * [March 2, 1869].

On appeal from the Court of the Judicial Commissioner at Oude.

Suit in the nature of an action of trover, by the Plaintiff, to recover Company's paper, as heir, such Notes being part of his deceased Mother's estate, against a Purchaser without notice and the Vendor, his Brother, alleging first, that the dealing with the Notes on the part of his Brother was illegal and contrary to the Plaintiff's rights as heir; and secondly, that in a previous

* Present: Members of the Judicial Committee—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (the Judge of the Court of Admiralty), the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard. Assessor:—The Right Hon. Sir Lawrence Peel.

suit against his Brother, regarding the notes, he had obtained a decree against him in respect of one of the Notes sued for, but had not enforced judgment. The suit was dismissed by the Courts in India on the grounds (1) of limitation, under Act, No. XIV. of 1859, and (2) as barred by the previous suit. On appeal, such decree reversed, as it appeared, that the real point in issue, the validity of the transfer of the Notes, had not been heard, and the suit remitted back to the Judicial Commissioner at Lucknow, to give directions to the Court of First instance to rehear the case, with liberty to either party to amend the pleadings.

Costs of appeal to abide the result of the rehearing.

This suit, in the nature of an action of trover, was instituted by the Appellant to obtain restitution of nine Government promissory Notes, commonly called Company's paper, or in the alternative to recover their value. These Notes formed a portion of the estate of Setara Begum, deceased, the Mother of the Appellant, and the Respondent, Mookrumoodowlah.

[508] The first Respondent, Sah Bunarsee Doss, was a Mahajun, or Banker, of Lucknow.

It appeared, that the Begum died on the 3rd of September, 1856, leaving two Sons and one Daughter, the Appellant, Mookrumoodowlah, the second Respondent, and Hoosainee Khanum, her legal heirs according to the Mahomedan Law.

The Begum's estate consisted of real property claimed by the Appellant by virtue of hibbeh (gift), personal and household property which afterwards was amicably divided, and Government promissory Notes of the value of Rs. 59,100 standing in her own name.

A few days after the Begum's death, Hoosainee Khanum died without issue, leaving Agha Husun Ruza, her Husband, her surviving.

The Appellant alleged, that during the first two days of the Indian Mutiny, which broke out in the summer of 1857, before the Begum's funded property had been divided, or a Certificate of heirship obtained, his Brother broke open a closet in which the Notes in question and his Mother's seal were deposited, and having stamped the Notes with the seal, sold them during the disturbances at an undervalue, without making over to him the share to which as co-heir he was entitled.

In February, 1861, the Appellant applied to the Accountant-General, to have the Notes standing in his Mother's name stopped, and in reply was informed, that before his request could be complied with, he must state to what loans they appertained. A correspondence followed, in the course of which the Appellant forwarded to the Accountant-General's Office a detail of seventeen Notes, together with the [509] number, year, and amount of each, and was informed in reply, that only one of them was then standing in the Register, in the name of the Begum, and that payment of it had been stopped in consequence of his application; that five had been paid off by transfer, and that the remaining eleven must have been erroneously described by him, as no such Notes were in existence.

On the 12th of March, 1863, the Appellant filed a plaint in the Court of the Civil Judge of Lucknow, against his Brother, and a native Banker of the name of Sheonath, for the recovery of his share (two-fifths) of the estate of his Mother, and Government Notes of the value of Rs. 23,640, part of the Notes of the value of Rs. 59,100, which their Mother had left; and also for the recovery from Sheonath of two Notes, part of the above Notes, of the value of Rs. 2500, which had been discovered to be in his possession, and in the plaint it was stated, that some of the Notes constituting part of the estate had been parted with by his Brother to other persons, and that as soon as the Appellant had obtained definite information, he would sue for them.

Sheonath made no defence.

In the course of this suit, the Respondent, Mookrumoodowlah, admitted that he had opened the closet, and abstracted therefrom the Notes, and his Mother's seal, which he subsequently impressed upon them, and stated that he had been induced to act thus by reason of his Brother having set up a claim to the whole of their Mother's realty, and by force of circumstances, consequent upon the breaking out of the mutiny.

By a decree, dated the 24th of April, 1863, Mr. [510] E. G. Frazer, the Civil Judge of Lucknow, decided that whatever might be the truth of Mookrumoodowlah's statement, he had constituted himself an *Executor de son tort*, and decreed in favour of the Appellant's claim for Government Notes belonging to his Mother's estate to the value of Rs. 23,640, or in lieu thereof that amount in cash, with costs against Mookrumoodowlah, and decreed that the two Notes of the value of Rs. 2500, attached in the hands of Sheonath, belonged to the undivided estate of the Begum, and as such should be sold and divided amongst her heirs as follows: two-fifths to the Appellant, two-fifths to the Respondent, Mookrumoodowlah, and to their Sister one-fifth; but she being dead, half of her one-fifth was to go to her Husband and the other half thereof equally between the Appellant and his Brother; Sheonath being left to his proper legal remedy.

These Notes were sold; and Agha Husan Ruza having given up any claim thereto, the proceeds were taken out of Court by the Appellant.

On the 4th of November, 1862, a Certificate of succession was applied for to the estate of the Begum, but was, on the 4th of April, 1863, refused on the ground, that neither party could have a certificate until their claims had been decided against each other by a regular suit.

By a petition in the same suit, dated the 22nd October, 1863, the Appellant prayed that Notes to the value of Rs. 27,000 (part of the Rs. 59,100) which, as he alleged, had been transferred to one Dhunput Roy and the Respondent, Sah Bunarsee Doss, by his Brother, the second Respondent, under the seal of the Begum, without his consent, should be sent for by issue of a warrant, and that satisfaction of the [511] remaining amount of the decree should be made by their attachment and sale.

On the 11th of December, 1863, the Clerk of the Court made the following Order:—"Case brought forward this day. Order to be issued to Dhunput Roy and Sah Bunarsee Doss, under sec. 234 of Act, No. VIII. of 1859, as applied for by the Petitioner, and a copy of the list filed by the decree-holder to be sent, with directions calling upon them to file any objection they might have in Court."

On the same day the Clerk of the Court, acting, as alleged by the second Respondent, in collusion with the Appellant, issued an injunction in the suit in these terms:—"To Sah Bunarsee Doss. At the request of the decree-holder, you are hereby directed not to deliver any of the Notes mentioned 30 in the list appended to this, which may be in your possession, to any one until further Orders of the Court, and to bring forward any objection you may have in Court. This injunction is issued under section 234 of Act, No. VIII., of 1859."

These proceedings were taken without Sah Bunarsee Doss being made a party to the former suit.

The Respondent, Sah Bunarsee Doss, in obedience to the injunction, returned a list of nine Notes, to the value of Rs. 27,000, which had been purchased by him in the Bazaar during the mutiny, and having been sent to Calcutta, were sold there.

By a petition, dated the 19th of February, 1864, the Appellant prayed that the Notes, when recovered from the Respondent, Sah Bunarsee Doss, might be delivered to him in the same manner as those in the possession of Sheonath had been, or that the amount might be paid to him in cash with interest.

[512] On the 21st of April, 1864, the Clerk of the Court, being of opinion, that the suit was not one which could be dealt with in a summary way, ordered that it should be struck out of the list of pending cases.

Having by means of the injunction obtained the discovery he required, the Appellant instituted, on the 6th of September, 1864, the present suit against both the Respondents, claiming restitution of nine Government notes, in value Rs. 27,000, (part of the Rs. 59,000 standing in the name of the Begum,) as having been wrongfully obtained by the first Respondent, by illegal purchase from the second Respondent during the late mutiny, and after the death of the Owner of the Notes, or in the alternative, their money value; and alleging that as the Respondent, Sah Bunarsee Doss, had not stated to whom he had transferred the Notes, it was believed that he had either caused the renewal of them in his own name, or obtained from the Treasury fresh Notes in his own name by increasing the value of those under litigation, and praying that in order to ascertain the real facts of the case the

Notes claimed might be sent for from Calcutta and delivered to him, or that the Respondent, Sah Bunarsee Doss, might be ordered to pay the value of them with interest and costs.

The Respondent, Sah Bunarsee Doss, pleaded, first, that the Appellant ought not to be allowed to reap any benefit from the discovery which he had obtained by fraud; secondly, that Notes sold in the Bazaar under the genuine seal of the Owner were validly sold; thirdly, the six years' limitation law; and fourthly, that the Appellant had already sued on the ground of inheritance, and had obtained a decree.

By a decree, dated the 7th of March, 1865, the [513] Civil Judge of Lucknow (Mr. E. G. Fraser), after stating it to be his belief that the suit was one of a collusive character got up by the two Brothers, dismissed it with costs on the following grounds:—First, that the claim was barred by limitation; and secondly, holding that there having been a money decree against his Brother, the Respondent, Mookmoodowlah, the Plaintiff had no right to another against the Respondent, Sah Bunarsee Doss, and that even if there had not been any preadjudication he could only obtain disclosure by equity, from which, by being party to the issue of an illegal injunction, he had debarred himself.

The Appellant appealed from this decree to the Judicial Commissioner of Oude, and Sah Bunarsee Doss put in an answer.

On the 27th of June, 1865, Mr. George Couper, the Judicial Commissioner, dismissed the suit with costs against the Respondent, Sah Bunarsee Doss, on the ground that, so far as the Respondent, Sah Bunarsee Doss, was concerned, there was nothing whatever to show, nor any reason to suppose that the transaction on the part of Sah Bunarsee Doss was not *bona fide*.

The present appeal was from this decree.

Mr. Leith, for the Appellant.—There was no fair or full trial of this suit in the Court of the Civil Judge of Lucknow, the Court of first instance; and there has been, therefore, from the first, a miscarriage in Justice to the loss and injury of the Appellant. The Judicial Commissioner on appeal ought to have directed a remand of the suit for re-trial upon proper pleadings and evidence. [514] Although the Judicial Commissioner was right in not affirming the decree of the Lower Court on the two grounds of law on which it was based, namely, the bar of a former decree, and the bar of the expiration of the period of limitation, *Wise v. Bhoobun Moyee Debia Chowdrainee* (10 Moore's Ind. App. Cases, 165), yet his decree was manifestly unjust in dismissing the suit solely on what he himself, in his judgment, terms a "presumption" that the alleged transfer of the stolen Notes in question to the Respondent, Sah Bunarsee Doss, was a *bona fide* transaction. It is a settled doctrine, that a Vendee cannot have a better title than the Vendor, except in the instance of a sale in market overt. *Wms. Saunders*, Vol. II. note [e] p. 47 b. A sale by one Tenant in common of a chattel is not a conversion to support an action of Trover, because the sale passes only the interest of the seller, which may be sued for, but otherwise of a sale of chattel in market overt, which deprives the co-tenant of his share and interest in the chattel.

Sir R. Palmer, Q.C.; Mr. Mackeson, Q.C.; and Mr. J. Edwards, for the Respondent, Sah Bunarsee Doss.

As there was no division of the Notes among the co-heirs, there was, consequently, no evidence to show that the Notes in question were the property of the Appellant more than of his Brother. There has been no certificate of succession to the estate of the Begum, as is required by Act, No. XXVII. of 1850, sec. 48, to vest the estate. This Respondent having purchased such of the Notes in question at the market value, [515] and without notice of any fraud on the part of the Respondent, Mookmoodowlah, he is not liable under section 9, ch. xiii. part I. of the Punjaub Code. No allegation of fraud as against this Respondent is to be found in the pleadings. With respect to the right to sue, the limitation applies only as between heirs. Here the suit is barred, first, by the former action, and secondly, by effluxion of time. As the Appellant has already sued, and obtained a decree in his favour for his share in full, he has waived his right to bring a second action, Civil Code Procedure Act, No. VIII. of 1859, section 2.

Judgment having been reserved, was now delivered by

The Right Hon. the Lord Justice Giffard (March 11, 1869).—This appeal is brought from a decree of the Judicial Commissioner of Oude, confirming a decision of the Civil Judge of the Court of Lucknow, which dismissed the Plaintiff's suit.

The Plaintiff by his suit sought to recover from the first Defendant, Sah Bunarsee Doss, certain Promissory Notes, commonly called Company's paper, of the Indian Government, which he alleges to have been illegally sold during the Indian mutiny. He claims either restitution of the notes, or alternatively, their value. He states that his claim is based on inheritance. It is obvious on the face of the plaint that he means to describe inheritance as the base or root of his title to the property, and that he alleges the illegal sale or transfer of, and the illegal dealing with, the Notes, as the wrong done to him, and that the alleged violation of his right constitutes [516] his cause of action. The Plaintiff was the eldest Son of his Mother, who died possessed of a considerable property, consisting of land, moveables, and certain Promissory notes, of which those in question are part. It was a Mahomedan family. The family consisted of two Sons and a married Daughter. The eldest Son claimed the land under an alleged gift from his Mother in her life-time, a gift the validity of which was disputed by his Brother at least. The Sister survived her Mother but a few days: the Brothers and Sister were entitled to the Mother's property as heirs under the Mahomedan law: the Brothers taking equally each the double of their Sister's share, and on their Sister's death they took certain shares with her Husband in the Sister's share. Soon after the Mother's death, the Sons and Daughter proceeded to make some division of the moveables: the elder son claimed the land: the title was litigated by the younger Brother, but it does not appear with what justice or success. The more valuable part of the moveable estate consisted of Government paper, amounting to Rs. 59,100, in which each Son's share would be of the value of Rs. 23,640; and the Daughter's of Rs. 11,820. The Daughter is stated to have received her share of this part of the property. The Daughter's Husband appears to have disclaimed.

The Plaintiff's right of suit in this action, is founded on an alleged illegal dealing by the younger Brother with his elder Brother's share of this property, and he seeks to extend his right and remedy against the first Defendant, by treating him as an illegal Purchaser under and consequent upon his Brother's alleged spoliation. The mode in which the [517] Plaintiff alleges this wrong to have been effected is this, viz., that the Notes were secured under the separate seals of the heirs, in a House belonging to the estate, in which the Mother died, and her Sister continued to reside: that the younger Brother, about the commencement of the Mutiny, broke the seals, carried off the property, and, alone sold and purported to transfer it. If this statement be true, and reference be had to the nature of the property sought to be recovered in this suit, viz., Company's paper, and reference also be had to the first Defendant's Letter of the 30th of July, 1865, it follows, that the first Defendant would be under the legal obligation of showing title to the Notes purchased. The law applicable to the acquisition of title to Notes passing by indorsement, as these appear to have been capable of being passed, must not be confounded with that applicable to the acquisition of title in ordinary chattels.

The Plaintiff had, previous to the institution of this suit, brought a suit of a similar nature against his Brother, the second Defendant, and one Sheonath, to whom two of the Notes had been traced. In that suit he recovered judgment against his Brother, who did not deny the case made, but excused it on insufficient grounds. The Plaintiff, having succeeded in this suit, is not shown to have taken any steps to enforce his judgment against his Brother. There is no proof whatever that the Brother is insolvent, or incapable of satisfying that judgment; nor is there any proof, whether the elder Brother's alleged title to the land is valid, nor of the value of that part of the property of the deceased.

After this judgment had been obtained, the Plain-[518]-tiff having acquired some information (at what precise time, however, does not appear), desired to enforce it by process against the Promissory Notes, the subject of the present suit, which he alleged he had traced to the possession of the first Defendant. If this could be done at all, under the execution of the process of the Court, it could be done only by attaching specific property still in the possession of the person against whom execution of the decree was sought to be extended. But such a proceeding

would be totally irregular and infructuous against a person who had parted with the Notes.

The application appears to have been for an attachment and sale. A process of injunction was issued instead. This was held by the Court as a wilful abuse by the Plaintiff of the process of the Court, and its own Officer was treated as an accomplice in the wrong; but as it would be substantially little more operative than the process actually prayed, and neither process in terms sought discovery, there appears to be quite as good reason to attribute this proceeding to ignorance and blundering as to conscious fraud in the Plaintiff or his advisers. The result was to obtain from the first Defendant an admission of which the Plaintiff claimed to make use as evidence, but which the Court rejected as proof.

The Plaintiff having obtained this advantage, which involved a partial discovery, filed his plaint in this suit, to which the first Defendant's defence was: first, that the Plaintiff ought not to be allowed to reap any benefit from the discovery which he had thus obtained. Secondly, that Notes sold in the Bazaar under the genuine seal of the Owner were validly sold. Fourthly, the limitation law; and fifthly, [519] that the Plaintiff had already sued on the ground of inheritance, and had obtained a decree. The evidence adduced by the Plaintiff seems to have been entirely documentary. The admission of the Brother in the former suit was used in this, and as against the Brother it was legitimate evidence, though not evidence such as to establish the case of wrong against his co-Defendant. The Letter of the first Defendant of the 30th of June, 1855, on the occasion of the injunction, was also attempted to be put in evidence. There was no clear or distinct evidence of the state of the indorsements on the paper, and no sort of evidence was given or attempted, of any legal transfer of the paper to the first Defendant.

In this state of things the first Court dismissed the Plaintiff's suit—first, on the ground that the suit was barred by limitation; and next, that holding a money decree against his Brother, the Plaintiff had no right to another against Sah Bunarsee Doss; and lastly, the Letter of the 30th of June, 1865, was excluded, but in their Lordships' judgment erroneously, on the ground of its having been obtained by the Plaintiff as being a party to an illegal and collusive Injunction.

From this decree the Appellant preferred his appeal to the Judicial Commissioner. Sah Bunarsee Doss put in an answer to the appeal.

The Judicial Commissioner dismissed the suit with costs as against Sah Bunarsee Doss, on the ground that there was nothing whatever to show, nor any reason to suppose, that the transaction on the part of Sah Bunarsee was not *bona fide*.

The statement of these decisions shows, that the case of the Plaintiff has been viewed and treated by the Courts as though the *onus* of proof rested on him [520] to rebut a presumable *bona fide* title by transfer in the first Defendant, Sah Bunarsee Doss. But the case made as to these papers is, that they were not in a state wherein a transfer, by delivery to a *bona fide* holder, would confer a title. On the contrary, it is stated that the legal title was in the Mother, and required a transfer by indorsement from her or all her heirs. Supposing that a mere imposition of a seal by a native Lady would be recognized as a legal transfer by indorsement, of which there is no allegation or proof, still such a transfer would not be valid after the death of the Mother. An invalid transfer might still confer a valid equitable title, either in part or in entirety; but such a transfer, being exceptional and dependent on special circumstances, cannot be raised by legal intendment or presumption. Consequently, the Plaintiff's case required an answer, unless met on other grounds: those on which the Court proceeded, of suspected collusion between the Brothers, would, if alleged and proved, have constituted a valid defence. A Plaintiff, however, ought not to have a defence of this sort urged against him at the hearing without due notice by the pleadings and issues of a case of fraud; and, as in a suit before the same original Tribunal, the admission made by the younger Brother had been credited and acted on, and formed the basis of a decision against him in the Plaintiff's favour, the Plaintiff had the less reason to come provided with proof to rebut that charge. The existence of a judgment against the Brother is no bar to this suit.

Again, the objection that the suit is barred by limitation seems to have been founded on a neglect to consider the Act of Limitation applicable to the [521] suit,

viz., the Act, No. XIV. of 1859, which, on the facts alleged, furnishes no ground whatever for it.

Then there is another objection founded on the want of a Certificate. This appears not to have been taken in the Court below, and is entirely inapplicable to a suit of this character.

The Act which provides for the granting of a Certificate is intended for the protection of Debtors to a deceased's estate; but Sah Bunarsee Doss was never a Debtor of the Mother, nor did his taking the share, or property, or part of the share, or property, of the Plaintiff, by an invalid title, constitute him a Debtor to the estate. The right of action is founded entirely on wrong, and not on privity of contract. Their Lordships, therefore, must humbly advise Her Majesty to allow this appeal, and direct that both decrees be reversed, and that the cause be referred back to the Judicial Commissioner, in order that he may give the necessary directions that it be reheard by the Civil Judge of Court of Lucknow, with liberty to either party to add to or amend the pleadings; and that the costs of the appeal on both sides should be taxed, and be costs in the suit, and abide the result of the suit.

In arriving at this conclusion, their Lordships have no intention whatever of giving any judgment on the merits. They are simply of opinion, that the facts ought to be inquired into on proper pleadings and evidence, including the first Defendant's Letter of the 30th of January, 1855, if the Plaintiff so desires it; and if the Plaintiff should prove his title as against the first Defendant to the whole or part of the Notes, then that the first Defendant ought to be called on to show, if he can, either title in himself, or some [522] grounds displacing the Plaintiff's right to complain of his acts; and that thus the facts and the real merits of the case should be arrived at.

Their Lordships are further of opinion, that the second Defendant ought not to have been dismissed; for if the Plaintiff has any right against the first Defendant, it may be that the first Defendant, if he makes satisfaction to the Plaintiff, ought to have the benefit of any subsisting judgment against the second, or, at all events, to have some remedy by way of indemnity or otherwise over against him; it must in this point of view be obviously for his benefit that the second Defendant should be bound by all the proceedings in this suit; the Plaintiff having brought the second Defendant before the Court, he, under the circumstances, ought not to be dismissed unless the whole suit should eventually fail on the merits against the first Defendant.

[523] NEELKISTO DEB BURMONO,—*Appellant*: BEERCHUNDER THAKOOR and Others,—*Respondents* * [March 8, 9, 15, 1869].

On appeal from the High Court of Judicature at Fort William in Bengal.

The normal state of every Hindoo family is joint, the presumption in the absence of proof of division being, that the family is joint in food, worship, and estate [12 Moo. Ind. App. 540].

Where a family custom of descent to a single heir, as in the case of a Raj, is proved to exist, such custom supersedes the general Hindoo law, which still however regulates all beyond the custom [12 Moo. Ind. App. 542].

Suit in the nature of an ejectment by N., the half brother of the late Rajah of Tipperah, to recover from B., his uterine Brother, in possession as Rajah, a zemindary forming part of the Raj of Tipperah, impeaching the title of B. as not having been validly appointed Jobraj (or young Sovereign), according to the family custom, by the late reigning Rajah on grounds first, of an alleged promise by a former Rajah, that N. should succeed, and secondly,

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, the Right Hon. Sir R. Phillimore (The Judge of the Court of Admiralty), and the Right Hon. the Lord Justice Selwyn. Assessor,—The Right Hon. Sir Lawrence Peel.

that he was the eldest living of a class out of which, according to the family custom, a Jobraj could alone be selected. The family custom being proved, and that the late Rajah appointed B. as Jobraj:—Held, affirming the judgment of the High Court:—

First, that B. was duly appointed Jobraj by the last reigning Rajah, and,

Secondly, that the right of succession to the Raj was governed by Koolacher, or family custom, and devolved on B., as there was no restriction by the family custom on the reigning Rajah obliging him to appoint the eldest of his kindred Jobraj.

The question in this appeal involved the right of succession to the ancient Raj of Tipperah of the Hills, and arose out of a suit brought by the Appellant against Beerchunder Thakoor, the principal Respondent, in the nature of an action of ejectment, to [524] recover from such Respondent, the Rajah in possession, a zemindary and other real estate forming part of the Raj, with mesne profits.

The Respondent, Beerchunder Thakoor, had been recognized as *de facto* Rajah of the Raj by the Government.

The issues raised, resolved into these points:—

First, whether Maharajah Essanchunder Manicko, the last Rajah, had power of his own free choice, to appoint the Respondent, Beerchunder Thakoor, the Jobraj (or young Sovereign) in preference to the Appellant, a senior member of the family, and nearest of kin.

Second, whether as a question of fact, he did so appoint him, and,

Third, supposing no valid appointment of the Respondent, Beerchunder Thakoor, as Jobraj to have taken place, who was entitled to succeed to the Raj by descent?

The Appellant set up a title as the eldest legitimate member of the family of the Rajahs of Tipperah, who are entitled as well to the Raj of Tipperah of the Hills, as also to estates part of which belong to independent Territories of the Kingdom, and the remainder consisting of the zemindary of Chucklay Rowshunabad and other estates, situated within the British dominions, which were the subject of the suit, and were claimed by the Appellant from the Respondent (the younger Brother by a different Ranee), who on the death of Maharajah Essanchunder Manicko (the elder Brother of both), took possession of the Raj and estates, by virtue of his appointment as Jobraj, under the family custom, the validity of which was disputed by the Appellant.

[525] It appeared that a special custom existed in the family of the Maharajahs of Tipperah, by virtue of which the Rajah nominates from amongst the members of his family as his presumptive successors, first the Jobraj (young Sovereign), second the Burra Thakoor (Chief Lord), and when these appointments are full at the time of the demise of the Rajah, the Jobraj succeeds to the Throne and the Burra Thakoor succeeds as Jobraj, the new Rajah making a fresh appointment of Burra Thakoor, and in default of any such appointment being full on the demise of the Rajah, the next male member of the family succeeds to the vacant Raj and estates (see 1 Sud. Dew. Ad. Rep., 270; 2 Sud. Dew. Rep., 139; and 3 Sud. Dew. Ad. Rep., 40, where this special family custom was recognized and upheld).

The suit was brought by the Appellant in the Court of the Principal Sudder Ameen of Zillah Tipperah, against the Respondent, Beerchunder Thakoor, Bepin Beharree Gossamee, the spiritual guide of the late Rajah Essanchunder Manicko, Brojomohun Thakoor, Gooroodoss Burdhun, and Bissonath Goopto, all severally Officers and servants attached to the Raj, as Defendants. The Plaintiff sought to establish his right of succession to the Raj and its possessions aforesaid, and in particular, to oust the Respondent, Beerchunder Thakoor, from possession of the zemindary, Talooks and Houses within the jurisdiction of the Zillah Court. The plaint stated, amongst other things, that the Respondent, Beerchunder Thakoor, in collusion with the other Defendants, took possession of the zemindary, etc., by fraud and without having any right at all, on the false allegation of his having been appointed [526] Jobraj, Brojendro Chunder, a Minor King, Burra Thakoor, and Nubdeep Chunder, Kurta; that his Brother, the late Maharajah Essanchunder Manicko, was attacked with paralysis, and was confined to his bed; that he was not in the enjoyment of his senses, and in that state, without appointing any one as

Jobraj, etc., departed this life at ten o'clock A.M. on the 17th Srabun, 1269, B.E. That thereupon agreeably to the custom and usage prevalent in the Royal family of Tipperah, the Appellant, being the eldest Son of the late Maharajah Kristo Kissore Manicko, the principal Respondent being his younger Brother, and under the authority of his Father was, during the lifetime of his Brother, entitled to the post of Jobraj; that during his lifetime no other person could get the post, nor could the Maharajah give it, nor did he give it; that after the demise of his Brother, the Maharajah, he was entitled to the Throne of the Kingdom and the Zemindaries, and he sought to obtain possession of the estates claimed with mesne profits and interest.

The Respondent, Beerchunder Thakoor, the principal Defendant, by his answer submitted, that agreeably to the custom and usage prevalent in his family the Kingdom as well as the Zemindaries, etc., devolve on the demise of the Maharajah upon the Jobraj, and in his absence upon the Burra Thakoor; that the Plaintiff was neither Jobraj nor Burra Thakoor, and his claim for the zemindary, therefore, was untenable; that the Respondent was the uterine Brother of the late Maharajah Essanchunder Manicko, and his favourite, and that being in the enjoyment of his senses and of his free will, he did in a regular form, on the 16th Srabun, 1269, B.E., corresponding with 1272, Tippe-[527]-rah Era, appoint the Respondent as Jobraj, his eldest Son, Brojendro Chunder, as Burra Thakoor, and his second Son, Nubdeep Chunder, as Kurta, and departed this life on the 17th Srabun, when in his full senses; that accordingly, in conformity to the family custom, the Respondent, by virtue of his position as Jobraj, was entitled to the Sovereignty and zemindaries, etc., real and personal properties, left by the deceased Maharajah; that all the allegations made by the Plaintiff with reference to the deceased Maharajah having breathed his last in an insensible state, without appointing a Jobraj, were false; he submitted, that it was not the family custom to obtain the post of Jobraj by seniority. That the appointment as well of Jobraj and the others, to be the successors to the Sovereignty, resting solely on the will of the Maharajah; consequently, when, on the demise of his Father, the late Kristo Kissore Manicko, his Brother, the late Maharajah Essanchunder Manicko, had become King and proprietor of all Zemindaries, etc., he was Rajah and proprietor of all the property, and had the entire right to appoint heirs. That the Maharajah did not appoint the Plaintiff as Jobraj; hence, the claim of the Plaintiff, that he was entitled to the post of Jobraj, on the allegation that, as to the matter of Jobraj, he had the permission of his deceased Father: and among the Sons from his married Wife, Essurree, he, the Plaintiff, was the eldest, and was, therefore, by right as Rajah, entitled to the property at issue, was utterly groundless, and also, that the averment in the plaint of the alleged permission, was false. That in the absence of the Jobraj and other heirs to the Kingdom, the next of kin to the deceased Rajah was entitled to succeed as heir to the properties left [528] by him. That the Plaintiff was not a person of that description either, so that his claim to the disputed properties against the Defendant was not admissible by any means; and the answer finally submitted, that the disputed properties were under the Sovereignty of Tipperah, and he, the Respondent, had become entitled to the Kingdom by virtue of Robraj; consequently, the claim of the Appellant to the estates subject to it, was not tenable, and his claim for mesne profits of the zemindary connected with the Kingdom was groundless.

A separate answer was filed by the Defendant, Gooroodoss Burdhun, in which he stated, that the allegation of the Plaintiff that the Jobraj, Burra Thakoor, and Kurta had been appointed by his collusion, and that the principal Defendant had taken possession of the disputed properties in collusion with him was false.

A suit, No. 9, of 1863, had been brought by one Chuckerdhuj, an illegitimate Son of Kishen Kissore, a former Rajah, against the Respondent, claiming as eldest surviving Son, to succeed to the Raj, and dismissed, and he petitioned under Act, No. VIII. of 1859, sec. 73, to be made a party to the Appellant's suit. By an Order of the Court, Chuckerdhuj was made a Defendant in the suit.

Chuckerdhuj, by his answer asserted his former claim, and stated that the allegation of the Plaintiff's averment in his plaint with reference to the permission or authority alleged to have been given by Kishen Kissore was utterly false, and

was set up as a fact on the strength of the evidence of witnesses under his own control; and that the Rajah of Tipperah could not act in opposition to the family custom. The answer [529] further stated, that the late Maharajah had not appointed a Jobraj in his lifetime, and submitted and charged that, by being next of kin to the deceased Maharajah, the chief Defendant was not on that account entitled to succeed to the Raj.

Issues were framed conformably to sec. 10 of Reg. XXVI. of 1814. First, with regard to the succession to the disputed zemindary, what custom there was in the families of the two litigants, and whether to become proprietor of the properties, there was the rule of seniority by birth or not? Second, was it the family custom or not for the Rajah to appoint a Jobraj, and for the Jobraj to be the proprietor of the zemindary, etc., on the demise of the Rajah? Third, was there the custom of appointing a Jobraj according to priority, and did it take place according to the wishes of the Rajah, and what was the exact custom with regard to it? Fourth, did the late Rajah Essanchunder Maniko in his lifetime appoint the Defendant (the Respondent), Beerchunder Thakoor, as Jobraj according to the established and family custom or not? Fifth, in the event of no Jobraj having been appointed by the Rajah, with regard to succession to the disputed zemindary, which of the two litigants had a preferential right? Sixth, was Chuckherdhuj, a Son born of the late Rajah Kristo Kissore Manicko's married or Santigrihita Wife or not? and if not, then could it be prejudicial to his claim? Seventh, were the Defendants, Gooroodos and others, unconnected with this suit or not?

Evidence was entered into by both sides, the material portions and effect of which is stated in their Lordships' judgment.

The hearing of the two suits, namely, first, the suit [530] distinguished as No. 9 of 1863, instituted by Chuckherdhuj, and secondly, the suit out of which the present appeal arose, took place together, on the 11th June, 1864, before Juggobundhoo Bannerjee, the Principal Sudder Ameen of Zillah Tipperah, upon the same evidence. By his judgment he dismissed Chuckherdhuj's suit, and decreed the possession of the zemindaries, etc., to the Appellant. The judgment then proceeded to state, that the late Maharajah Essanchunder did not appoint any one to the post of Jobraj during his lifetime, and that this appeared from the evidence of the Ranees, the Widow of the late Rajah Kasseechunder, and of her Daughter, and also from the evidence of certain Thakoors, and declared, that it was satisfactorily established, that in this royal Family a custom had always prevailed of appointing heirs in the order of seniority. It then decided, that although the Respondent, Beerchunder Thakoor, was uterine Brother of the late Maharajah, yet that the Appellant, being senior in age, was entitled to succeed under and by virtue of the family custom, and that as between Chuckherdhuj, the Plaintiff in the other suit, and the Appellant, the latter was entitled to succeed to the late Maharajah because the former was the Son of a Katchoo (Slave or maidservant), and, therefore, illegitimate. The judgment concluded in these terms:—"Under these circumstances, when Neelkisto Deb Burmono, who is senior in age and high in birth, it is not legal that his younger Brother should possess the zemindaries, etc., consequently in all respects the Plaintiff, with regard to taking possession of the properties claimed, is the preferential heir and is entitled as of superior right. But according to the rules of the family the Plaintiff, being proved to be the owner of the disputed [531] properties, it is not necessary to enquire and see whether, with regard to his getting the posts concerning the Raj, there was his Father's permission or not. As the colluding Defendants have fully assisted the Defendant, Beerchunder Thakoor, in setting himself up as the feigned Jobraj they are not exonerated from costs. On these considerations it was ordered, that the claim of Chuckherdhuj, the Plaintiff in suit No. 9, be dismissed, with costs; that the claim of Neelkisto Deb Burmono, the Plaintiff in suit No. 78, be decreed, that the Plaintiff in suit No. 78, be put in possession of the disputed zemindaries, etc., and get his costs from all the other Defendants, except Chuckherdhuj; that the Defendants in suit No. 9, do receive their costs from the Plaintiff, Chuckherdhuj; that the Ranees bear their own costs. That the Plaintiff in suit No. 78, receive from the Defendant, Beerchunder Thakoor mesne profits, which will be ascertained at the time of the execution of decree, together with interest.

From the decree founded on the above judgment, the Respondent, Beerchunder Thakoor, appealed to the High Court at Calcutta.

The appeal was heard before the High Court, the Justices Norman and Kemp presiding, who on the 26th of September, 1861, pronounced judgment, stating at great length their reasons for dismissing the suit, and reversing the judgment of the Principal Sudder Ameen. After a full examination and consideration of the evidence they were of opinion, that the appointment of the Respondent, Beerchunder Thakoor, as Jobraj was proved, and on that ground held, that he was entitled to the property, and they also held, that independently of his title as Jobraj [532] he had, as Brother of the whole blood of the deceased Maharajah, a preferable claim by inheritance to that of the Appellant.

The present appeal was from this decree.

Pending the appeal from the High Court, an application was made on behalf of the Appellant for an Order to restrain the Respondent from doing any act whereby the Raj, etc., the property in dispute in the appeal, might be damaged; and for the appointment of the Collector of the District, as Manager and Receiver, to prevent the Government Revenue falling into arrears, and so rendering the Raj liable to be sold.

Their Lordships, after hearing Counsel on behalf of the Appellant, dismissed the application with costs, expressing their opinion, that no case was shown for asking for such an unusual interference with the right and interest of the Respondent who was in possession of the Raj by his own title, as well as the decree of the High Court; and that the Court below alone, if any, had authority to interfere in the manner asked for; though in their Lordships' opinion, no grounds were shown which could justify such a proceeding.

The case of the Appellant on appeal was, that Maharajah Essanchunder Manicko did not appoint the Respondent, Beerchunder Thakoor, to be Jobraj, but that, even if such appointment had taken place, it had not the effect of enabling Beerchunder Thakoor to succeed to the Raj and estates of the Maharajah in preference to, and the exclusion of, the Appellant, the elder member of a class of the family, named to succeed to the Kingdom by a former Rajah.

On the part of the Respondent it was submitted, first, that the suit being in the nature of an action [533] of ejectment, the Appellant could only recover by strength of his own title, which he had failed to do. Secondly, that as the Appellant, while admitting that Koolachar or family custom governed the descent of and succession to the Raj of Tipperah, including the zemindaries, etc., sued for, and that, by virtue of the power vested in him by such custom, the Rajah for the time being could appoint his successor with the title of Jobraj, had failed to establish by evidence, that such power was limited and restricted in its exercise, so that the Rajah could only legally appoint the eldest male member of the family then living, or controlled by the wishes of a former Rajah, which fact was denied; thirdly, that he was duly appointed Jobraj by the Rajah; and lastly, that he was by the Hindoo Law of inheritance, as full-blood Brother of the last Rajah, entitled to succeed, even if he had not been appointed Jobraj.

Mr. Field, Q.C., and Mr. J. D. Bell, for the Appellant.—As to the nature of a Raj by Hindoo Law, and that with respect to a Raj there was no preference of half-blood to whole blood, they cited the following authorities, Colebrooke's Dig., Vol. II., pp. 119, 121; W. H. Macnaghten's "Hindoo Law," Vol. I., p. 17; Strange's "Hindu Law," Vol. I. pp. 198, 208; Strange's "Manual of Hindoo Law," p. 61; *Rawut Urjun Sing v. Rawut Ghunsiam Sing* (5 Moore's Ind. App. Cases, 169); *Baboo Gunesh Dutt Singh v. Maharajah Mohesher Singh* (6 *ib.*, 187); *Narakuntj Lutchmeederamh v. Vengama Naidoo* (9 *ib.*, p. 66); *Katima Natchear v. The Rajah of Shiva* [534]-*gunga* (9 Moore's Ind. App. Cases, 593); *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee* (*ante* [12 Moo. Ind. App.], p. 1); and, as to the special family custom in this Raj for the reigning Rajah to nominate his successor a Jobraj; they referred to *Ramgunga Deo v. Doorgamunee Jobraj* (1 Sud. Dew. Ad. Rep., 270); *Urjun Manic Thakoor v. Ramgunga Deo* (2 Sud. Dew. Ad. Rep., 139); and *Ranee Soomitra v. Ramgunga Manik* (3 Sud. Dew. Ad. Rep., 40).

At the conclusion of the Appellant's case, the further hearing of the appeal was adjourned.

Sir R. Palmer, Q.C., Mr. Forsyth, Q.C., Mr. Leith, and Mr. Doyne, appeared for the Respondent, Beerchunder Thakoor, but were not called upon. Their Lordships' judgment was delivered by

The Right Hon. Lord Chelmsford (March 15, 1869).—This is an appeal from a decision of the High Court of Calcutta, which reversed a decision of the Principal Sudder Ameen of the Zillah of Tipperah. The suit was one in the nature of an ejectment brought by the Appellant, the half-Brother of the late Rajah of Tipperah, Essanchunder, against the Respondent, Beerchunder Thakoor, the uterine Brother of Essanchunder, and against the other Respondents, to recover a very valuable zemindary, being that part of the royal possessions of the Rajah of Tipperah which lies within the Indian Territories of the British Crown. The Rajah of Tipperah, though in respect to these lands subject to the laws and Courts of British India, is in fact an independent Prince with [535] a considerable territory known as the Tipperah Hills, and as the title to the zemindary and to the Raj is the same, the dispute respecting the former involves a question of the right of succession to the Musnud or Throne of the independent Principality. The Respondent, Beerchunder Thakoor, has been acknowledged by the British Government as *de facto* Sovereign of Tipperah, but this acknowledgment has been regarded in the Court below as determining nothing more than his present and actual possession of the Throne, and their Lordships will deal with the question between the parties as if the litigation were between two ordinary subjects of the Crown upon a disputed title to lands within the jurisdiction of the Indian Courts.

The Appellant included originally as Defendants to the suit four persons besides the Respondent, Beerchunder Thakoor, viz., the third, fourth, fifth, and sixth-named Respondents in the appeal, being the spiritual guide, and the servants of the deceased Rajah. He charged that these four Defendants colluded with Beerchunder Thakoor, to obtain by fraud the Raj and the zemindary in question. Another Defendant, the second on the record, was made a Defendant on his own petition. He was an illegitimate Son of Kristo Kissore, the Father of that Defendant and Beerchunder Thakoor; and the Ladies whose names appear on the record, being the Mothers of infants whose legitimacy was disputed, were made parties by the act of the High Court on a petition addressed to it in the progress of the litigation. In disposing of this appeal, however, it is unnecessary, in their Lordships' view, to consider the cases made for or against any of these parties. It will be suffi-[536]-cient for the purpose of their decision, to treat the suit as being in the nature of an ejectment brought by the Appellant against the Respondent, Beerchunder Thakoor, alone.

Maharajah Essanchunder had one legitimate Son, Brogendro Chunder, who survived him. He was not made a Defendant in this suit. He died after its commencement at some early stage of its progress, but this event affects in no way the questions either of law or fact at issue in this suit.

After Essanchunder's death, Beerchunder Thakoor claimed and obtained the Throne. His claim was founded on an appointment of him as Jobraj by Essanchunder the deceased Rajah, who, it was alleged, had the day before his death, being the 16th Srahun, 1269, or the 31st of July, 1862, duly appointed Beerchunder Thakoor, Jobraj, his legitimate Son, Brogendro Chunder, Burra Thakoor, and an illegitimate Son, Kurta. The fact of this appointment was denied by the Plaintiff, who charged it to be false and fraudulently concocted between Beharry Gosseen, the family Priest, Brojomohun Thakoor, Goorodoss Burdhun, and Bissonauth Goopto, all Officers in considerable trust and employment under the deceased Rajah, and who are respectively the third, fourth, fifth, and sixth Defendants on the record.

Before the institution of the Plaintiff's suit, the second Defendant, Chuckerdhuj, filed a suit of a similar character with the present against Beerchunder Thakoor and others, and the present Plaintiff intervened in it as a Defendant. That suit and the present were treated as substantially involving the same questions, and were heard together; much of the evidence in this suit was taken in the other. [537] The suit of the second Defendant, Chuckerdhuj, was dismissed by the Principal Sudder Ameen on the ground of his illegitimacy; he did not appeal from that decision, and his claim may, therefore, be treated as no longer in question.

It is not necessary to consider minutely the pleadings in the cause, or the issues settled between the parties. Their Lordships will only observe, in answer to an argument of Mr. Field upon these issues, that, in their judgment, they do not in any degree relieve the Appellant from the obligation which lay upon him as Plaintiff in a suit, in the nature of an ejectment, of recovering by the strength of his own title, and of showing not merely that the Defendant's title was bad, but, that failing that title he, the Plaintiff, was entitled to the possession of the lands in question.

The questions to be determined upon this appeal are simply these:—

First, had Essanchunder Manicko the power of appointing Beerchunder Thakoor, Jobraj in preference to the Appellant?

Second, did he in fact so appoint Beerchunder Thakoor?

Third, supposing there was no valid appointment of Jobraj, who was entitled to succeed to the Raj and the zemindary in question, or is now entitled thereto?

The two latter questions were decided in favour of the Appellant by the Principal Sudder Ameen: all three questions have been determined by the High Court in favour of the principal Respondent.

It is admitted, that the right of succession to both Raj and zemindary is governed not by the general law, but by koolacher, or family custom. This custom had [538] been the subject of investigation, trial, and decision in the Courts of the East India Company in the early part of this century in the case of *Ramgunga Deo v. Doorgamunee Jobraj* as reported in 1 Sud. Dew. Adaw. Rep. 270, and also *Urjun Manic Thakoor v. Ramgunga Deo* (2 Sud. Dew. Adaw. Rep. 139), and *Ranee Soomitra v. Ramgunga Manic* (3 Sud. Dew. Adw. Rep. 40). These cases establish that, according to the custom, a reigning Rajah should name a Jobraj and Burra Thakoor, of whom the first succeeds to the Throne, and the latter to the office of Jobraj. Both parties to this appeal admit the custom so far. It is, however, contended by the Appellant, that if Maharajah Essanchunder appointed a Jobraj, he was bound to appoint him partly on account of an alleged promise or intention on the part of the former Rajah, Kristo Kissore, and partly on the ground that he was the oldest living member of the class out of which, according to the family custom, a Jobraj could alone be selected. On the other hand, the Respondent insists, that the choice of the reigning Rajah, at least within a certain class, is absolutely free, and cannot be controlled by the wishes of a former Rajah, had any such in fact been expressed in favour of the Appellant.

On the argument of this appeal before their Lordships, the Appellant's preferential title by seniority to the Jobrajship was sought to be established by evidence of a family custom to be collected from the instances given in the genealogy of actual successions. But where there is evidence of a power of selection the actual observance of seniority even in a considerable series of successions cannot of itself defeat a custom which establishes the right of free choice, [539] and had the instances been uniform and without exception, that alone would not have been sufficient to support the Appellant's case. Such uniformity of practice was, however, not proved, for several instances appear of infants appointed to the office of Jobraj, whilst relatives within the custom, and older in years, were living. This evidence, therefore, failed. Still it was open to the Appellant to contend, as he did, that, in default of any appointment to either office, seniority of age constituted a title by descent to this Raj; and to this latter branch of the argument insisted on by the learned Counsel for the Appellant, their Lordships will now direct their attention.

The question now to be considered is, whether, assuming no valid title to the office of Jobraj to have been conferred on the Respondent, Beerchunder Thakoor, the Appellant establishes a title by seniority. It is not denied that his title to succeed must be made out as legal heir to the last Maharajah Essanchunder. The Plaintiff is senior in years to Beerchunder Thakoor; he was the half-Brother of Essanchunder, and Beerchunder Thakoor is Essanchunder's Brother by the whole blood. By the general Hindoo law, Beerchunder Thakoor would be the heir to Essanchunder Manicko, in preference to his half-Brother, were it a disputed succession to divided property. The Counsel for the Appellant have however contended, that this preference of whole blood to half blood does not extend to a Raj, and to support this contention they relied on the rule which obtains in certain cases of undivided ancestral estate, when Brothers of the whole and half blood are on the same footing.

[540] The rule on which they insisted is this, that in the case of a Raj or Kingdom,

or other impartible estate descending by inheritance to a sole heir, the Court must view the property as though it were joint estate, part of an undivided joint ancestral estate, and apply the law applicable to such an estate, with a view to the selection of the eldest from those who would be equal in degree as coparceners. This position was advanced in the High Court without success. The Court observed that no authority had been cited in its support, and treated the doctrine as novel and unknown to them. The argument has been strongly urged by Mr. Bell, and their Lordships will give their reason for concurring in the opinion which was expressed by the High Court somewhat more fully than was done in that Court.

The normal state of every Hindoo family is joint. Presumably every such family is joint in food, worship, and estate.

In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all or any of these three things. The family in which a title to a Kingdom exists in one member follows this general law but it follows it in part only, for the succession to a Kingdom is an exception to it from the very nature of the thing (see 1 Strange's "Hindu Law," p. 198 [2nd Ed.]), the family may have property distinct from that to which a sole heirship belongs, and may continue joint. Still when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction to call this separate ownership, though coming by inheritance, at once sole and joint owner-[541]-ship, and so to constitute a joint ownership without the common incidents of coparcenership. The truth is, the title to the Throne and the Royal lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands, and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir. In *Katama Natchear v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 614), it is stated in a judgment which underwent the most careful consideration by their Lordships, that there are in the Hindoo law two leading rules of inheritance,—that founded on the religious duty and superior efficacy of oblation and sacrifice; and that of survivorship. Where the latter rule cannot apply, the former must be resorted to. Now, this rule of religious obligation and priority marks the Brother of the whole blood as preferably heir in succession to the estate of his Brother, over the Brother of the half blood only. The reason given is, that he offers more sacrifices, and benefits more the manes of the dead of his family: in their eyes a real substantial ground of preference. In nature, also, he is nearer, and, therefore, satisfies the description nearest of kin. Since, then, the custom in this family, where no appointment of Jobraj or Burra Thakoor has been made, requires the union of two things to constitute the legal heir, viz. seniority [542] in age and nearness of kin (which in truth is in conformity with the general law of Royal descent), and the Claimant has but one of these qualifications in himself, viz. seniority; he does not entitle himself by the family custom. There is no trustworthy evidence that the custom supersedes the general rule as to the precedence of the whole over the half blood. The custom is silent on that point. Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom: on general principles, therefore, the Hindoo law must be resorted to in this case, and that does not favour the Appellant's claim; for unless where survivorship furnishes an exception, the whole blood is preferred.

The decision of this question alone would justify the dismissal of this appeal; but their Lordships think it right to review also the decision of the High Court on the facts as to the appointment.

The facts stated by the *de facto* Rajah and deposed to by his witnesses on this part of the case, are few and simple. The fact that the Rajah had appointed a day and hour for the celebration of the ceremony of opening a new hall, cannot be doubted. The disputed nomination of the Jobraj is said to have been made on that occasion, and during that ceremony the Rajah is stated to have directed the

intended Jobraj, Burra Thakoor, and Kurta to bathe and come to his presence. Dresses had been prepared, it is said, by orders overnight to the bearer. The dresses were brought on silver dishes to the Rajah's presence; the Jobraj, Burra Thakoor, and Kurta were invested with their dresses, appeared, made their salaams, were verbally appointed, gave presents of gold mohurs, and, so appointed, received the customary muzzles.

[543] This contest is in truth a contest as to the title to reign: a matter, rather, of State policy than one proper for Judicial decision. Into such disputes, passions stronger than those which affect the minds of ordinary litigants may well be supposed to enter, and fear and favour may sway in an unusual degree the minds of those who depose on either side. The power of an absolute Prince over the fate of those who surround him may enable him to array a body of witnesses deposing to facts to which it may be difficult to offer any positive contradiction. The addition by false testimony of an incident or two, or of a few words, to an actual scene or ceremony, may, if credited, determine the title to a Throne; and it is scarcely possible to conceive a case more requiring than this does, the nicest scrutiny and examination of the evidence. The Defendant, Beerchunder Thakoor is *de facto* Sovereign, and as such has been recognized by the Indian Government, the paramount arbiters in a case of disputed succession. The High Court has founded its judgment on the positive testimony which was given in support of the appointment. The objections stated by the Court below to the testimony of the witnesses, twenty-one in number, are not that they are of a bad character, or that their manner and demeanour induced the Court to disbelieve them; but they are of such a nature as a Court of appeal might be well able to judge of without being under any inferiority to the judge who tried the case. The exact agreement in the story, even to its details, by all the witnesses, the supposed difficulties as to the ready production of dresses and gold mohurs, the dependence of all the witnesses, more or less, on the Rajah's power and favour, the absence of all mention [544] of the appointment in the early letters of the Gooroo to the Superintendent, the want of notification to the British authorities, and of invitations to the members of the family absent from the ceremony, though resident in the Palace, with the ignorance as to any such appointment stated by Ladies of the Palace of high rank, the want of the accustomed religious ceremony and non-observance of Regal State in the usual Throne-rooms,—these, with some minor objections, led the Judge below to discredit a story fully and consistently deposed to by witnesses of a class not ordinarily untrustworthy, nor to be lightly disbelieved. In addition to this, the *de facto* Rajah was considered to be throwing difficulties in the way of the Appellant, who desired to examine the Gooroo and some other witnesses; and the singular character of the answer of the latter, which avoided any recognition of the titles of Jobraj, or Thakoor, or Kurta, augmented the matter of suspicion. Their Lordships are far from saying, that the objections urged with so much force by the Counsel for the Appellant are undeserving of a very serious and attentive consideration; they appear to have received such consideration in the High Court, and their Lordships, during the argument, and since, have carefully considered and weighed them. The probabilities, however, are, in their Lordships' opinion, strong in support of the fact of a nomination of the *de facto* Rajah by his deceased Brother to the office of Jobraj. An experience of Indian cases shows that few of them, however true, are free from admixture of exaggeration and invention; and it is not necessary to the affirmance of this judgment that their Lordships should believe entirely all the attendant cir-[545]-cumstances detailed by the witnesses who support the nomination.

The Rajah was infirm in health; his state was evidently one calculated to inspire doubt and alarm; he had two years before declined to appoint to the offices of Jobraj and Burra Thakoor: he was supposed at that time to desire to be succeeded by his own Son; but from his reluctance to name him when he was of tender age, he may reasonably be supposed to have considered the appointment of an adult Sovereign the best for his Kingdom. When his own health was seriously impaired, it would become not only to him, but to those around him, a subject of anxious thought how the Raj should be preserved. The Appellant had an enemy in the Gooroo, who exercised great influence over the mind of the Rajah, and sick-

ness and the near prospect of death would not diminish that influence. His Son was still young; the Rajah might naturally suppose him unable to compete with one who laid claim by right to the succession upon an alleged superior title. He might dread also the Appellant's influence over the Hill tribes, whether that influence were real or supposed, or the offspring of a jealous fear. The Gooroo might think it best to arrange matters with one Thakoor; and the appointment of the two Sons of the Rajah, one, though illegitimate, to the office of Kurta, gives an air of probability to the supposition that some arrangement may have preceded the actual celebration of the opening of the Hall, especially as some rumours of an intended appointment appear to have reached the ears of a witness who deposes on the side of the Appellant. Notwithstanding, therefore, the former reluctance of the Rajah to appoint either the [546] Appellant or Beerchunder Thakoor, the changed circumstances prevent the conclusion that his mind was still opposed to the appointment of one of them, his own Brother of the whole blood, whom he might desire to associate with his Son, for the advantage of his Son, of himself, and of the Kingdom. Nor is the concurrence of his spiritual adviser in this view, under the changed circumstances of the case, an improbable supposition.

The Rajah was not then in a state in which he was likely to resist any strong pressure upon him to make some appointment to secure the succession. Many feelings might exist in a weak and suspicious mind to explain the absence of the usual ceremonies, invitations, and notification. Fear of the Appellant, and of his influence; jealousy of the English Officials, and apprehensions, however groundless, of annexation to the British rule; doubts whether some delay or obstruction might be interposed, might induce his advisers to snatch at an opportunity offered by the approaching ceremonial to add the more important to the less important ceremony. Rival parties appear to have existed in the Palace. It seems little credible that a story of an act having been performed before a large audience which never took place should have been adopted by the conspirators in a fraudulent usurpation, as so much larger a scope for contradiction would thereby be given by such a mode of fabricating the story; and the falsehood of the alleged nomination would be needlessly exposed to many persons. It is still more improbable that the conspirators, without the slightest necessity, should be found so dangerously communicative of their conspiracy.

[547] The utter worthlessness of this part of the Appellant's case lends considerable support to the Defendant's story: the Gooroo made no sign till he himself was dismissed and disgraced. And the reliance which the High Court justly placed on the early resistance by the new Rajah to this man, in whose power he would have been had they been common actors in this scheme of fraud, cannot be discarded in considering the weight of the whole body of evidence.

Though, according to the Appellant's story, the Rajah had placed his character, and, perhaps his power and Throne, at the mercy of the Gooroo, he, before the litigation had ended, appointed another Agent, and deposed the Gooroo from power. Can it be supposed that if the plot was really planned, no thought of it had occurred to the Respondent, Beerchunder Thakoor, until many hours after the Rajah's death. A moment of time would have sufficed to give rise to the thought that the Throne might be reached by contrivance, and yet the evidence discloses this man as at once weak, timid, and needlessly communicative, crying and exclaiming that the Raj was ruined, and then entering into an inner chamber to concoct a fraud, which some of the conspirators seem immediately eager to reveal. The evidence for the Appellant on this part of the case is inconsistent. One witness stated that the Gooroo told him of the nomination in the afternoon between the hours of three and four of the 17th Shabun; whilst the others, speaking of a much later hour of the same day, tell their story of the distress manifested by the Gooroo and Beerchunder Thakoor because no nomination had been made.

One Letter which is treated as a forgery by the [548] High Court, and in defence of which no argument has been advanced before their Lordships, is ascribed to Beerchunder Thakoor, who is represented by it as informing the Government that he has no hopes of the Raj but from their mercy, whilst at this very time he must reasonably be presumed, if guilty, to have formed the design to usurp the Throne. The family took sides in this dispute, part siding with the Appellant and

part with the *de facto* Rajah. The Ladies in the recesses of the Palace might well know nothing of their own knowledge of what actually took place at the ceremony in the Hall. The story they repeat may have been so represented to them; but this kind of evidence is negative against positive testimony. It is so regarded, and rightly, in the judgment of the High Court. The Mother of the legitimate Son of the deceased Rajah supports the appointment, and so do the mothers of the two illegitimate Sons. To the argument that they are swayed on the side of the Rajah may be opposed the argument, that in these contests of factions in a native Palace, little of unbiassed testimony can be looked for. The Appellant seems not to have wanted friends and supporters there, and even Chuckerdhuj found support in similar quarters in favour of his groundless claim.

On the subject of the obstruction offered to the Appellant's procurement of evidence, the Respondent may have feigned a fear of the Appellant's measures at his Capital, in order to oppose his being present at the examination of the named witnesses; but, on the other hand, it is idle to suppose that no one but the Appellant himself could have been found to ascertain the identity of the Ladies whom he wished to examine. The Respondent may have feared not the true testi-[549]-mony of the Gooroo, but the effect of a fabricated story on the mind of a Court. Amidst all this mass of conflicting probabilities impeaching or supporting the disputed nominations, the High Court proceeded on positive testimony, weighty enough to decide the issue, if not successfully impeached. Unless native testimony is to be thrown aside entirely, and decisions are to pass on conjecture or suspicion instead of evidence, their Lordships think the High Court did not err in coming to a conclusion that the positive testimony must prevail in this case.

The High Court were able to judge of the sufficiency of the reasons alleged by the Sudder Ameen for discrediting so numerous a body of respectable witnesses. They, it should be remembered, had been the trusted Officers of the deceased Rajah, and were continued by Beerchunder Thakoor in the same posts and at the same salaries. From whom but the servants, officers, friends, and members of the family of the deceased Rajah could his successor be expected to derive his evidence? These would be the persons most likely to be present at the ceremony of the opening of the Hall: and the objection that all were subject to the will of the Rajah can at most be but an argument, and not a conclusive one, for discrediting such testimony. The case is barren of any opposing evidence of persons of equal value who were present in the Hall, and who state that they saw nothing of the alleged ceremony of nomination. Again, the concurrence of testimony of many intelligent witnesses, without circumstantial variety, where the facts are very few and simple, and all would be naturally attentive observers of the scene, furnishes no ground for suspicion; and if the evidence showed [550] some sign of drilling or tutoring in the mode of narration, that, however improper, would not constitute a sufficient reason for discrediting evidence of many trustworthy witnesses, since the evidence of witnesses to a true story is too often subject in native Courts to such a kind of manipulation.

The reasons assigned, therefore, by the Judges of the High Court for differing from the Court below, and believing the evidence which the Lower Court rejected, appear to their Lordships to be satisfactory, and they think that the Appellant has not succeeded in showing that the appointment insisted on by the *de facto* Rajah did not in truth take place. For these reasons their Lordships must humbly advise Her Majesty, that the decree of the High Court of Judicature at Fort William ought to be affirmed, and this appeal dismissed with costs.

MEMORANDUM OF THE LORDS OF THE COUNCIL ON THE REMOVAL OF
COLONIAL JUDGES.

The following Memorandum with reference to the removal of Colonial Judges having been drawn up by Order of the Lord President, in pursuance of a request from the Earl Granville, the Secretary of State for the Colonial Department, after having been submitted to and confirmed by the Lords of the Council, was presented and laid on the table of the House of Lords.

"The Lord President, in answer to the question submitted to this department and to the Lords of the Judicial Committee by direction of Earl Granville, has caused the following Memorandum to be prepared, for the purpose of explaining the views taken by their Lordships on the subject of the removal of Colonial Judges, as far as they may be gathered from reported cases, and from the experience of the last thirty years."

[10] "It is obvious that some effectual means ought to exist for the removal of Colonial Judges charged with grave misconduct, and that these means ought to be less cumbrous than those existing for the removal of one of Her Majesty's Judges in this Country. The mode of procedure ought to be such as to protect Judges against the party and personal feelings which sometimes sway Colonial Legislatures, and to ensure to the accused party a full and fair hearing before an impartial and elevated Tribunal. Hence it was considered in the case of Mr. Justice Boothby, that although the Legislature of South Australia had passed addresses to the Crown for his removal, that measure did not suffice, as it would have done in England; and that although the Legislature might act as his Accuser, it rested with the advisers of the Crown in England to dispose of the charges against him.

"All the forms of suspension or removal which are in use lead by different roads to the same result, viz., a hearing before the Privy Council.

"When a positive 'motion' has been made by a Governor under Burke's Act (22nd Geo. III. c. 75), the appeal to the Queen in Council is *strictissimi juris*, being provided by the Statute itself.

"When an Order of suspension from office has been made, the matter has commonly been referred by the Queen to the Judicial Committee, on the recommendation of the Secretary of State, though not invariably so, as in some cases the Secretary of State has himself advised the Crown to confirm or to disallow the suspension.

[11] "The reference may be made to the Judicial Committee, or to a Committee of Council generally; but if it be made to the Judicial Committee, it is desirable that the Lord President and the Secretary of State for the Colonies should sit with the Judges on the hearing. This course has been pursued with advantage in several instances.

"When charges are brought by a Colonial Assembly against a Judge, in the shape of petition to the Queen in Council for his removal, as in the cases of Chief Justice Boulton, from Newfoundland; Mr. Justice Sanderson, from Grenada; and Chief Justice Beaumont, from British Guiana, the Privy Council exercises a species of original jurisdiction on these petitions, which shall be considered presently.

"It may be remarked, generally, that it is extremely difficult, and might be highly injurious to the public service, to lay down an inflexible rule as to the mode of procedure to be adopted in all cases of this nature. When a Judge is charged with gross personal immorality or misconduct, with corruption, or even with irregularity in pecuniary transactions, on evidence sufficient to satisfy the Executive Government of the Colony of his guilt, it would be extremely improper that he should continue in the exercise of judicial functions during the whole time required for a reference to England, or a protracted investigation before the Privy Council. Immediate suspension is in such cases a necessity, if much greater evils are to be avoided. But it must be borne in mind, that a Governor who resorts to such a measure, takes it at his own peril, and is bound to [12] make out a complete

case in justification of it. When such cases come to be investigated at home, both the Governor and the Judge are in reality on their trial; and to have taken unwarrantable proceedings against a Judge, would doubtless be regarded as a most serious offence on the part of an Executive Officer.

On the other hand, when the charges against a Judge consist, not in any alleged acts of personal misconduct, but in a cumulative case of judicial perversity, tending to lower the dignity of his office, and perhaps to set the community in a flame, it is more difficult for the local Executive to act on its own responsibility. It is in cases of this description that petitions for the removal of Judges have been addressed to the Queen in Council by Colonial Legislatures.

This last-mentioned mode of proceeding has been found by the Lords of the Judicial Committee to be more dilatory, more expensive, more onerous to the parties, and less satisfactory to their Lordships than the mode by way of previous suspension or amotion. And that for the following reasons:—The Privy Council, accustomed to act as a Court of appeal, that is, to review the evidence and decision of inferior Tribunals, has by its constitution considerable difficulty in exercising an original jurisdiction, especially when the evidence has to be transmitted from the Colonies. No regular system of pleadings and procedure can be said to exist in such cases. The consequence is, that the charges being often loose, vague, and multifarious, their Lordships have not found it easy to reduce them to distinct and [13] positive issues of fact or of law, such as are necessary to the maintenance of a quasi-criminal proceeding.

“As in Ecclesiastical suits for the correction or removal of Clerks, to which these proceedings offer some analogy, it is essential that the acts complained of should be clearly expressed, and that the accused person should have full notice of all that is to be proved against him.

“When the issues are settled, comes the difficulty of the evidence. Both sides produce affidavits and other written testimony from the Colony. When a batch of affidavits has been filed on one side, application is made by the other side for time to answer them. Great delay and expense ensue; and, as in the case of Mr. Beaumont, this kind of irregularity may protract the hearing of the case for two or three years, during which time the Judge, whom the Colony is seeking to remove, retains his office. When the case is completed by the parties or their agents, and brought in for argument, it is often loaded with a mass of irrelevant matter. Over these proceedings, regulated as they are by the advice of Counsel on either side, their Lordships can exercise but little control in the preliminary stages of the case, being themselves unacquainted with the merits of it.

“The mode of amotion with the right of appeal, or of temporary suspension with a reference to England, is not open to these objections. The evil of an inefficient or discredited Judicial Officer is at once removed. The Governor who feels called upon to take so decided a step, is bound to give to the accused person full notice of all the charges brought against [14] him, to call upon him for his answer and to hear it. This, therefore, affords a solid groundwork for his subsequent proceedings.

“Furthermore, the Governor, knowing that his decision will be reviewed in England, on appeal, is bound, for his own justification, to send home the proceedings and evidence on which that decision rests, in a clear and intelligible shape, and provision is made for the performance of this duty, Nos. 83, 84, 85, and 86, of the Colonial Regulations.

“If the matter is then referred by Her Majesty in Council to the Judicial Committee, their Lordships are at once in a position to deal with it. The delay and expense incidental to getting up a case at a distance from the original scene in dispute, vanish. The case is, or ought to be, already complete. And if it be at once submitted to the judgment of their Lordships in a complete form, there is no reason that it should not be heard and disposed of in a very short time, and at a small expense. Mr. Cloete's case (8 Moore's P.C. Cases, 484) is a fair sample of a proceeding judiciously conducted in this manner. That Gentleman had been improperly removed from a judicial office on the 19th April, 1853; he was restored to it by their Lordships on the 20th of February, 1854, and although he had undoubtedly suffered an injustice, their Lordships expressed their desire that he

should be indemnified for the expense he had been unjustly put to; and he was, in fact, soon afterwards promoted to a higher judicial office.

"It is scarcely necessary to add, that in Colonies [15] having Legislative Assemblies, those Assemblies cannot be deprived of their undoubted constitutional right to address the Crown for the removal of a Judge; and the exercise of this right is altogether independent of the course which the Governor of the Colony may think fit to adopt. When the charges against a judicial Officer originate with Assemblies, the form of Address or petition is perhaps the most correct, though not the most convenient, form of proceeding. When the action for removal originates with the Governor, he has the power to give effect to it in his own hands, subject to the control of the Home Authorities.

"The experience of the Lords of the Council, therefore, strongly corroborates the arguments stated in a paper (presented to the Colonial Office by Sir F. Roger) in favour of proceedings by the Governor, subject to a review by the Secretary of State or the Privy Council in England, and they have invariably found, that in the cases in which proceedings have originated with the local Assemblies, the delay, uncertainty, and expense have been greatly augmented.

"At the same time, when the misconduct charged is purely judicial, and, therefore, not properly amenable to the decision of the Executive authority, acting on the advice of Law Officers or advisers of inferior rank, it would seem that the due maintenance of the independence of Judges requires that judicial acts should only be brought into question before some Tribunal of weight and wisdom enough to pronounce definitely upon them, and this function appertains with peculiar fitness to the Privy Council, which, as [16] a Court of appeal, has to review the decisions of the Colonial Courts."

Observations by Lord Chelmsford upon the Memorandum with reference to the removal of Colonial Judges:—

"I concur generally in the views expressed in this Memorandum.

"The question of the removal or suspension of a Colonial Judge is one of great delicacy and of some difficulty; but, upon the whole, I think that in all cases, except those which sometimes occur, of judicial indiscretion or indecorum, the best system is that which leaves the responsibility in the first instance to the Governor of the Colony, subject to an appeal to the Queen in Council. Of course, so serious a step as the removal or suspension of a Judge ought not to be taken without a distinct communication being previously made of the specific charges of misconduct imputed, and without an ample opportunity being afforded to the Judge of answering those charges. In every instance of this kind it seems to me, that it would be better that the matter should be brought before the Privy Council, rather than that the final decision should rest with the Secretary of State, because the reasons for the determination in the latter case are not made public (publicity in an accusation of a Judge being always desirable), and because an impression sometimes prevails that there is an inclination in the Colonial Office to uphold their Governors upon any subject of complaint which arises in the Colonies.

[17] "When I speak of judicial indiscretion or indecorum, it may be difficult to explain my meaning in words, yet it will probably be sufficiently understood. As an illustration, I would mention ebullitions of temper and intemperate language, leading continually to unseemly altercations and undignified exhibitions in Court. Upon occasions like these, different opinions may be entertained whether the conduct of the Judge is such as to render him unfit to continue upon the Bench. I think the evil of allowing such a Judge to exercise his functions while his conduct is being inquired into, would not be so great as permitting a Governor to determine upon his own judgment and discretion, that the behaviour of the Judge was so incompatible with the temperate and dignified administration of justice, as to render it desirable, on public grounds, that he should be removed. In these cases it would be better, in my opinion, to inform the Judge of the specific instances in which it is alleged that he has not preserved the decorum of his judicial character, and to call upon him for distinct answers to the charges, with an intimation that the whole will be sent home for the decision of the Privy Council.

"These observations do not apply to grave charges of judicial delinquency, such

as corruption; or to cases of immorality, or criminal misconduct. Instances of this kind ought to be visited by immediate removal from the Bench (of course, not before a full opportunity has been afforded to the accused Judge to defend himself). Such serious cases ought to be brought before the Privy Council, either by appeal on the part of the removed or suspended Judge, [18] or upon the recommendation of the Secretary of State.

CHELMSFORD.

"9th April, 1870."

Opinion of the Right Hon. Stephen Lushington, D.C.L., late Judge of the Admiralty, on the foregoing Memorandum:—

"It is, I think, perfectly clear, that all inquiries into the alleged misconduct of Colonial Judges must be attended with difficulty, and in most cases with some mischievous consequences.

"I entertain no doubt in my own mind, that the most efficacious means of proceeding, and productive of the least evil consequences, is that the Governors of the Colonies respectively should be entrusted with the power of investigating any alleged charges against the Judges, and, if in their opinion need be, of suspending them; of course, all the proceedings and the evidence upon which they act should be remitted without delay to the Colonial Office, and, if need be, Her Majesty will be advised to remit the case to the consideration of the Privy Council. I apprehend that the Judicial Committee has no peculiar claim to take cognizance of such a case.

"I think the propriety of the Colonial Governor being invested with this power, great as it is, would be more apparent if contrasted with any other mode of proceeding than that suggested.

[19] "I forbear to enter into those particulars, not only because they are obvious, but also because I feel confident the consideration of them would naturally occur to all who have to look into this question.

S. L.

"April 14, 1870."

Opinion of the Right Hon. Sir Edward Ryan on the foregoing Memorandum:—

"I entirely concur in the opinion expressed by Lord Chelmsford and Dr. Lushington, and in the Memorandum, that the best mode of proceeding, and productive of the least evil consequences, in most cases, will be to leave the responsibility, in the first instance, to the Governor of the Colony, subject to an appeal to the Queen in Council.

"I agree with Dr. Lushington in thinking that the Judicial Committee has no 'peculiar claim' to take cognizance of such cases, though probably the Secretary of State would generally be desirous of referring such cases to that body. In the case of *Willis v. Gipps* (5 Moore's P.C. Cases, 379), the then Lord President (the Duke of Buccleugh), with the Lord Chancellor (Lord Cottenham), Lord Brougham, Chief Justice Tindal, Mr. Baron Parke, the Right Hon. T. Pemberton Leigh, and the Right Hon. W. E. Gladstone, sat on the Judicial Committee upon an appeal against an Order of Amotion.

"I concur in the arguments stated in Sir F. Roger's paper in favour of proceedings by the Governor, subject to a review by the Secretary of State, or the [20] Privy Council, and generally in the view so clearly stated in the Memorandum, as to the course of proceeding in cases of this nature before the Privy Council.

"April 21, 1870.

E. R."

[21] ORDER IN COUNCIL FOR THE ESTABLISHMENT OF CERTAIN RULES TO BE OBSERVED BY PROCTORS, SOLICITORS, AGENTS, AND OTHER PERSONS ADMITTED TO PRACTISE BEFORE HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

At the Court at Windsor, the 31st day of March, 1870.

Present:—The Queen's Most Excellent Majesty in Council.

Whereas there was this day read at the Board a representation from the Lords

of the Judicial Committee of the Privy Council, dated the 26th day of March instant, humbly recommending to Her Majesty in Council, that certain Rules be established by the authority of Her Majesty, by and with the advice of Her Privy Council, to be observed by all Proctors, Solicitors, Attorneys, Agents, or other Persons employed in the conduct of appeals, petitions, or other matters pending before Her Majesty in Council, Her Majesty having taken the said representation into consideration, and the schedule of Rules hereunto annexed, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, and it is hereby ordered, that the same be punctually observed, obeyed, and carried into execution.

ARTHUR HELPS.

[22]

SCHEDULE ANNEXED TO THE FOREGOING ORDER.

I. Every Proctor, Solicitor, or Agent admitted to practise before Her Majesty's Most Honourable Privy Council, or any of the Committees thereof, shall subscribe a declaration, to be enrolled in the Privy Council Office, engaging to observe and obey the Rules, Regulations, Orders, and practice of the Privy Council; and also to pay and discharge, from time to time, when the same shall be demanded, all fees or charges due and payable upon any matter pending before Her Majesty in Council; and no person shall be admitted to practise, or allowed to continue to practise, before the Privy Council, without having subscribed such declaration in the following terms:—

FORM OF DECLARATION.

We, the undersigned, do hereby declare, that we desire and intend to practise as Solicitors or Agents in appeals and other matters pending before Her Majesty in Council; and we severally and respectively do hereby engage to observe, submit to, perform, and abide by all and every the Orders, Rules, Regulations, and practice of Her Majesty's Most Honourable Privy Council and the Committees thereof now in force, or hereafter from time to time to be made; and also to pay and discharge, from time to time, when the same shall be demanded, all fees, charges, and sums of money due and payable in respect of any appeal, petition, or other matter in and upon which we shall severally and respectively appear as such Solicitors or Agents.

[23] II. Every Proctor, Solicitor, or Attorney practising in London, and duly admitted in any of the Courts of Westminster, shall be allowed to subscribe the foregoing declaration, and to practise in the Privy Council, upon the production of his Certificate for the current year; and no fee shall be payable by him on the enrolment of his signature to the foregoing declaration.

III. Persons not being certificated London Solicitors, but having been duly admitted to practise as Solicitors by the High Courts of Judicature in India or in the Colonies respectively, may apply, by petition, to the Lords of the Judicial Committee of the Privy Council for leave to be admitted to practise in the Privy Council; and such persons, if admitted to practise by an Order of their Lordships, shall pay annually on the 15th of November, a fee of five Guineas to the Fee Fund of the Council Office.

IV. Any Proctor, Solicitor, Agent, or other person practising before the Privy Council, who shall wilfully act in violation of the Rules and practice of the Privy Council, or of any rules prescribed by the authority of Her Majesty, or of the Lords of the Council, or who shall wilfully misconduct himself in prosecuting proceedings before the Privy Council, or any Committee thereof, or who shall refuse or omit to pay the Council Office fees or charges payable from him when demanded, shall be liable to an absolute or temporary prohibition to practise before the Privy Council, by the authority of the Lords of the Judicial Committee of the Privy Council, upon cause shown at their Lordships' Bar.

REPORTS OF CASES heard and determined
by the Judicial Committee and the Lords
of the Privy Council, on Appeal from the
Supreme and Sudder Dewanny Courts in
the East Indies, 1869-70. By EDMUND F.
MOORE, Barrister-at-Law. Vol. XIII.

RAE MANICK CHUND,—*Appellant*; MADHORAM and Others,—*Respondents* *
[March 10, 1869].

*On appeal from the Sudder Dewanny Adawlut at Agra,
North-Western Provinces.*

By sec. 2 of Ben Reg. XI. of 1825, it is provided that, "whenever any clear or definite usage of Shekust pywust (separation and accretion of lands by alluvion), respecting the disjunction and junction of land, by the encroachment or recess of a River may have been immemorially established, for determining the rights of the proprietors of two or more contiguous estates, divided by a River (such as that the main channel of the River dividing the estate shall be the constant boundary between them, whatever changes may take place in the course of the River, by encroachment on one side, and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land, between the parties whose estates may be liable to such usage." Held, that, according to the true construction of that section, the *onus* is on the party who relies on that section as his title to alluvial land by accretion, to prove a local usage and custom.

This was a claim for possession of alluvial lands. The suit was brought by the Appellant against the Respondent and others, to recover possession, with [2] mesne profits, of 1743 beghas of land, described in the plaint as partly cultivated land, and partly light sandy lands, which it was contended by the Appellant was severed from a portion of his zemindary, by a sudden and violent change in the course of the River Ganges, on its northern bank. The Appellant also sought to set aside an Order of the Collector, which gave possession of the lands in dispute to the Respondents, as proprietors of mouzahs which had extended up to the southern bank of the River Ganges, previous to the above-mentioned sudden and violent change of

* Present:—Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the Admiralty Court), the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

course. The Appellant, in support of his claim, relied on cl. 2, sec. 4, of Ben. Reg. XI. of 1825 (a).

[3] The Respondents put in separate answers, denying the Appellant's allegations, and relying, *inter alia*, on cl. 2, sec. 4, of the same Regulation. Witnesses were examined, but there was no evidence given of any special usage in the *locus in quo*, with respect to accretion by alluvion. Evidence was given of the proceedings of the Government in respect of claims by the respective parties to the land, and report of the Tahseeldar, under which the Deputy Collector of the District put the Appellant in possession; also a Letter of the Collector, dated the 25th of August, 1863, was put in, in which he stated, that it appeared "from investigation, that the main stream of the Ganges had hitherto been held to constitute the boundary between the two Pergunnahs of Chail and Jhoosi, and that by maintaining the rule in the present instance, the land will appertain to the Petitioners who claim it. At the same time, whilst thus reporting (he added), I ought not to omit to [4] record my opinion, that the real point at issue between the rival Claimants of this land will not be affected by the above-mentioned fact." In the Report of the Government Commissioner forwarding this Letter, he expressed his concurrence with the opinion of the Collector, that the point at issue was not affected by the fact that the Government treated, for revenue purposes, the channel of the River as the boundary, for the time being, between the two Pergunnahs. On the 24th of October, 1863, the Sudder Board of Revenue made an Order, reversing the Collector's Order, and declaring the land to belong to the Respondents, who, by an Order of the Collector, were put in possession.

The questions raised in the suit were, whether the lands had been, anterior to the change in the course of the River Ganges, a portion of the Appellant's zemindary

(a) The following are the principal clauses in this Regulation affecting the question at issue:—

Sect. II. "Whenever any clear and definite usage of Shekust pywust, respecting the disjunction and junction of land, by the encroachment or recess of a River, may have been immemorially established, for determining the rights of the proprietors of two or more contiguous estate, divided by a River (such as that the main channel of the River dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the River, by encroachment on one side, and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land, between the parties whose estates may be liable to such usage."

Sect. IV. cl. 1. "When land may be gained by gradual accession, whether from the recess of a River, or of the Sea, it shall be considered an increment to the tenure of the person whose land or estate it is thus annexed, whether such land or estate be held immediately from Government, by a Zemindar, or other superior land-holder, or as a subordinate tenure, by any description whatever. Provided that the increment of the land thus obtained shall not entitle the person in possession of the estate or tenure, to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue, to which it may be liable under the provisions of Reg. II., 1819, or of any other Regulation in force."

Cl. 2. "The above rule shall not be considered applicable to cases in which a River by a sudden change of its course may break through and intersect an estate, without any gradual encroachment, or may by the violence of stream separate a considerable piece of land from one estate, and join it to another estate, without destroying the identity, and preventing the recognition of the land so removed. In such cases the land, on being clearly recognized, shall remain the property of its original owner."

Cl. 3. "When a chur or Island may be thrown up on a large navigable River (the bed of which is not the property of an individual), or in the Sea, and the channel of the River, or Sea, between such Island and the shore may not be fordable, it shall, according to established usage, be at the disposal of Government."

and lands, or had been otherwise in his exclusive possession and enjoyment as proprietor, and whether, afterwards, the identity of the lands thereby severed could be made out, and the recognition thereof established, according to the provisions of Ben. Reg. XI. of 1825, sec. 4, cl. 2, (*ante* [13 Moo. Ind. App.], p. 3); or whether, on the other hand, as was contended for by the Respondents, the lands had never in fact been in the possession of the Appellant, or, if they had been, whether their distinguishing marks and features had not been completely obliterated, so as to prevent their being identified in terms of the Regulation; and, also, whether any such "clear and definite usage of shekust pywust," separation and accretion of lands by alluvion, as contemplated and intended by section 2 of that Regulation, had been proved by the Respondents. [5] Also whether, as was contended by the Appellant, the change in the course of the River Ganges had been sudden and violent, so as thereby to cut off or sever the lands in dispute from his zemindary and lands. And lastly, whether the lands in dispute, as was also contended by some of the Respondents, were to be considered an increment to their mouzahs by gradual accretion or accretion, so as to bring the case within cl. 1, sec. 4, of the same Regulation; or whether, as was contended by other Respondents, the lands could be considered and treated under cl. 3 of the section, as a *chur* (Island) thrown up in a navigable river, with a fordable channel between such *chur* and the bank of the river nearest to the Respondents' mouzahs and lands; and, therefore, to be considered to belong to those Respondents as owners of their mouzahs.

On the 27th of July, 1864, Mr. H. G. Keene, the Officiating Judge of the Civil Court of the Zillah Allahabad gave judgment, and decreed in favour of the Appellant with mesne profits and interest. The material part of his judgment was in these terms:—"This suit concerns a large tract of culturable land situated on the bed of the River Ganges, where it flows between the Pergunnahs of Chail and Jhoosi, in the District of Allahabad. The River formerly ran on the Jhoosi side, and was brought down opposite Daragunj, on the Chail side, some fourteen years ago, by artificial means. But it appears that on the subsidence of the rain floods in 1862, the River was found to have reverted to its original bed. A claim was then set up by certain villages of the Chail Pergunnah to be allowed to consider the land annexed to their areas under the provisions of Ben. Reg. XI. of 1825, [6] sec. 4, cl. 1. Mr. Deputy Collector, E. B. Thornhill, however, after examining the place, found that this was not an ordinary case of alluvion, but a sudden intersection of the estate, by which a portion still recognizable had become separated for a time at least from its present area. The decision was, therefore, according to the ensuing clause of the above section adverse to the suit, and was affirmed on appeal by the Collector and Commissioner, the Plaintiffs having also failed in establishing a fresh issue, viz., that the land was theirs by a custom of 'Shekust Pywust.' But the Board, on a fresh appeal, gave them the land. The propriety of these rulings of the local Officers seems clear. The Plaintiffs, as Defendants in this Court, have cited as a ruling case the decision of the Sudder Dewanny Adawlut in a Gazeepore suit (No. 164 of 1856), but have not succeeded in establishing its applicability. This is not a question of amorphous sand banks thrown up by a gradual process, and only useful for the production of cucurbitaceous vegetables, but a case admitted by the Canoongoe, Defendants' own witness, to be one to which local usage does not apply."

The Respondents appealed from this judgment to the late Sudder Dewanny Adawlut at Agra, and the hearing of the appeal took place on the 6th March, 1865, before Messrs. W. Roberts and F. B. Pearson, two of the Judges of that Court, who reversed the decree of the Officiating Judge with costs. The material part of the judgment of the Court was as follows:—"First, that the evidence showed that the change in the course of the River Ganges was not sudden, but gradual. Second, that the main stream of the Ganges formed the limit [7] between the villages of both parties, and that such main stream had always been the boundary between the Pergunnahs Chail and Jhoosi. Third, that both before and subsequent to the settlement, the evidence showed that the test, whether the alluvial lands belong to the Pergunnah or the other, was, whether the channel is fordable, or not; hence, the present suit ought to be disposed of in conformity with such rule and usage. That the amount of mesne profits awarded was inconsistent with the statements filed by the several Defendants. That the Plaintiff had overvalued his claim, and that the costs payable to him on that account ought to be

abated. The judgment then proceeded:—"We are of opinion, that on the second and third grounds of appeal, the decision of the Court below must be reversed, and the award of the Sudder Board of Revenue should be maintained. The local authorities, and the Court below, have decided in favour of the Plaintiff, the proprietor of Bela Sailabee, of Pergunnah Jhoosi, on the east or left bank of the Ganges, on the ground that the River has, by a sudden change of its course, broken through the lower lands of the Plaintiff's mouzah, and joined a considerable piece thereof to the lands of the Defendants, without, however, destroying the identity of the Plaintiff's land. In other words, they have decided this case upon the rule laid down in cl. 2, sec. 4, Ben. Reg. XI. of 1825. But this rule, as well as the other rules in section 4 of that law, apply only where no definite local usage for the adjustment of such disputes prevail, as is expressly declared in section 3 of that Regulation. Section 2 enacts that, whenever any clear and definite [8] usage of 'Shickust Pywust,' respecting the disjunction and junction of land, for determining the rights of the proprietors of two or more contiguous estates, divided by a River (such as that the main channel of the River dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the River, by encroachment on one side, and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land, between the parties whose estates may be liable to such usage. Section 3 then enacts, that where no such local usage may be established, the rules in section 4 shall be applied for the determination of all claims and disputes. It was of material importance to the decision of this case, that the evidence as to local usage should have been carefully recorded, and fully considered. The Judge has given but very passing attention to this point. We are of opinion, however, that though the evidence on this matter is not so full as is desirable, we have sufficient materials for forming our judgment, without causing further delay and expense to the parties to the suit by sending back the case for investigation, under section 354 Civil Procedure Code. We remark that the Sudder Board of Revenue called upon the Collector, Mr. Morris, to report as to what was found to be the boundary between Pergunnahs Jhoosi and Chail. The Collector stated in reply, on the 28th August, 1863, that 'the main stream of the Ganges has hitherto been held to constitute the boundary of the two Pergunnahs, and that by maintaining the rule in the present instance, the land in dispute will appertain to the (Zemindars of Busgee, Moostufabad, and [9] Belmun Putti) Petitioners who claim it.' We consider that this statement of the Collector, as to the existence of the 'rule' for the adjustment of such disputes, weighs most strongly in favour of the Defendants, as it was given after investigation, and contrary to his previous finding when the case was before him, in appeal. The correctness of this statement is not seriously impugned on the part of the Plaintiff (the Respondent). It is confirmed by the copy of the survey Map of 1838, which shows that the low lands of the villages of Pergunnah Chail extended as far as the main stream of the Ganges. In the Settlement report of the 1st October, 1839, the Collector notices, that the District is divided into three parts, the first two of which he mentions as the Pergunnah situated in the Dooab, as Chail, etc., and those 'lying on the other side of the Ganges,' as Jhoosi, Hundeea, and others. In paragraph 25 of Reports of the Revenue Settlement, North-Western Provinces, vol. ii., part 1, page 433, he makes particular mention of the state of low lands in respect of some of the villages now claiming the land in dispute. This shows, that there was much low land subject to constant claims between the proprietors of the conterminous mouzahs of Pergunnah Chail; but it is remarkable that no mention is made of the low land of Jhoosi. Indeed the plan shows that all low land beneath the fort and Daragunj was on the Chail side of the main stream, and that the land now in dispute at that time appertained to Chail. The Plaintiff himself admits that, about fifteen or sixteen years ago, he acquired the land in suit. It is clear from other testimony that this was owing to the main stream running close under Daragunj. The evidence of [10] the Canoongoe of Chail is clear, that the possession of the low lands has varied with the shifting of the main stream. The land, which was formerly in the possession of the Daragunj people, the Zemindars of the River mouzahs of Chail, passed into the possession of the Jhoosi people when the River came on the Daragunj side; we see no reason for doubting the statement of this witness. The Canoongoe of Jhoosi was not produced

to show that the statement of the Chail Canoongoe (if, indeed, they are different individuals) was incorrect. We are of opinion, then, that the decision of the Sudder Board of Revenue was made upon the rule applicable to disputes of this nature, was according to usage, and should be upheld."

The appeal was from this decree.

The Respondents did not appear, and the case was consequently heard *ex parte*.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant. - The decree of the Sudder Court cannot be maintained. It is entirely based on an assumed local usage, bringing the case under section 2 of Ben. Reg. XI. of 1825, although it declares, that the evidence in the suit of such custom was not so full as desirable; but the Court supplements the same by referring to the Letter of the Collector, dated the 28th of August, 1863, the effect of which the Sudder Court has altogether misapprehended and misapplied: attaching to it a meaning entirely opposed, both in its language and spirit, in respect to the question at issue. Section 2 of Ben. Reg. XI. of 1825 provides, that claims and [11] disputes relative to alluvial lands are to be decided "between the parties whose estates may be liable to such usages," by immemorial and definite usage, when such shall have been clearly recognized and established. Here the Respondents, who in the plaint alleged and relied on such a usage, failed to prove the same by the evidence adduced by them. Again, the Respondents alleged, that the lands in dispute were gained by gradual accession to their own mouzahs from the River Ganges, and so were to be considered an increment to the tenure of their estates under cl. 1, sec. 4, of Reg. XI. of 1825: they failed, however, to prove such allegation. The decree of the Sudder Court ought to have been made in favour of the right of the Appellant under cl. 2, sec. 4, of that Regulation, as his case was established by the evidence of the lands in dispute having been so separated from the Appellant's estate by the sudden change of the course of the River Ganges, as to destroy the identity or prevent the recognition of the lands in question.

At the conclusion of the Appellant's argument judgment was pronounced by

The Right Hon. Sir James Colville.—Their Lordships are of opinion, that the only arguable question upon this appeal is, whether it has been established, within the meaning of the 2nd section of Reg. XI. of 1825, that there is an immemorial custom by virtue of which the River Ganges at the point in question is taken to be the boundary between the estates on either bank, so that alluvial land, like that in question, belongs to one or other of those estates according to the actual course of the River?

[12] If that custom is not established, their Lordships are perfectly satisfied that the Appellant had succeeded in the Court below in establishing every circumstance which was necessary to bring his case within the 2nd clause of the 4th section of the same Regulation:—that he had shown that the land was separated from his estate by a sudden change in the course of the River, and had clearly identified it as cultivated land which had formed a portion of his estate.

Upon the question of immemorial custom, he had the judgment of the Zillah Court in his favour. The learned Judges of the Sudder Court have reversed that judgment, on the ground, that they thought there was sufficient evidence of the custom to warrant them in so doing. That is not their Lordships' opinion.

The reasons assigned by the learned Judges do not support their conclusion.

They rely principally on the Letter of the Collector, Mr. Morris, which was written in an early stage of the proceedings mentioned in the record to the Sudder Board of Revenue; but it seems to their Lordships, that they have put an entirely erroneous interpretation upon that Letter. That Letter, as their Lordships read it, amounts to this,—That the main stream of the Ganges had hitherto been held to constitute the boundary of the two Pergunnahs for Police and fiscal purposes; and that if that rule were to determine the proprietary right to alluvial land, it would no doubt follow that the land in question belonged to the zemindary on the southern side of the River. But the Collector went on to state his opinion, and to give reasons for that opinion, that the question of proprietary right was not to be determined upon that principle. Therefore, the Judges of the Sudder Court [13] seem to have been in error in treating the opinion of the Revenue Officer so given as an argument for coming

to the conclusion to which they arrived. And it may be further observed that the Sudder Board of Revenue, the authority to which the Collector's Letter was addressed, does not appear to have taken that view.

Then as to the other evidence upon which the Judges of the Sudder Court rely, it seems to their Lordships to be far from sufficient to justify the conclusion that an immemorial custom had been proved. The Conoongoe's evidence, which has been chiefly relied upon, is clearly too slight for that purpose. The proceeding with reference to the Gogra, which is set forth in the record, if it amounts to a decision that such a custom as that which is now set up obtains on the banks of that River, affords no evidence that a similar custom exists on the banks of the Ganges where it forms the boundary between the Pergunnahs, Jhoosi and Chail. The language of the Regulation implies that the custom to be proved is a local custom.

Upon the whole, then, their Lordships are of opinion, that in holding that the custom was established, the Court below was wrong.

The only further question for their Lordships to consider is, whether they should reverse the decree under appeal, and affirm the decree of the Court of first instance, or whether they should remit the case, as the Judges of the Sudder Court seem at one time to have thought of remitting it, for a new trial? It appears that the parties were fully informed what issue they had to prove; they should have come prepared with evidence to prove, if it was capable of proof; and they have failed to do so.

[14] Their Lordships think, therefore, they ought to take the first of the before-mentioned courses, viz., reverse the judgment of the Court of appeal, and affirm the judgment of the Zillah Court.

Considering, however, that the case of the Respondents may have failed from mere defect of proof, and that similar cases may arise between other parties in the neighbourhood of this locality, their Lordships are desirous to state, by way of caution, that this judgment should not be quoted in any future case between other parties as a conclusive decision of this Court of appeal, to the effect, that no such custom as that which has been here alleged exists. All they intend to decide is, that it lay on the Respondents to prove the custom which it was essential to their title to prove, and that, as they have failed to do so, the title of the Appellant must prevail.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the late Sudder Dewanny Adawlut at Agra; to order that, in lieu thereof, a decree be made dismissing the appeal to that Court from the decree of the Zillah Court of the 27th of July, 1864, with costs. And the Respondents must also pay the costs of this appeal.

[See *Baboo Bissessurnath v. Maharajah Mohessur Bux Singh Bahadoor*, 1872, L.R. Ind. App. Sup. Vol. 38.]

[15] THE BANK OF HINDUSTAN, CHINA, AND JAPAN, LIMITED, IN LIQUIDATION,—*Appellants*; THE EASTERN FINANCIAL ASSOCIATION, LIMITED, IN LIQUIDATION,—*Respondents* * [March 15, 1869].

On appeal from the High Court of Judicature at Bombay.

A registered Joint Stock Company in Bombay, with limited liability, being in the course of voluntarily winding up under the Act of the Indian Legislature, No. XIX., 1857, sect. 69, and the Official Liquidators having entered into an arrangement for compromise with a class of Contributors, in discharge of their liabilities, for a specific sum, the "Indian Companies Act," No. X. of 1866, was passed. By sections 173 and 174 of that Act, power is given to the High Court at Bombay, to sanction compromises and arrangements. The

* Present:—Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

Liquidators applied to the High Court, under the aforesaid Acts, to ratify the compromise above entered into, which the Court accordingly sanctioned and ordered. On appeal, held:—

First, that under the 173rd and 174th sections of the Act, No. X. of 1866, the power of the Liquidators extended to making a general compromise of claims upon Contributories as a class, abandoning an equal proportion in each case, notwithstanding the difference of position between the Contributories, or inquiring closely into the means of each individual Contributory, and

Secondly, that upon the evidence and the judicial knowledge of the existing state of affairs at Bombay, the Court had exercised a just discretion in the investigation, and the Order of the Court sanctioning the compromise affirmed.

The case of *ex parte Totty* (29 L.J. (Ch.) (N.S.), 702), distinguished [13 Moo. Ind. App. 31].

The Judicial Committee is always reluctant to interfere with a matter of discretion exercised by the Courts in India, unless it can be shown that the Court has acted upon an erroneous principle [13 Moo. Ind. App. 35].

In this case, the appeal was brought from a decree or Order of the High Court of Judicature, on its appellate side, affirming an Order made by Sir [16] Joseph Arnould in Chambers under the 173rd and 174th sections of the Indian Companies Act, No. X. of 1866 (*a*), sanctioning a general compromise between the Official Liquidators and the Creditors of the Respondents' Association in their winding up, and directing that all the Creditors should be bound by the compromise, with this variation—that such Order should be subject to the condition that one Ahmedbhoj Hubibbhoj joined in giving a certain guarantee.

By Act, No. XIX. of 1857, of the Legislative Council of India, persons are authorized to form themselves into a Joint Stock Company or Association, with limited liability, for the purpose of Banking or Insurance, upon registration; and provisions are made by section 60, for the winding up of any [17] such Company by the Court, or voluntarily: in either case, the existing Shareholders are made liable to contribute to the assets of the Company to an amount sufficient to pay the debts and liabilities of the Company and the costs of the proceedings, but in the case of a Company with limited liability only, not exceeding the amount unpaid on each share; and section 62 provides, that, in the event of a limited Company being wound up by the Court, and not voluntarily, any person who has ceased to be a holder of any share or shares within the period of one year prior to the commencement of the winding-up, is to be liable in respect of such share or shares to contribute in the same manner as an existing Shareholder. By section 89, power is given to the Official Liquidators, with the sanction of the Court, to compromise any debts or claims, and to execute all acts which might be necessary for the winding-up and distributing assets.

The Respondents' Association was registered under this Act, as a joint stock

(*a*) These sections were as follows: Section 173 enacts, that, "the Liquidators may, with the sanction of the Court, where the Company is being wound up by the Court, or subject to the supervision of the Court . . . pay any classes of Creditors in full, or make such compromise or other arrangement as the Liquidators may deem expedient, with Creditors or persons claiming as Creditors, or persons having, or alleging themselves to have any claim, present or future, whereby the Company may be rendered liable."

Section 174 enacts, that "the Liquidators may, with the sanction of the Court, where a Company is being wound up by the Court, or subject to the supervision of the Court . . . compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, subsisting or supposed to subsist, between the Company and any Contributory, or alleged Contributory, or other Debtor or person apprehending liability to the Company, and all questions in any way relating to or affecting the assets of the Company, or the winding up of the Company generally, upon such terms as may be agreed upon; with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities."

Company with limited liability, and in 1865 a resolution was passed for voluntarily winding-up the Company.

On the 6th of July, 1865, an Order was duly made by the High Court of Judicature at Bombay, on its ordinary original civil jurisdiction side, that the Respondents' Association should be wound up by the Court, under the Act, No. XIX. of 1857, sec. 69, and that all suits and proceedings against the Association should be stayed.

By the Indian Companies Act, No. X. of 1866, which came into operation on the 1st of May, 1866, fresh provisions were made for the winding-up of such Companies; and by sections 173, 174, power [18] is given to the Court to sanction compromises and arrangements between the Liquidators and the Creditors of, or Debtors to, the Company, and by section 191, this power applies to a limited Company registered under the Act, No. XIX. of 1857.

After the making of the above Order, Rowland Hamilton, and Nesserwanjee Ardaseer Wadia, were appointed Official Liquidators, and the winding-up proceeded in the High Court.

The original nominal capital of the Respondents' Association was one crore of Rupees divided into 25,000 shares of Rs. 400 each. The capital was subsequently increased by the issue of 25,000 new shares of Rs. 400 each; 12,500 of which were sold at auction, but such sale had not been recognized as legal by the Court, and the issue of the remaining 12,500 was, therefore, contested. The list of claims admitted against the Respondents' Association disclosed debts to the amount of 42 lacs of Rupees, or thereabouts, less securities of the value of about Rs. 85,000 without interest, which would probably amount to 6 to 8 lacs of Rupees, or thereabouts.

A Committee of Shareholders was appointed about March, 1867, to consider the position of the Respondents' Association, and what amount it would possibly offer to the Creditors, and how much the Contributories would be able to pay, when a compromise was proposed by the Contributories and Directors of the Respondents' Association to the Liquidators for the provision of funds to be divided amongst and paid to the Creditors in discharge of their claims, so that each Creditor requiring it might receive the sum of 6 annas in the Rupee, on the [19] amount of his debt without interest, upon the following terms:—

“First, that Kessowjee Naik, Cassumbhoy Dhuramsey, and Ahmedbhoy Hubibhoy, do forthwith bring in and pay to the Liquidators the sum of 6 lacs of Rupees, and that they and Premchund Roychund become purchasers of the assets of the Company, at 6 lacs of Rupees, which assets are to be realized by the Liquidators, and the Purchasers are to pay within four months to the Liquidators any balance which may be necessary to make up the said sum or purchase-money of 6 lacs of Rupees, each of the said Purchasers being liable for the sum of $1\frac{1}{2}$ lacs only in respect of the said purchase or towards the making up the balance thereof; any surplus realized by the said assets to be paid to the Purchasers.

“Second, that a call of Rs. 30 per share, and no more, be paid by all the Contributories mentioned in the list already prepared by the Liquidators, excepting the names of certain persons holding 11,000 shares, to be prepared and handed to the Liquidators by Cassumbhoy Dhuramsaybhai, Kessowjee Naik, and Ahmedbhoy Hubibhoy.

“Third, that the said Kessowjee Naik, acting, as we believe, in concert with other persons, shall guarantee the payment of such further sums, if any, required to make up the payment of 6 annas in the Rupee to any of the Creditors requiring the same, within the like period of four months from the date of the Order of the Judge confirming the said compromise, or authorizing the same to be accepted by the said Liquidators.”

The majority of the Creditors assented to the principle of this compromise, and amongst others [20] who so consented were the Bank of Bombay, who were Creditors for 16 lacs of Rupees, or thereabouts; the Asiatic Bank Corporation, whose claim for 8 lacs of Rupees, or thereabouts, had been compromised at a cost of less than 6 annas in the Rupee; the Central Bank of Western India for 5 lacs of Rupees, or thereabouts, had signified their willingness to accept a compromise of considerably less than 6 annas in the Rupee, against which Bank the Respondents' Association had a claim for calls on shares, but which might be difficult to enforce; the Agra Bank were Creditors for Rs. 75,000; the Indo-Egyptian were Creditors for Rs. 98,739; the Bank of Surat and Bank of Guzerat were Creditors for Rs. 52,796; the

Financial Association of India and China, who were Creditors for 1 lac, 97,589 Rupees, were all willing to accept a compromise of less than 6 annas in the Rupee, provided that a prompt settlement could be made; the representatives of the late Darashaw Dorabjee Rundana, who was a Creditor for Rs. 45,000, the Trustees of the estate of Navulchund Nahalehund were also willing to accept a compromise of much less than 6 annas in the Rupee. There were also twelve small Creditors, who had signified their willingness to consent to a compromise. The European Assurance Company, who were Creditors for Rs. 39,000, the head office of which is in London, had no power in Bombay to compromise, but the compromise had been recommended by the Bombay Board to the Board in London. Of the other Creditors, the amount of whose claims was about Rs. 22,000, nearly all were prepared to accept similar compromises.

The Appellants, who were in liquidation under the [21] Court of Chancery in England, and who were Creditors for 5 lacs 17,000 Rupees, or thereabouts, the Liquidators of which Bank were resident in London, instructed their Agent in Bombay not to accept any compromise, but to press for payment of their claim in full; and Mr. Michael Hugh Scott, a Creditor for 2 lacs of Rupees or thereabouts, required a composition of a larger sum than 6 annas in the Rupee; and Sir William Gordon, another Creditor for Rs. 25,000, declined, through Scott, to accept a composition; and these were substantially the only Creditors who objected to the compromise.

In an affidavit made by the Liquidators, it was stated, that the Contributories contended, that the winding-up of the Respondents' Association was proceeding under the Order of the 26th of July, 1866, or under the resolution for the voluntary winding-up before referred to, and that a very large proportion of the Shareholders, who would be best able by their position and means to contribute towards the payment of the debts of the Company, and who were on the list of Contributories as past and not present Members, would be absolutely discharged from all liability as Shareholders. That the Official Liquidators had consulted with the Committee of Shareholders before mentioned, and with other persons, and upon an examination and inquiries as to the position of the Debtors or Contributories under the winding-up, and also as to the value of the securities held, arrived at the following results:— First, that the offer on the terms before mentioned, of 6 lacs of Rupees for the assets of the Company, was a fair one. Second, that if the argument of the Contributories was well founded, the list of Contri-[22]-butories, as it would then stand, would not produce more than a sum varying from 3 to 4 lacs of Rupees. Third, that if it should be decided by the Court, that the Order made on the 6th of July, 1865, for the winding-up of the Company by the Court, was revived by the Order of the 25th of July, 1866, the list of Contributories which would then be settled as it had already been prepared and filed in Court, would not, as the Liquidators verily believed, in consequence of some of the principal Shareholders being beyond the jurisdiction of the Court, and of the impoverished circumstances of those who are resident in Bombay, be likely to produce a larger sum than 8 to 10 lacs of Rupees. Fourth, that the call of Rs. 30 per share, which the Contributories had agreed to pay if the compromise mentioned was carried out, had been estimated by the Committee of Shareholders and others, to produce a sum varying from 2 to 3 lacs of Rupees; in which estimate they concurred. For these reasons, the Official Liquidators were of opinion, that it would save great delay and expense, and would be very much to the interest of the general body of Creditors, if the terms of the proposed compromise could be accepted and carried out. The affidavit then went on to state, that having special regard, therefore, to the very great delay and expense which would attend further litigation with the Contributories, who assumed a very strong position on the point before mentioned, and, further, considering that a very large majority of the Creditors assented to the proposition of a compromise for the speedy settlement of their claims, the Liquidators were clearly of opinion, that it would be very much to the interest of the general body of Creditors of the [23] Company that the compromise should be adopted, and the acceptance of the same compromise by the Liquidators of the Company (to be carried out by proper deeds to be executed by and between the parties) should be sanctioned by the Court.

Thereupon an application was made to the High Court to sanction such com-

promise, and after reading certain affidavits and hearing the parties in Chambers, Sir Joseph Arnould, on the 26th of June, 1867, ordered, under sections 173 and 174 of the Indian Companies Act, No. X. of 1866, that the compromise should be sanctioned and that all the Creditors should be bound thereby.

The Appellants, who were Creditors to a large amount, appealed against this Order to the High Court on its appellate side, when the above Order was affirmed.

The Judges of the appellate Court of Bombay, consisting of the Chief Justice, Sir Richard Couch, and Mr. Justice Westropp, in their reason for sanctioning the compromise, said:—"At the close of the argument, we intimated, that the compromise might be made satisfactory to us if some security were given for the performance by Kessowjee Naik of his guarantee. We have now been informed by Counsel for the Liquidators, that he declines to do so solely on a point of honour, but that Ahmedbhoj Hubibbhoj has consented to join in the guarantee, and to execute the Deed. We are of opinion, that, with this addition to its terms, the compromise which has been sanctioned by the learned Judge should receive the sanction of this Court. The question is a peculiar one, and the compromise not of the ordinary character which is contemplated in section 174 of the Indian [24] Companies Act of 1866. If the proposed compromise had been with a class of persons who had been finally determined to be Contributories, and the only questions had been how much they should be required to pay, and what their means of paying the calls for which they were liable might be, the case would have been less difficult, and the decisions of the Courts in England, and the *dicta* of the Judges there which have been cited by Counsel, would have been applicable. In those cases the Contributories were ascertained; but this is a case in which, in the present state of things, it is uncertain who may be ultimately liable as Contributories. The determination of that liability is a question of considerable difficulty. If it were at all clear, that the compromise might not be advantageous to the Creditors, the Court might consider that the decision of the learned Judge ought to be reversed, and the sanction to the compromise withheld; but it is possible, that the result of our doing so might be very unfortunate for the Creditors of the Company. The question of the liability of the Shareholders cannot be settled without a very considerable delay, and we must regard the result of any litigation on that point as very uncertain. Indeed, we might say more than uncertain, as regards the interests of the Creditors, for there is a decision of Sir Joseph Arnould in the case of another Company, which is opposed to the view of the question which would be beneficial to them, and this decision has not been appealed against. If the compromise were not made, and the view of the law taken in that case were finally adopted, it would seem that the Creditors would be injured by the question having been raised. What [25] ever the result might be, the Creditors must be kept out of their money for some time; nor can we ignore the probability that, after the delay which would be caused by litigation the question, the persons who may ultimately be held to be Contributories may be unable to pay the calls; great changes may occur in the interval; and when the liability is established, many of the persons may have left Bombay, and be at such a distance that the Liquidators could not prudently attempt to enforce payment from them. It is necessary that all these circumstances should be considered by the Court. From what we have heard in the course of the discussion of this case, and from the answers to questions put by us to Counsel, it appears to us, supposing the result of the litigation as to the liability as Contributories to be most favourable to the Creditors, to be at least very doubtful, whether a much larger sum will be realized from the persons who may be held to be Contributories than would now be given to the Creditors under the present arrangement. It is a very material element in the consideration of the question before us, whether, when the possibility of gain to the Creditors is so small, it is really worth their while to run the risk of litigation; and whether it would be right for this Court, when a large majority of the Creditors are unwilling to run the risk, to force them to do so, because two Creditors wish it. We do not think that we should be justified in doing that. We have felt the question to be one of considerable difficulty, but have at length arrived at the conclusion, that we ought to sanction the compromise, as one by which a most troublesome and we may say dangerous litigation will be avoided. [26] Considering the peculiar nature of the case, we do

not think it is necessary that we should direct any further inquiries to be made as to the means of the persons who may be liable as Contributories. All the parties who have appeared in the case, except the Liquidators, should bear their own costs, and the costs of the Liquidators should be paid out of the estate."

The appeal was from the Decree or Order made thereon, dated the 27th of September, 1867.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants.—The first question is, whether the High Court had any jurisdiction at all to make the Order appealed from. The proceedings for the compulsory winding-up of the Company was nothing more than a continuance of the voluntary winding-up which had begun under the Act, No. XIX. of 1857, before the Act of the Indian Legislature, No. X. of 1866, came into operation. Section 221 of the latter Act expressly enacts, that it shall not apply to a voluntary winding-up begun before the passing of the Act. It is clear, therefore, that the Act of 1866 does not apply to this case, and the Order appealed from cannot stand, as the Indian Act, No. XIX. of 1857, does not confer the same powers to compromise as are in the Act, No. X. of 1866. Secondly, assuming that the Act, No. X. of 1866, does apply, then we submit, that the Order of the Court below cannot be maintained. It is under the 173rd and 174th sections of the latter Act that the compromise is sanctioned by the Court. Those sections are substantially the same as sections 159 and 160 of the [27] Imperial Statute, 25th and 26th Vict. c. 89, but those sections are intended only to apply to an arrangement between the Liquidators representing the Company and any "Contributory, or alleged Contributory, or other Debtor." Now, as the word "Contributory" is used in the singular number, it is patent that only individual Contributories are meant, and a general compromise of liabilities of Contributories as a class is not contemplated, or within the purview of the 174th section of the Act, No. X. of 1866. Whenever the Legislature intends to deal with Creditors as a class, the word "classes" is expressly used. *Ex parte Totty* (29 L.J. (Ch.) (N.S.), 702, 712) is an authority to show, that a compromise by Liquidators for a fixed sum to be paid by an aggregate class of Contributories, will not be sanctioned by the Court, unless it is shown, that the compromise is founded upon the basis of each individual's personal liability, and, in substance, constituted a compromise with each Contributory. Here there is no proof that each individual Contributory's means of paying have been ascertained by the Liquidators. Neither had the High Court power or authority under any of the sections of the Act, No. X. of 1866, to make an Order directing that "all the Creditors of the said Association be bound by the said compromise," or to affect, prejudice, or in any manner restrain the Appellants, or their legal rights under that Act, which included, in respect of their admitted claims, a rateable proportion of the whole of the assets, including the unexpended and available subscribed capital of the Company. The Appellants are a limited Company, having its domicile [28] in England, and at the time in course of being wound up under an Order of the Court of Chancery in England. Moreover, it sufficiently appears that the compromise was partial and unfair towards the Creditors of the Association, that there was not sufficient proof before the Court on disputed and material points affecting the same, in order to form the elements of, and to enable the Court to arrive at, a safe and correct judicial opinion as to the advantages or disadvantages to Creditors of the proposed compromise, even if such opinion could have been acted upon, where there was no legal power or authority in the Court to bind dissentient Creditors.

Mr. Mellish, Q.C., and Mr. Graham Hastings, for the Respondents.—As the winding-up Order of the 26th of July, 1866, purports to be made under the Acts of the Indian Legislature, Nos. XIX. of 1857, and X. of 1866, s. 162, and has not been appealed from, the Appellants cannot now object that the latter Act does not apply to the proceedings had under the Act, No. XIX. of 1857. The compromise made by the Liquidators and sanctioned by the Court was within the scope of the powers given by the 174th section of the Act, No. X. of 1866. The construction put by the Appellants cannot be supported. It could not have been the intention of the Legislature that compromises should be made with individual Contributories alone, and not with classes. An inquiry by the Liquidators into the circumstances of each individual Creditor was not necessary. It was very uncertain who might be

ultimately liable as Contributories, and that could not be settled without delay and litigation, [29] which would have probably led to the loss of a large part of the calls or payments which may now be obtained from the Contributories. The proposed compromise is reasonable and fair, and for the benefit of the Creditors, as the Purchasers were anxious to abandon their bargains. All the Creditors approved of it except three. The Liquidators must be at liberty to act upon general considerations in compromising with a class of Contributories, and to take advantage of their local knowledge of the impoverished circumstances of the Native residents in Bombay; and the High Court, who had the best opportunity of knowing the state of mercantile affairs there, approved of the compromise recommended by the Liquidators. *Totty's Case* (29 L.J. (Ch.) (N.S.), 702) is distinguishable, and does not apply. There the compromise made by the Liquidators was as to the liability of certain Shareholders; those Shareholders insisting, as a condition, that the *data* upon which the compromise was founded should not be divulged, and it was shown that it was founded upon details of property and circumstances, which, if known, would be detrimental to the interests of the Company, therefore, the Court refused to sanction the compromise made by the Official Liquidators, on the ground of such a secret understanding. *The Risca Coal and Iron Company* (31 L.J. (Ch.) (N.S.), 283) is in point. In that case it was held, that the general power to compromise debts and claims given by section 90 of the 19th and 20th Vict. c. 47, to the Official Liquidator of a Company, with the consent of the Court, is not restricted by any powers given by [30] the 20th and 21st Vict. c. 14, s. 16, nor the 21st and 22nd Vict. c. 60, s. 19; and that the Court had jurisdiction to sanction the compromise of any claim made against the Company if it should consider it expedient and beneficial, having regard to the interest of all parties, so to do. Section 174 of the Indian Act, No. X. of 1866, is substantially the same as the 160th section of the Companies Act, 25th and 26th Vict. c. 89. As the matter was one of discretion vested in the Court below, unless it has proceeded upon a wrong principle, this Tribunal, according to the principles it has acted upon, will not take upon itself to decide the point, whether the compromise was or not beneficial to the Creditors.

The Lord Justice Selwyn.—In this case their Lordships must assume the validity of the Order of the 26th of July, 1866, against which no appeal has been presented, and by which the Eastern Financial Association has been ordered to be wound up. This Order is the foundation of the proceedings, and assuming its validity, there are two questions raised by the present appeal; first, whether the compromise which was sanctioned by the Order of the 26th June, 1867, was one which the Court was competent to sanction; and secondly, whether the Court, assuming it to have the power, ought to have exercised that power under the circumstances of this case.

The words of the 174th section of the Indian Act are, "That the Liquidators may, with the sanction of the Court, where a Company is being wound up by the Court, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and [31] all claims, whether present or future, subsisting or supposed to subsist between the Company and any Contributory or alleged Contributory, or other Debtor or person apprehending liability to the Company; and all questions in any way relating to or affecting the assets of the Company, or the winding-up of the Company generally; and on such terms as may be agreed upon, with power for the Liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharge in respect to all or any of such calls, debts, or liabilities." These words are very wide and general, and they are similar to those contained in section 160 of the English Winding-up Act of 1862. It may be conjectured, that the great amount of costs and expenses incurred in the winding-up of these Companies induced the Legislature to increase the powers of the Court with respect to compromises, in order to the diminishing of the amount of those costs. The words which are to be found in this section, especially the words "liabilities to calls, debts, and liabilities capable of resulting in debts, subsisting or supposed to subsist," and the words "alleged contributory," plainly show that the compromises intended to be sanctioned might be entered into before the list of Contributories had been settled, or the liabilities or competence of the Shareholders had been ascertained. It appears to their Lordships that the compromise in question is a compromise with

Contributories or alleged Contributories, and consequently that it is a compromise within the words of the section in question.

The authority of the case of *Ex parte Totty* (29 L.J. (Ch.) (N.S.), 702) [32] has been much pressed upon the consideration of their Lordships, but the real ground of the decision in that case is explained in the marginal note of the case, which states that "A Company was being wound up compulsorily, after an abortive attempt had been made to wind it up voluntarily, and the Official Liquidators agreed with thirty-five Shareholders to compromise their liabilities for a fixed sum, those Shareholders insisting as a condition, that the *data* upon which the compromise was founded should not be divulged. The compromise was sworn to be founded upon details of property and circumstances, which if made known would operate detrimentally to the thirty-five Shareholders and to the interests of the Company. The Official Liquidators applied to the Court to sanction the compromise under that condition, in pursuance of the 19th section of 21st and 22nd Vict. c. 60, some of the Creditors opposed on the ground of the *data* not being stated, and the application was refused, with costs." And on appeal the decision was affirmed. But in that case, there was no question as to the liability of the thirty-five Shareholders; the question was as to the amount which was likely to be recovered from those thirty-five Shareholders, and that, of course, was the question which the Court had to decide when it came to consider, whether such a compromise was advisable or not; and the grounds upon which that question was to be determined were, from the very terms of the compromise itself, to be kept secret. The mere statement of these facts is sufficient to distinguish that case from the present, in which there are two very different questions: first, whether these persons who are alleged to be Contributories are Contribu-[33]-tories at all? and secondly, whether, assuming them to be fixed upon the list of Contributories, they would be able to pay any, and if any what, proportion of the amount of the calls which might be made upon them?

Now, the first of these questions, viz., whether they are Contributories at all, depends very much upon the time which is to be fixed for the commencement of this winding-up. That is a most material point, upon which the ultimate determination of the question, as to who are the persons liable to be fixed upon the list as Contributories would depend. All the facts relating to that point are apparent upon the affidavits and upon the Orders of the Court itself; for in truth it mainly depends upon the effect which is to be given to the very singular Orders which appear to have been made for the winding-up of this Company; there having been a winding-up order in the first instance, then a proceeding in the nature of a voluntary winding-up, then a discharge of the former Orders, and then ultimately the Order of the 26th of July, 1866, which is the foundation of the present proceedings. Now, all these matters were perfectly patent to the Court, and to all the Shareholders; and they gave rise to the doubt which existed as to the date at which the winding-up of this Company ought to be considered as commencing.

So also with respect to the competency of the Shareholders. The Judges had before them, on the evidence in this case, and from their knowledge of the then state of circumstances existing at Bombay, reason to doubt whether the persons who were on the list of Contributories, as alleged Contributories, would be able to pay any considerable sum, supposing they [34] were ultimately fixed upon the list. In the present case, therefore, there was no agreement for secrecy, there was no object in secrecy, there was no attempt at secrecy; everything was brought fairly before the attention of the Court; and consequently, in the opinion of their Lordships, the case of *Ex parte Totty* (29 L.J. (Ch.) (N.S.), 702) cannot be considered an authority inconsistent with the decision at which the Indian Court has arrived.

That brings us, then, to the consideration of the second question, viz., whether, assuming that the Court had power to sanction such a compromise, that power was properly exercised in the present case.

Now, the power is, as has already been said, one of so wide and extensive a character, that it is doubtless one which ought to be exercised with very great caution; but, on the other hand, in accordance with the principle upon which this Board has always acted, their Lordships would be extremely reluctant to interfere with the discretion of the Courts in India when two Courts there had arrived at the same

conclusion in such a case as this, unless it could be shown that these Courts had acted upon an erroneous principle. A question respecting such a compromise as that which is now under consideration is one falling in a peculiar manner within the discretion of the Judges before whom it is brought, and in this case that discretion appears to have been exercised with very great caution. The fact of the opposition of the present Appellants to the proposed compromise was stated to the Court in the affidavit which was filed on the part of the Official Liquidators. All [35] the Creditors had due notice of the intention to bring this question before the Court, and the Appellants themselves were heard by Counsel in opposition to the Order which was proposed to be made for sanctioning the compromise. It appears upon the evidence that all the Creditors in Bombay, that is, all the Creditors who had the best means of forming a judgment upon the question,—at all events, upon the second of the two questions, viz., the competency of the Shareholders, assuming them to be fixed upon the list,—all of these Creditors assented to the terms of the compromise. From the first there were only three Opponents, and of these, the present Appellants, who are themselves a Company under Liquidation, alone appear here before their Lordships; and it is stated in the affidavit, and not denied, that the persons concerned in the management of the affairs of this Appellant Company, now under liquidation, had sent out orders to Bombay not to accede to any compromise whatever. In addition to this, Mr. Hamilton, one of the Official Liquidators, states in his affidavit that he, after the retirement of another Liquidator, considered himself as bound to act, and that, in point of fact, he did act, as protector of the interests of the Creditors. He says, that he has given careful consideration to all the circumstances of the case so far as they bear upon the question of the advisability of this compromise, and that in his judgment there is no doubt, that it is one which is very advisable, having regard to the interests of the Creditors. He says, that all the Books of account had been from the first open to the inspection of the Creditors, and that some of the principal Creditors have, in fact, for a considerable time retained possession of some of the Books and accounts, or copies of them. No question has been raised as to the *bona fides* of all or any part of the proceedings which are now before us; all the material circumstances of the case were brought at the time to the attention of the Court, and were matters in respect of which the High Court of Bombay was much more competent to arrive at a satisfactory conclusion than this Board can possibly be.

As, therefore, their Lordships have, in the first place, no doubt as to the jurisdiction of the High Court to make the Order in question, and in the second, as they see no ground for controlling the discretion which that Court has exercised in accordance with the wishes of the great bulk of the Creditors, their Lordships will feel it their duty humbly to advise Her Majesty that the Order of the High Court of Judicature at Bombay ought to be affirmed, and this appeal dismissed with costs (see *In re Commercial Bank Corporation of India and the East*, Law Rep. 8 Eq. 241, where a similar Order was made).

[Mews' Dig. tit. COLONY, III. APPEALS TO PRIVY COUNCIL, 5. *Principles on which Privy Council acts*; tit. COMPANY, XXIII. WINDING UP BY COURT, 16. *Liquidator*, b. vii. a. S.C. 6 Moo. P.C. (N.S.) 114; L.R. 2 P.C. 489; 20 L.T. 889; 17 W.R. 554. See *In re Commercial Bank Corporation of India and the East*, 1869, L.R. 8 Eq. 241; *Nicholl v. Eberhart Co.*, 1888, 58 L.J. Ch. 400. Act X. of 1866 was repealed by Act VI. of 1882, of which see s. 201.]

[37] GOPEEKISHEN GOSHAMEE,—*Appellant*; BRINDABUNCHUNDER SIRCAR CHOWDHRY, SREESCHUNDER SIRCAR CHOWDHRY AND GUNGAPERSHAD GOSHAMEE,—*Respondents* * [June 23 and 24, 1869].

On appeal from the High Court of Judicature at Calcutta.

A advanced money to B., in the years 1841 and 1842, the repayment of which was secured by Bonds. A. died leaving two Sons, C. and D., who succeeded to his estate in equal moieties. In 1843, B. required a further loan, when an adjustment of the amount due on his Bonds to A. was made and the balance due ascertained. C. and D., A.'s Sons and representatives, thereupon made a fresh loan to B., who executed a new Bond and a Karanamah to secure repayment of the old debt as well as the new loan. Various sums were paid by instalments by B. between the years 1843 and 1859, under the Bonds and Karanamah. B. subsequently compromised with D. as to the amount due upon his moiety, but C. refused to compromise his share of the debt due to him, and he applied at various times to B., and up to the time of bringing the suit, for payment of the amount due to him under the Bonds and Karanamah. The debt was admitted by B., and an offer made by him to compromise, but refused by C. In 1857, within the two years prescribed by the Act of Limitation, No. XIV. of 1859, C. brought a suit against B.'s representatives to recover the amount due under the Karanamah. B. set up, as bar to the suit, the limitation of twelve years, under Ben. Reg. III. of 1793. Held, on appeal, by the Judicial Committee, reversing the decree of the High Court at Calcutta:—

First, that according to the true construction of the words "clear and positive proof" contained in the exception, in clause 14 of Ben. Reg. III. of 1793, it was sufficient for the Plaintiff to show that he asserted his claim secured by the Karanamah within twelve years from the filing the plaint, and that the Defendant had admitted the demand to be right [13 Moo. Ind. App. 53].

Second, that "clear and positive proof" means such evidence as leaves no reasonable doubt as to the matter required to be proved [13 Moo. Ind. App. 54]; and

Third, that it is not necessary that a precise sum should be mentioned by either party, or a promise to pay should have been made by the Defendant [13 Moo. Ind. App. 53, 54].

The distinction between the acknowledgment of a debt and a promise to pay, illustrated [13 Moo. Ind. App. 54].

The questions raised in the Court below and on appeal, were, first, one of fact; whether a Karanamah, or agreement, was proved to have been executed for the consideration therein expressed; and, secondly, if so, whether the Appellant had established by evidence his case of the assertion of a demand of his [38] debt, and a promise to pay, so as to bring him within the exception contained in section 14 of Ben. Reg. III. of 1793, and take it out of the operation of the twelve years' rule of limitation provided by that section.

The suit out of which these questions arose was instituted by the Appellant against the Respondents; Gungapershad Goshamee, being joined as a Defendant, but no relief prayed against him, to recover Rs. 34,865. 6. 7, owing by the first two Respondents. The principal Sudder Ameen of Zillah Hooghly, dismissed the suit, as being barred by the law of limitation, Ben. Reg. III. of 1793, and held that independently of that bar, the Appellant had failed to give satisfactory proof of an admission of his demand by the Respondents. On appeal, the High Court at Calcutta affirmed that decision. The appeal was from this decree of affirmance.

* Present: Members of the Judicial Committee—The Right Hon. Lord Romilly, the Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the Admiralty Court), and the Right Hon. Sir Joseph Napier, Bart. Assessor:—The Right Hon. Sir Lawrence Peel.

The following were the circumstances of the case:—

Surroopchunder Sircar Chowdhry, the Father of the Respondent, Brindabunchunder Sircar Chowdhry, and Grandfather of the Respondent, Sreeschunder Sircar Chowdhry, at different times, borrowed money of Rughoram Goshamee, the Father of the Appellant.

[39] The first of these loans, namely, for Rs. 20,000, at 12 per cent. interest, was made on the 2nd Shrahon, 1248, B.E. (16th July, 1841), by Rughoram Gossain to Surroopchunder and his Son, Brindabunchunder. The repayment thereof, with interest, being secured by a Tumasook (Bond). The next loan was made the 13th Maugh, 1248, B.E. (25th January, 1842), when a further sum of Rs. 10,000 was advanced by Rughoram Gossain to the same two borrowers, also secured by a Bond.

In the month of Assin, 1250, B.E. (September, 1843), Surroopchunder, requiring a further loan, applied to the Appellant and his elder Brother, Gungapershad, to make such loan, their Father, Rughoram Gossain, having died, leaving them his joint heirs, and entitled to succeed to his estate, including the above two Bond debts. Surroopchunder was then informed by them, that he must first adjust the old debt before a new loan would be made, to which he agreed, and, accordingly, the Khattas, or Books of account, were examined, an adjustment and settlement of the old accounts took place, when a balance was found, owing by Surroopchunder and Brindabunchunder of Rs. 31,702. 2. 10, to the Appellant and his Brother, in respect of the Bonds.

A fresh loan of Rs. 6000 was then made by the Appellant and his Brother to Surroopchunder and Brindabunchunder, and to secure the repayment thereof a further Bond was executed in their joint names, and also another instrument, called a Karanamah, or agreement, on the same day, in their joint names, by the same parties, to secure the payment of the balance so previously found due; and in which instrument the fresh loan, as well as the Bond to cover [40] the same, was expressly mentioned, and was agreed to be paid along with the balance.

Part of the debt thus contracted was paid by the borrowers by instalments, and it appeared, that Brindabunchunder compromised the claim with Gungapershad, so far as related to his moiety, without the privity of the Appellant: Brindabunchunder, undertaking to pay Gungapershad a sum in respect of the balance of the debt due under the Karanamah of Rs. 8500, by equal annual instalments of Rs. 1700; which, with the sum of Rs. 4000, amounted in the aggregate to Rs. 12,500, payable, in respect of the then advanced balance. The instalments were paid by Brindabunchunder to Gungapershad, the last of them being paid on the 28th of February, 1857.

Brindabunchunder also endeavoured to effect a compromise with the Appellant, in terms similar to the above, in respect to the payment of the balance due from him and his Brother, the other Respondent, under the Karanamah, and renewed proposals and offers of settlement to the Appellant, of the balance of the debt under the Karanamah, were made as late as February, 1860, when Brindabunchunder offered him a similar sum of Rs. 12,500, in full satisfaction and discharge of the balance of the debt due. The Appellant refused to accept these offers of compromise, and he repeatedly demanded the payment of the full amount due under the Karanamah. These demands were met by the Respondents, not by any denial of the existence of the debt, which it appeared from the evidence was acknowledged and admitted by them, but by offers over and over again repeated, to compromise and settle the same by a [41] payment in money to the Appellant, similar in amount to that previously made to his Brother, Gungapershad.

To enforce payment of the balance of the debt thus due, the suit out of which the present appeal arose was brought by the Appellant in the Court of the Principal Sudder Ameen of Zillah Hooghly, on the 13th of June, 1859, against the two first Respondents as principal Defendants, and Gungapershad, who was made *pro forma* a Defendant, in consequence of his refusing to join the Appellant as a co-Plaintiff, to recover the debt due from the two principal Defendants, under the Karanamah, and after giving credit for and deducting the moneys received and payments made in respect thereof (including the Rs. 12,508 paid to Gungapershad), in the whole amounting to Rs. 17,892 8. 6; which amount being deducted from the amount so secured by the Karanamah, left a balance of principal money due of Rs. 34,865 6. 7, and for interest, making together the aggregate sum of Rs. 69,730 13. 2. Of that sum

the Appellant claimed Rs. 34,865 6. 7. as his moiety of the above debt. The plaint stated the adjustment of accounts, in respect of previous Bonds which took place at the family house at Serampore, on 7th Assin, 1250, B. E. (22nd of September, 1843), the further loan of Rs. 6000, then made; the execution of the new Bond for the latter sum, and of the Karanamah for the balance of former debt as well as for that sum, by Surroopchunder Sircar Chowdhry and the Respondent, Brindabunchunder. The plaint then gave credit for the sums of money received and paid in respect of the debt, and charged that since Maugh, 1263, B. E. (January, 1856), repeated calls were made on the [42] principal Defendants for the payment of the balance in question, but that, although they admitted their liability, they failed to pay it off.

The Respondent, Brindabunchunder, by his answer alleged, that the suit was based on a fabricated Karanamah; that he never signed the same, and that during his Father's lifetime he had never heard any mention made of the deed either by him or the Plaintiff. There was no denial in the answer of the signature of the Defendant's Father, or of the further loan to him of Rs. 6000. The answer then pleaded the law of limitation, under sec. 14 of Ben. Reg. III. of 1793, in bar of the suit; and as to the statements in the plaint of acknowledgment of the debt, which brought the case within the saving clause of that section, and prevent the operation of such bar, the Defendant in his answer denied, that he had made any payments on account of the Karanamah, or admissions of liability, and he also objected to the claim for interest, on the ground that no mention was made of it in the Karanamah, and submitted, that in the absence of any promise for its payment, the claim ought not to be admitted under Act, No. XXXII. of 1839. The answer then concluded by charging the Appellant with having patronized a Cousin of the Defendants, and having supported him with money in bringing a suit against them, stating that the suit having failed, the Plaintiff, in revenge, had instituted the present suit.

The other Respondent, Seerischunder, filed a separate answer, which contained similar allegations to those contained in the above answer in bar to the suit, and, like the latter, contained no denial of the signature of his Grandfather, Surroopchunder Sircar, [43] nor of the other Respondent, to the Karanamah, nor his.

Witnesses were examined, who proved the execution by Surroopchunder and Brindabunchunder, of the three Bonds, and the Karanamah; the adjustment of accounts, the striking a balance and the new loan previous to the execution of the latter instrument; the subsequent payments and entries on account of the debt as above mentioned; also the demands of payment made on the two first Respondents, and the acknowledgment of the existence of the debt, and offers to settle the same, made by the Respondent, Brindabunchunder, as before mentioned, in order to bring the case within the saving clause in section 14 of Ben. Reg. III. of 1793, the Regulation of limitation of suits. The Appellant offered himself for examination and was examined, verifying the several instruments aforesaid, and proving the execution thereof and the adjustment of accounts, and offers of settlement made to him by the Respondent, Brindabunchunder.

The hearing of the suit took place on the 10th of December, 1863, before Nazeerooddeen Mahomed Khan, the Principal Sudder Ameen, who by his judgment dismissed the suit with costs, first, on the plea in bar on the law of limitation; and, secondly, on the issue of fact; declaring that the execution of the Karanamah was not proved by the Plaintiff. The grounds on which he arrived at his conclusions of law and fact, were stated in his judgment as follows:—First, the suit of the Plaintiff is founded upon an Ikrar for debt, dated the 7th Assin of the year 1250, and it has been brought after the prescribed period of twelve years from the date of the principal docu-[44]-ment. Rather after a lapse of fifteen years, eight months, and twenty-two days. Besides, a space of fifteen years and one month has passed away from the 18th Choitro of the year 1250, the date on which the Plaintiff alleges to have obtained a payment of Rs. 5237 2a. Op., and it appears, on reference to the account books filed by the Plaintiff, that the sum of Rs. 76 3a. 9p., and Rs. 79 2a. 9p. stated to have been received by him on the 24th Assar of the year 1253, and on the 9th Assar 1254, respectively, in gram, are not entered in them, as payments on account of the debt entered in the Ikrar, and none of the depositions prove that the

said payments in gram were made on account of the debt covered by the Ikrar, and instead of its being proved that the gram to the value of the above-mentioned sum of money was delivered and received on account of the debt of Rs. 35,865; it has been rather established that the gram in question was given on sundry accounts. The Plaintiff states that his uterine Brother, Gungapershad Goshamee, who owns a half-share in the amount of the Ikrar, received from the Defendant a sum of Rs. 12,500 by gradual payment up to the 3rd Maugh of the year 1263, and the Plaintiff had in proof of this statement cited his uterine Brother as a witness. But the evidence of the Plaintiff's uterine Brother did not prove anything of the kind; he had rather deposed to the effect, that the Ikrar, on which the claim of the Plaintiff is based, was drawn up and executed, and that he did not receive any payments under it from the Defendants. The allegation which the Plaintiff makes that the amount covered by the Ikrar was paid and received within twelve years from its date, and that the present action was brought by [45] him under the old law, within twelve years from the date of such payment, is wholly devoid of proof. The law of limitation must bar the Plaintiff's claim. The evidence tendered by the two servants of the Plaintiff, viz.: Ramchunder Ghose and Sreenath Chuckerbutty, and by the Plaintiff himself, is mere oral evidence respecting the above-mentioned payments under the Ikrar, and cannot be deemed by the Court good and valid, in preference to the testimony of the Plaintiff's Brother, who is a co-sharer in the amount mentioned in the deed, to the extent of a moiety, and when there is no vestige of such payments of the amount of the Ikrar in the account Books, etc., alluded to above. And the mere statement of the Plaintiff's uterine Brother as to the receipt by him of Rs. 12,500 from the principal Defendants, of their previous and recent debts, can never establish the identity of that amount with the debt contracted under the alleged Ikrar of the Plaintiff, when the genuineness of that deed has been denied by his said Brother, and in a case where the Debtor sets up a plea of denial, and the Creditors are two Brothers, the testimony of that Brother who deposes in favour of the Debtor, ought, according to the rules of Justice, to be given preference to. Secondly, the spirit of section 170 of Act, No. VIII. of 1859, is that, if one of the parties in a suit cites another as a witness in it, and if the party so cited refuses to give his evidence, without any reasonable cause, then the Court will either decide the case against him, or pass such other Order as may seem to it proper in the circumstances of the case. The section above quoted does not mean that Courts are bound to pass a deci-[46]-sion against the recusant party. Hence, as the circumstances of the application of the law of limitation to the claim of the Plaintiff have been clearly exhibited in the first paragraph, I think, that with reference to the true spirit of the section above quoted, the case cannot be justly decided against the Defendants, and that it should be accordingly dismissed as barred by the law of limitation, the application of which has been fully shown above. Third, that issues have been framed in this case on the original claim, and both oral and documentary evidence have been adduced respecting them, and that this evidence has had the consideration of the Court. I am also of opinion, that a finding on these issues cannot be probably in opposition to my finding on the question of limitation. Hence apprehending, lest my finding on the issue in bar be overruled by the appellat Court, the case might be remanded under section 351, Act, No. VIII. of 1859, then both the parties might be again put to trouble and the case for a long time remain stationary; therefore, a few remarks on the issues of fact are recorded. It is not unknown that both the parties are wealthy, and the Ikrar is a valuable instrument; still it has not been registered. And it is said that the deed in question was executed in Serampore, and in that place several persons of respectability reside; but the deed has not been witnessed by any one of them, even the two low men whose names are written in the place of witnesses are stated to be dead, and the person who is alleged to have been the writer, has not appeared in Court and given his testimony; he has been absent; and the Plaintiff's Brother, whom the [47] Plaintiff says holds a moiety share, has denied the execution of Ikrar, and the Ikrar has not been proved by any other witnesses. Under these circumstances, I think that the testimony of the Plaintiff himself and his four relatives and servants, who have deposed to the execution of the Ikrar, is not valid.

From this decree an appeal was instituted by the Appellant to the High Court.

The appeal was heard on the 15th of March, 1865, before Mr. Justice Bayley and Mr. Justice Phear, two of the Puisne Judges of that Court, who differed in their respective judgments. The Senior Judge, Mr. Bayley, decided, on the evidence in the suit, first, that the suit was not barred by limitation of time under section 14 of Ben. Reg. III. of 1793, as the Appellant had brought himself within the saving clause of that section, which required him "to show, by clear and positive proof, that he had demanded the money, and that the Defendant had admitted the truth of the demand, or promised to pay the money"; and, secondly, upon the merits, which chiefly involved the question as to the execution of the Karanamah, that the suit should have been decreed in favour of the Appellant, and, therefore, that the decree of the Principal Sudder Ameen should be reversed. The other Judge, Mr. Phear, did not concur in the conclusion arrived at by the Senior Judge on the issue of limitation, but agreed with the Lower Court in thinking that the evidence of the Appellant as to the demand and admission or promise was insufficient to satisfy the requirements of, and to bring the Appellant within, the saving clause of section 14 of Ben. Reg. III. of 1793, and on that [48] ground alone held that the suit was barred, and ordered that the decree of the Principal Sudder Ameen should be affirmed.

As the decision of Mr. Justice Phear, on the question of fact concurred with the Principal Sudder Ameen's judgment, it was under the provision of Act, No. XXIII. of 1861, sec. 23, held final, and was made a decree of the High Court.

From such decree the present appeal was brought.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—Two points arise. First, whether the Karanamah was, as alleged, in fact executed, and, secondly, as to the operation of the exception contained in section 14, Regulation III. of 1793, taking the case out of the twelve years' limitation of suit.

First, on the issue upon the merits, we submit, that the Courts below ought to have found, as the evidence given by the Appellant satisfactorily proved, that the Karanamah was duly executed by Surroopchunder Sircar, and also by his Son, the Respondent, Brindabunchunder, and that on the occasion of the adjustment of the accounts, a further loan was made to them.

Secondly. The Act, No. XIV. of 1859, does not apply, and the Appellant is within the exception contained in section 18 of that Act, as the suit was brought in June, 1859; the law, therefore, applicable to the case is Ben. Reg. III. of 1793, sec. 14. The evidence is sufficient to bring the case within the exception to the twelve years' prescription, the limitation of suits provided by Ben. Reg. III. of 1793, [49] sec. 14; as there is clear and positive proof of a demand for the money and promise to pay, sufficient to satisfy the requirements of the saving part of the section pleaded in bar to the suit. The English cases, under the Statutes of Limitations, as to acknowledgments to take the case out of the operation of that Statute, apply. Thus in *Trulock v. Robey* (12 Sim., 402), a Letter by a Mortgagee stating "that he was willing to settle," was held to be a sufficient acknowledgment by the Mortgagee to exclude the operation of the Statute of Limitations, 3rd and 4th Will. IV. c. 27, s. 28, and to save the right to redeem the mortgaged premises. That case was followed by the Lord Justices in *Stansfield v. Hobson* (3 De G. M. and G., 620). [Sir James W. Colville:—In *Bhaee Chund v. Purtab Chund Manikchund* (1 Moore's Ind. App. Cases, 155), it was held, that under the Bom. Reg. I. of 1800, sec. 13, which is similar to the Ben. Reg. III. of 1793, sec. 14, the offer of a specific sum by the Defendant, by way of compromise was not such an admission of the Plaintiff's demand as to take the case out of the operation of the law of limitation.] That case differs from the present and is distinguishable, as it was an offer after action brought, in no way involving the justice of the Plaintiff's demand, and no payment was made.

Mr. Forsyth, Q.C., and Mr. J. D. Bell, for the two first Respondents.—The *onus probandi* is on the Appellant. He must prove two things to take the case out of the operation of the Ben. Reg. III. of 1793, sec. 14; first, the debt, [50] and, secondly, that he is entitled to avail himself of the exceptions contained in that section. Now, there is not sufficient evidence of the making of the Karanamah, or of the Bond, to entitle the Appellant to a decree, independently of the bar of limitation.

To entitle a party to the exception contained in the 14th section, there must first be a demand, and, second, an admission of the truth of the demand, or promise to pay the money. The cause of action stated in the plaint arose twelve years before the suit was commenced, and the Appellant has not shown any sufficient ground to entitle him to bring such action after the expiration of twelve years, limited by that section of the Regulation. Even if the payments had been made to Gungapershad Goshamee, it would not, according to the terms of the Regulation, entitle the Appellant to succeed in his suit. *Bhave Chund v. Purtab Chund Manik-chund* (1 Moore's Ind. App. Cases, 155) is in point; there the offer was to compromise the subject-matter in dispute, but this Tribunal held it did not operate as an acknowledgment so as to take it out of the Bom. Reg. I. of 1800. Cases in English Law fully support this. It is laid down in Chitty: Col. of Statutes, Vol. III. p. 14, as to limitation of actions, that the terms must be so distinct as to make out a promise to pay, and it must be shown to be on account of the debt for which action was brought, and a promise to pay the remainder—*Francis v. Hawkesley* (28 L. J. Q. B. 370). There is no proof that a demand of the amount of the debt was specifically made by the Plaintiff. Part payment of a debt will not take the case out of the Statute of Limitations. *Wainman v. [51] Kynman* (1 Ex., 118), *Tippets v. Heane* (1 Cr. Mee. and Ros., 252), *Davies v. Edwards* (7 Ex., 22), *Waugh v. Cope* (6 Mee. and Wels., 824), *Sidwell v. Mason* (2 Hur. and Nor. 310), *Smith v. Thorne* (21 L. J. Q. B. 201). The Equity cases, *Trulock v. Robey* (12 Sim., 402), and *Stansfield v. Hobson* (3 De G. M. and G., 620), cited by the Appellant, are not in point, as they are under the Statute, 3rd and 4th Will. IV. c. 27, s. 28, and not under the Statute, 21st James I. [c. 16].

Sir R. Palmer, Q.C., in reply.—The cases cited by the Respondent under the Statutes, 9th Geo. IV. c. 14, are not applicable, as they are all on promises giving a new cause of action.

Judgment having been reserved, was now delivered by

The Right Hon. Sir Joseph Napier (July 12, 1869).—The material questions in this case are, first, whether the Karanamah on which the suit is based was executed for the consideration, and by and to the parties alleged in the plaint; and secondly, whether the Complainant has brought his case within the exception in the old law of limitation, Ben. Reg. III. of 1793, section 14, which prohibits the hearing and determining the merits, if the cause of action shall have arisen twelve years before the commencement of the suit, "unless the Complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the Defendant had admitted the truth of the demand, or promised to pay the money," etc.

[52] In addition to the reason set forth in the judgment of Mr. Justice Bayley, in support of his opinion, that the Karanamah was executed, as alleged in the plaint, their Lordships think it proper to observe, that no evidence has been offered, in order to disprove the handwriting of the parties by whom the Karanamah purports to have been executed, or of the attesting witnesses thereto. Instead of giving or producing any such evidence, the principal Defendant has confined himself to the surmises and arguments of his Pleader in his answer to the plaint.

Their Lordships are of opinion, that the first question should be answered in the affirmative. Taking it then as established by the evidence that the Karanamah was executed by the principal Defendant and his Father as alleged, it is next to be considered, whether the defence of the law of limitation has been met by proof of demand and admission, sufficient to bring the case within the exception in this law.

The action, though in form a claim of the entire sum secured to the Plaintiff and his Brother (Gungapershad Goshamee) by the Karanamah, with interest thereon, is in effect, for the Plaintiff's moiety. Gungapershad Goshamee does not make any claim on his own behalf for the other moiety; he refused to join as co-Plaintiff, and was made a Defendant *pro forma*, for the reasons alleged in the plaint, but he has not filed any answer thereto. He was, however, examined as a witness.

It is clear upon his evidence that, between the years 1847 and 1857, he received from the principal Defendants upwards of Rs. 12,500 on account of a larger claim; and he does not bring forward evidence [53] of any claim which he then had against this Defendant, other than for his share of the debt which was secured by the Kara-

namah to himself and his Brother jointly. These payments were made after the death of the Father of the principal Defendant, who, with the principal Defendant, had executed the Karanamah. There is adequate proof that after these payments were made to Gungapershad Goshamee, the principal Defendant tried to induce the Plaintiff to settle the claim for his moiety upon terms such as those which Gungapershad Goshamee was alleged to have accepted, but that the Plaintiff insisted on payment in full.

Their Lordships are satisfied upon the evidence, that the payments made to Gungapershad Goshamee were, on account of his moiety of the joint claim, under the Karanamah; and that the offers made to the Plaintiff related to his claim to the other moiety. No other claim is proved, or could be presumed, to which these payments and offers were appropriated. *Manderston v. Robertson* (4 Man. and Ry., 440).

These offers were made not to buy off vexatious or doubtful litigation, but to settle a claim secured by an obligation, which fixed its amount.

Their Lordships consider, that upon the true construction of the law of limitation applicable to this case, and in order to bring the case within the exception, it was sufficient for the Plaintiff to show, by "clear and positive proof," that within the prescribed period he asserted his claim to what was secured to him by the Karanamah, and that the Defendant admitted this claim to be as-of right. It was not necessary that a precise sum should have [54] been mentioned by either party; or that a promise to pay should have been made by the Defendant.

"Clear and positive proof" is such as, upon the case made, leaves no reasonable doubt as to the matter required to be proved, the truth of which it establishes to a moral certainty; and it is by the combined effect of the whole evidence that we have to judge, whether the proof is "clear and positive."

It was contended, that there is no proof that a demand of the amount of the debt in dispute was specifically made by the Plaintiff; or that the Defendant admitted the truth of such a demand, or promised to pay it: that as to the admissions of indebtedness, there is some doubt, whether any of them were made to the Plaintiff himself; and that there was not any which amounted to a promise to pay the debt due under the Karanamah, or to an acknowledgment of any specific sum; that they were but attempts at a compromise, which failed.

The authorities which have been mainly relied on, in order to show that there has not been a sufficient acknowledgment within the period of limitation in the present case, were cases of actions on promises, decided on the Statutes of the 21st Jac. I. [c. 16], and the 9th Geo. IV. c. 14. The principal of these decisions is not applicable to a case like the present. They depend not upon the effect of an exception in the Statute, but upon the principles of the Common Law with respect to the cause of action. The issue joined, made it incumbent on the Plaintiff to prove a promise made within six years, and such as to agree with that laid in the declaration. In such cases, acknowledgments, whether by words or acts, are of [55] no avail, save so far as they sustain the promise alleged; there is no exception within which they come; and these cases are to be regarded simply as actions brought on promises made within six years. But the cases in which acknowledgments are operative by way of exception, are of a different character. In these, the action must be maintained on the original security; and an acknowledgment within the prescribed period of limitation, shows that the obligation was then subsisting and unsatisfied; a promise to pay is not required.

It has, therefore, been decided that in an acknowledgment within the 3rd and 4th Will. IV. c. 27, sec. 40, it is not necessary that the amount of the debt should be specified, nor a promise made to pay it. *Carroll v. Darcy* (10 Ir. Eq. Rep. 329). It has also been held, that an admission of a Bond debt contained in the answer of the Executors of the Obliger, although in a suit to which the Obligee was not a party, was sufficient to take the case out of the operation of 3rd and 4th Will. IV. c. 42. *Moodie v. Bannister* (4 Drew., 432).

It is one thing to acknowledge a debt and another to promise to pay it, and this distinction is recognized by the terms of the law relied on by the Defendant. The decisions on the sufficiency of acknowledgments within the exceptions in recent Statutes of limitation, have (as Sir Edward Sugden has observed) "proceeded on a

liberal but yet a fair and just construction of these Statutes." *Blair v. Nugent* (3 Jo. and Lat., 677).

Giving a like construction to the law of Limitation that applies to the present case, their Lordships are satisfied, that all that is required to be shown to bring [56] the case of the Plaintiff within the exception, has been shown sufficiently. If the conclusions at which they have arrived upon the material facts of the case needed confirmation, they are fortified by the omission of the principal Defendant to tender himself as a witness in support of his defence in a case, the circumstances of which were all within his own knowledge; and by the unsatisfactory character of the evidence given by Gungapershad Goshamee, who has kept back (evidently from hostility to the Appellant) the Books which he ought to have produced. Such a course suggests the natural inference, that the evidence which has not been produced, was felt to be adverse, and subjects the parties who take such a course, to the construction that is least favourable to the views and interests which they seek to support by imperfect or inferior evidence.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be allowed; that the judgment of the High Court at Bengal and the judgment affirmed thereby, should be reversed and set aside; and that the Appellant should have judgment for his moiety, with interest at the full legal rate and costs. He must also have the costs of this appeal.

[57] RAJAH LEELANUND SINGH, —Appellant: RAJAH MOHENDERNARAIN, and RAJAH JYEMUNGUL SINGH, —Respondents * [June 24 and 25, 1869].

On appeal from the Sudder Dewanny Adawlut of Bengal.

In a question of boundary the Judicial Committee, the Court of last resort, is extremely reluctant to reverse the judgment of an Indian Court, and will not do so, unless they are, upon the facts and evidence, satisfied that the decision of the Court below was clearly wrong [13 Moo. Ind. App. 68].

There is a strong presumption against a Plaintiff who seeks to set aside an Award made by Government Officers on a revenue survey, after full local inquiry, for the purpose of obtaining a rectification of the boundaries between two estates, and the *onus* of proof that the Award was wrong lies on the party impeaching it [13 Moo. Ind. App. 59].

This was a boundary suit, instituted by the Appellant, the owner of Pergunnah Singhol, against the first Respondent, the Owner of Pergunnah Ahsur Biscoond, and the other Respondent, the Owner of Pergunnah Ahsur Chundun, and Chundun Bhooka and Junkeepore. The object of the suit was to obtain possession of 5000 beegahs of chiefly Hill and Forest land, as appertaining to the Appellant's zemindary, with mesne profits.

The facts of the case, which entirely depended on the evidence of identification of certain parcels of ad-[58]-joining lands of the two Pergunnahs, and the grounds of argument, are fully stated in their Lordships' judgment.

The appeal was argued by Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant, and by Mr. J. D. Bell, for the Respondents.

Their Lordships' judgment was reserved, and now pronounced by

The Right Hon. Sir James W. Colville (Dec. 10, 1869).—The Appellant is the present possessor of the large zemindary known as the Kurruckpore Mehals, which includes the whole of Pergunnah Singhol: and one of the mouzahs composing that Pergunnah is called Kusbeh Budholee. This zemindary formerly belonged to one

* Present: Members of the Judicial Committee.—The Right Hon. Lord Romilly (Master of the Rolls), the Right Hon. Sir James William Colville, the Right Hon. Sir Robert Phillimore (Judge of the Admiralty Court), and the Right Hon. Sir Joseph Napier, Bart. Assessor.—The Right Hon. Sir Lawrence Peel.

Rajah Kadir Ali, from whom it descended, first to his Son, Ikbul Ali Khan, and afterwards to his Grandson, Ruhmet Ali Khan; but in 1842 it was sold for arrears of Government revenue, and was then purchased by Rajah Bidanund Singh, the Father of the Appellant.

Abutting upon Pergunnah Singhol, and on the west and south of it, is Pergunnah Chundun Bhooka. This includes the mouzahs of Jankeepore, Ahsur Chand *alias* Kuchwa, and Ahsur Biscoond. The two former of these form part of the zemindary of the Respondent, Rajah Mohendernarain Singh, who is the Son and successor of Rajah Nirbye Singh. The other village forms part of the zemindary of the other Respondent, Rajah Jyemungul Singh, who is the representative and successor of Rajah Nuwab Singh.

The question in the suit is one of boundary between [59] the two Pergunnahs Singhol and Chundun Bhooka, *i.e.*, whether the 5000 beegahs which the Appellant as Plaintiff, seeks to recover possession form part of Kusbeli Budholee, and, therefore, lie within the proper boundary line of Pergunnah Singhol; or whether they are included partly in the villages of Jankeepore and Kuchwa, and partly in that of Biscoond, and, therefore, lie within the proper boundary line of Chundun Bhooka.

From this statement, however, it follows that the portions of the disputed land which are held by the Respondents respectively may be so held by them by different titles; and that although the principal question of fact, *viz.*, the true position of the boundary line between the two Pergunnahs, is common to both, the one may, in respect of long possession, be in a more favourable position than the other; and that that which may be evidence against the one may not be evidence against the other. And this being so, it is perhaps unfortunate that the Appellant's claims against the two Respondents should be litigated in one and the same suit. The suit is brought not only for the recovery of the lands in question, but, as a necessary step towards that object, to set aside certain Awards passed by the Officers employed to conduct the Revenue survey in this District, and to obtain a rectification of the boundary line as defined by them. The suit was brought within the period in which the law allows such Awards to be contested in a regular suit. But their Lordships need hardly observe, that the Plaintiff in such a case has to overcome the strong presumption which the decision of such a question as this by competent Officers after full local inquiry, made with the aid of a scientific [60] survey of the locality, is calculated to raise against him.

It may be convenient, in the first place, to state shortly what is the effect of the survey proceedings which are impeached. The line laid down by the survey as the northern boundary of Pergunnah Chundun Bhooka, and the southern of Pergunnah Singhol, is not a River, but seems to be almost identical with the chain of Hills which on the Map of Hoolas Roy (A), which has been so much discussed in this case, are delineated as running east and west between the Jorbarara and the stream which he calls the Punjhairee Khoord. To these Hills we may give the name, which is applied to them in some of the proceedings, of "Suhoodree."

There was throughout the survey proceedings a dispute between the Appellant and the Respondent, Mohendernarain Singh, or Nirbye Singh, his Father, touching the possession of the lands sought to be recovered from the last-named Respondent. The earlier proceedings treated that portion of the land in dispute as falling within the mouzahs of Pergunnah Chundun Bhooka, which belong to Mohendernarain. Mr. Brown, the Deputy Collector, was dissatisfied with this finding as being inconsistent with Hoolas' Map A; he objected to Brijhookun's Map B, and directed that there should be a further investigation, and a comparison of the Country with the Map A. He also proposed to go himself to the spot and decide the question of possession. He never did so; and the question was finally decided by Mr. Quintin, the Superintendent of Surveys, after local inquiry and investigation, in his proceeding of the 24th of December, 1847.

[61] The case as to the lands sought to be recovered from the Respondent, Jyemungul Singh, is somewhat different. When the survey of these lands first took place, the Appellant raised no claim to them. The contest was between the Respondent, Mohendernarain Singh, saying that they belonged to his village of Ahsur Chand *alias* Kuchwa, and Jyemungul Singh, saying that they belonged to his village of Biscoond. The decision was in favour of the latter.

In the final proceeding of December, 1848, before Mr. Ward, also a Government Superintendent of Surveys, and two years after the commencement of the dispute between the Respondent, the Appellant did intervene as third party, and ineffectually claimed the lands as part of Pergunnah Singhol. But his omission to come forward before that time affords a strong presumption that he was, at the commencement of the survey, out of the possession of these lands, if he had ever been in it.

These survey Awards are founded on evidence of the actual possession. They are not, if questioned in time, conclusive on the question of title.

Their Lordships will now consider upon what evidence of title the Appellant seeks to impeach them.

The earliest piece of evidence is the proceeding of 1816, before a Mr. Sutherland, described as a Registrar of the Civil Court of Monghyr, who appears, under the law then in force, to have exercised a jurisdiction in questions of possession similar to that which is now exercised by the Magistrates under Act, No. IV. of 1840.

The complaint was brought by Rajah Kadir Ali against the Lessees of part of Pergunnah Chundun [62] Bhooka, and seems to have been directed rather against encroachments upon wild and jungle land, for the purpose of collecting the Forest products, than against any actual occupation of cultivated soil. One Rajah Juswunt Singh, however, describing himself as the proprietor and Zemindar of Pergunnah Chundun Bhooka, intervened; and the question, what was the true boundary between the Pergunnahs, was thus raised between the two Zemindars.

Those stated by the Zemindar of Singhol were:—"To the west is Geedha Ghaut and Churhee Khoord (by which we understand a line drawn from Geedha Ghaut to Churhee Khoord), to the east is Dabeedah, and to the north is a great Mountain, and south is Punjhairee Khoord."

The statement of Juswunt Singh was that the boundary of his lands extended "from the west of Dabeedah straight along as far as the Soordhobee and Sunkareekh and Sireekabutan." It is not easy to identify all these names; but the conclusion to which their Lordships have come is, that this statement makes the southern boundary of Singhol that line of Hills above called Suhoordree, which is admitted by the Respondents to have been the dividing line as regards actual possession and enjoyment, and has been fixed as such boundary by the survey proceedings. If this be so, it follows that Juswunt Singh asserted no title to the land lying to the north of these Hills, and between them and the Jorbarara; and that he did not treat that stream, or any other stream, under the name of "Punjhairee Khoord," as the boundary between the two Pergunnahs. On the other hand, the issue thus raised between the parties seems to admit that the Punjhairee Khoord was to the [63] south of that line of Hills; and that the controversy was about the lands claimed in the present suit, or part of them.

Mr. Sutherland's decision was in favour of Kadir Ali, and directed that the disputed land should remain in his possession according to the before-mentioned boundaries, until the decision should be rescinded by an action under Regulation X. of 1793. In 1817, one Budhnarain was sent by Mr. Sutherland to mark out the western boundary between the Pergunnahs, in accordance with the last-mentioned decision; and that, starting from Geedha Ghaut and proceeding southward to some point or another, he did place certain boundary pillars, is undisputed. His own statement, made on oath in January, 1830, is, that they extended southward as far as the Punjhairee Khoord, and that that stream is south of the Punjhairee Kalan.

Juswunt Singh and Nirbye Singh, who then first appear on the stage, declined to take any part in this demarcation, and intimated that they intended to dispute Mr. Sutherland's Order in a regular suit. No such suit was, however, brought.

It will be convenient here to inquire upon what parties this proceeding of 1816 was binding, and what lands did it cover?

It may be taken to have bound Juswunt Singh, who was a party to it, and those who claim through him. It may, therefore, be taken to have bound Nirbye Singh, and after him the Respondent, Mohendernarain Singh. But is it binding on Jyemungul Singh, or was it binding on his Father and predecessor, Nuwab Singh? That depends on the question how far either derived title from Juswunt Singh; and the [64] evidence is unfortunately either very scanty or altogether silent on their connection with Juswunt Singh, and as to the time at which, and the manner in which, Pergunnah

Chundun Bhooka became divided between two distinct Zemindaries. The Principal Sudder Ameen, in his judgment, speaks of Juswunt Singh as the "Moories" of the Defendants. And "Moories" is, we apprehend, the same word as "Meeras," which, in Professor Wilson's Dictionary, is defined to be the person through whom an inheritance is derived. On the other hand, the judgment of the Sudder Court speaks of the proceeding of 1816 as made against the ancestor of one of the Defendants. Again, the Report of Hoolas Roy alludes to the proceedings on a partition between Nirbye Singh and Nuwab Singh, and speaks of Juswunt Singh as the elder Brother of both. Chunderchain Singh, a witness of Jyemungul Singh, also speaks of such a partition.

That the Respondents, therefore, held their respective portions of Pergunnah Chunder Bhooka under a title which, up to some date, is a common one, seems probable; but there is little, if any, direct evidence of the fact, and still less of the date at which the separation in title commenced.

There is no statement in the proceeding of 1816 of the specific quantity of the land then in dispute: and the complaint seems to have been of invasion on the part of the Tenants of Juswunt Singh, occupying lands to the west of the westward boundary. Juswunt Singh, however, claimed all the land which lay south of the line of Hills which he said was the southern boundary of Singhol and west of Dabeedah (which we take to be the range of Hills on the east of the now disputed land). The question was, whether south of [65] the line of Hills the eastern boundary of Pergunnah Chundun Bhooka was the Dabeedha range, or a line prolonging the line from Geedha Ghaut to that line of Hills up to the Punjhairee Khoord: and the controversy so stated seems to embrace the whole of the land now in dispute.

The Respondent, Jyemungul Singh, whether bound or not by the proceedings of 1816, is certainly not bound by those from 1829 to 1832, in which Hoolas Roy and Motu Roy made their conflicting reports. These proceedings were occasioned by a dispute which arose between Rajah Nirbye Singh and the then Zemindar of Singhol, after the supposed partition between Nirbye Singh and Nuwab Singh, and were confined to that portion of the disputed land which is west of the Punjhairee Kalan. It did not, therefore, embrace the land which the Appellant now seeks to recover from the Respondent, Jyemungul Singh.

It was in these proceedings that, in order to get rid of the effect of the Order of 1816, Nirbye Singh first raised the point, that the Punjhairee Khoord mentioned in that proceeding, was identical with the stream marked in Map A as the Jorbarara. Neither the Respondent, Jyemungul Singh, nor his immediate ancestor, Nuwab Singh, was a party to that issue, nor is the former responsible for the inconsistency which it involves, in claiming a boundary inconsistent with the admitted possession. On the contrary, some of the witnesses produced by him in this suit speak of the southern boundary of Pergunnah Singhol as the line of Hills which has been assigned as such boundary by the Survey proceedings, and such was the boundary asserted by Juswunt Singh in the proceeding of 1816.

We cannot find that Jyemungul Singh has in any [66] way made the identity of the little Punjhairee and the Jorbarara a material question, unless it be by the 13th paragraph of his answer. And, in that, he seems merely to raise the question, whether Budhmarain had lain down the western boundary, or the dispute of 1816 had extended further to the south than the latter stream. He does not admit that the southern boundary of the Singhol is the little Punjhairee, whether north or south of the line of Hills. On the contrary, by paragraph 15, he distinctly asserts that the line of Hills is the true boundary.

If the case rested here, their Lordships, considering the scanty evidence afforded by the proceeding of 1816, would have felt that no sufficient ground had been laid for setting aside the survey proceedings against the Respondent, Jyemungul Singh, or even against Mohendernarain Singh. The real difficulty in the case has been occasioned by the way in which the cause has been conducted in the Courts of India by the Counsel for the parties, who seem in argument to have accepted as a fact, that the southern boundary of Pergunnah Singhol was a river called the Punjhairee Khoord, and to have disputed concerning the position of this stream, and the accuracy of the Map of Hoolas Roy. They probably took this course because they felt pressed by the effect of the proceedings of 1816. The Principal Sudder Ameen's judg-

ment proceeds almost entirely upon the preference which he gives to the Map of Hoolas Roy over that of Brijobookun. But the Map of Hoolas Roy is really a document of very slight authority. He differed from the other Arbitrator who was appointed conjointly with him to settle that particular dispute: and no final Order was [67] passed in that matter. His Map and report were before the revenue authorities when they made the survey and the survey Awards, and were ultimately disregarded by them. When this case came on appeal before the Sudder Dewanny Adawlut, the Judges of that Court observed, as their Lordships think with great justice, that they were bound to treat the survey proceedings as correct, so far as the appearance of the Country is recorded therein, and failing to find in the survey map any stream which corresponded with the stream set down in Hoolas' Map, they rejected that Map, reversed the Principal Sudder Ameen's decision, and dismissed the Appellant's suit. Afterwards, on a suggestion that there was in the survey Map a stream which might correspond with the Punjhairee Khoord of Hoolas' Map, they granted a review, and direct a further local investigation into the existence of this stream by an Ameen. The Ameen made a report, in which he describes an intermittent stream, dry in some places, flowing in others, which he traced in the Jungul. The Judges of the Sudder Dewanny Adawlut upon this report adhered to their former judgment, dismissing the suit. When the appeal was heard here we had not before us their reasons for this conclusion, and we caused a communication to be made to India, of which the result is, that the final judgment of Mr. Raikes is now before us. That Judge, with better means of forming a judgment on such a point than their Lordships have on the materials before them, came to the conclusion that the stream described by the Ameen did not correspond with the Punjhairee Khoord laid down in Hoolas' Map: or with the description given by the [68] Appellant's Vakeels of the alleged boundary of his zemindary. Their Lordships, after full consideration of the case, are not prepared to say that that conclusion is erroneous. They must observe that, upon a boundary question they would be extremely reluctant to reverse the judgment of an Indian Court, unless they were clearly satisfied that it was wrong. If it had been shown that there was a well-defined stream corresponding, or nearly corresponding with that laid down in Hoolas' Map, they might have felt that, considering the proceedings of 1816 and the way in which the parties have conducted their case, the survey Awards ought to be reversed. But as the evidence stands, they feel that the position, course, and very existence of the Punjhairee Khoord are left in such uncertainty, that if the boundary laid down by the survey proceedings were altered, it would be impossible, with any certainty, to fix the boundary to be substituted for it. And, in these circumstances, they must humbly recommend to Her Majesty, that the decree under appeal be affirmed, and this appeal be dismissed with costs.

[69] AGA SYED ABDOOL HOOSAIN,—*Appellant*: ADAM LENAINE and RICHARD SNADDEN,—*Respondents* * [June 28, 1869].

On appeal from the Court of the Recorder of Moulmein.

A. sold to B. certain Logs of Timber, and ninety-five Logs were delivered to B. in part performance of the contract. C. brought a suit against A. and B., claiming the Logs under another title. Pending this suit, C. entered into an agreement with D., selling him the Logs in the event of being successful in his suit. The judgment of the Court of the First Instance was in C.'s favour, and under such judgment D. obtained possession of the Logs in suit. This judgment was, on appeal, reversed. B. then brought a suit, in the nature of an action of Trover, against C. and D. for the Logs and damages. The Court, without entering into the merits, dismissed the suit, on the ground that

* Present:—Members of the Judicial Committee—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard. Assessor:—The Right Hon. Sir Lawrence Peel.

it was not maintainable, as the same relief could have been obtained under the provisions of section 2 of Act, No. XXIII. of 1861 :—Held, by the Judicial Committee, reversing such judgment, that there had been a miscarriage, as that section did not apply, the suit by B. against C. and D. being to recover damages for a tort alleged to have been committed by C. and D. and that the latter was not a party to the original suit, or bound by the judgment in that suit.

The question in this appeal was, whether the Appellant, in the circumstances hereinafter mentioned, was barred by section 2 of the Act, No. XXIII. of 1861, from bringing a regular suit against the Respondents.

That section is as follows :—“ All questions regarding the amount of any mesne profits which, by the terms of the decree, may have been reserved for [70] adjustment in the execution of the decree, or of any mesne profits, or interest, which may be payable in respect of the subject matter of a suit between the dates of the suit and execution of the decree, as well as questions relating to the sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by Order of the Court executing the decree, and not by separate suit, and the Order passed by the Court shall be open to appeal.”

The facts were these :—In the Burmese year, 1221, two persons, named Mah Amone and Monuq Toon Bone sold to one Aga Yacoob Ally 250 Logs of Timber, at Rs. 55 per Log, which Timber was expected to arrive at a place called Kuddoe in about three months, and taking an advance of Rs. 2000, at interest, they executed a Bond in favour of Aga Yacoob Ally, embodying such contract. The Timber was growing in the territory of Myne-longyee, and a quantity of the Timber, and in particular 95 Logs, was there cut by, amongst other persons, one Ko Bonk, the Father of Monuq Toon Bone, and the 95 Logs were dispatched down the River to Moulmein, and taken possession of by Monuq Toon Bone, and made over by him in part performance of the sale contract to Aga Yacoob Ally at Kuddoe.

On the 4th of October, 1859, the Respondent Lenaine, brought a suit in the Court of the Deputy Commissioner of the District of Amherst, claiming as against Monuq Toon Bone and Aga Yacoob Ally, the 95 Logs of Timber, on the ground of their having been cut in the territory of the Chief of Zimmay, and of that Chief's having confiscated the same, and sold them to him.

[71] Monuq Toon Bone and Aga Yacoob Ally defended such action, on the ground of the 95 Logs of Timber being the property of Monuq Toon Bone, and sold by him to, and received by, Aga Yacoob Ally.

Pending that suit, Lenaine, on the 31st of July, 1860, entered into an agreement with the Respondent, Snadden, and his Partner (carrying on business as R. and W. Snadden), whereby he sold them a quantity of Timber, including, in the event of his being successful in the above suit, the 95 Logs of Timber in litigation.

On the 29th of August, 1860, the Deputy Commissioner decided the suit in favour of Lenaine, and, on the 1st of May, 1861, on an appeal by the Defendants therefrom to the Commissioner of Tenasserim, such decree was affirmed.

On the 2nd of August, 1861, Snadden, as the Attorney for Lenaine, who had obtained an Order of the Court for the delivery to him of the 95 Logs of Timber, took possession of the Timber, and, apparently under the above agreement, he retained possession thereof for himself.

About the same time Aga Yacoob Ally presented a special appeal to the High Court at Calcutta, on the ground that he was, as *bona fide* Purchaser, without notice or concealment, entitled to retain possession of the 95 Logs. The High Court remanded the case for trial by the Commissioner, upon the issue, whether Aga Yacoob Ally had bought for full value openly, and whether the 95 Logs of Timber had become his property. The Chief Commissioner (Lieut.-Col. A. P. Phayre) having taken evidence on these points, on the 1st of April, 1864, decided in the Appellant's favour. Lenaine appealed to the Chief Commissioner of British Burmah against such decision, on the grounds [72] that the sale was not in market overt, that the purchase was not in good faith, and that a document adduced in evidence was wrongly admitted : but the Chief Commissioner dismissed the appeal with costs.

The Order of the Commissioner made on the appeal was as follows:—"The Court orders and decrees that the decision in this case, dated 1st of May, 1861, be revised, and decrees to the Appellant, Aga Yacoob Ally, the 95 Logs of Timber claimed by the Respondent, Lenaire, in the original suits (together with his own Aga Yacoob Ally, the Appellant's) costs and fees in all three Courts."

On the 15th of June, 1861, Aga Yacoob Ally, considering the wording of the decree as unsatisfactory to him in his position as a Defendant, Snadden, not being a party to that suit, presented a petition praying the Court to pass a simple decree ordering the appeal to be allowed and the former decision reversed, and to be kept in possession of the 95 Logs and other Timber bought by him from Monuq Toon Bone. The Court, however, refused to alter the terms of the Order.

About this time Aga Yacoob Ally died, having appointed the present Appellant his Executor.

On the 23rd of November, 1866, the Appellant, as such Executor, filed his plaint in the present suit in the Court of the Recorder of Mouluicin against the Respondents, in the nature of an action of Trover, whereby, after reciting the proceedings in the other suits, and the alleged conversion by the Respondents of the 95 Logs of Timber, he claimed damages to the extent of Rs. 23,304. 6a. 4p., including interest from the 2nd of August, 1861, being the time admitted as the date when the Respondent, Snadden, obtained the 95 Logs of Timber.

The Respondent, Lenaire, filed a written statement, [73] setting up as defence, first, that the suit was barred by limitation. Secondly, that the cause of action had been determined. Thirdly, that the deceased had already sued the other Respondent, Snadden, as Agent to Lenaire, for 30 Logs out of a batch of 128 Logs of Timber, and that, therefore, he could not now sue him and the other Respondent for the 95 Logs. Fourthly, that, if by the agreement between the Respondents of the 31st of July, 1860, the Respondent, Snadden, had undertaken any liability for the Timber claimed by the late Aga Yacoob Ally. Fifthly, the suit would not, according to sec. 2 of Act, No. VIII. of 1859, lie, as the Plaintiffs sought to recover Timber already decreed to him, and he ought to have executed that decree; sixthly, a denial of liability for interest; and, lastly, that Aga Yacoob Ally having, in the suit of 1862, elected to sue the second Respondent for 30 Logs of Timber, part of 180 Logs claimed by him, he could not sue the first Defendant for the remaining 95 Logs.

The other Respondent also filed a written statement embodying the same defences, except the third and seventh.

Issues were settled by the Recorder, the only material one to the present question being the first, whether the case was maintainable with reference to the provisions of sec. 2 of Act, No. 23 of 1861.

The Pleader on behalf of the Plaintiff addressed the Court, but no evidence was adduced, in consequence of the Recorder (Mr. J. Coryton) considering it right to decide the case on the first issue only, and he dismissed the suit with costs against both Defendants.

The judgment of the Recorder, after referring to [74] the framing of the issues, proceeded in these terms:—"I think it is not necessary, acting under sec. 145 of Act, No. VIII. of 1859, to go beyond the first issue, and that my finding on that issue being adverse to the Plaintiff must determine the suit. It appears clear to me, that this suit is founded on the decree obtained by the Plaintiff, and that the proper course was to have applied to this Court for the execution of that decree, and that a regular suit such as the present is expressly prohibited by the provisions of sec. 2 of Act, No. XXIII. of 1861."

The Appellant applied to the Recorder for a new trial, or review of judgment, and an Order was accordingly issued for the Respondents to appear on such application.

On the 25th of February, 1867, that application came on for hearing, and was dismissed, the Recorder giving judgment as follows:—"It appearing that the decree, on the propriety of executing which, in conformity with sec. 2 of Act, No. XXIII. of 1861, and not with the practice obtaining before 1st of May, 1860, I based my judgment in this suit, was passed in 1864. I think the 2nd section of the Act of 1861 applies, and gives the Appellant an ample remedy, and that the institution

of a regular suit for the purpose virtually of carrying out the decree is wrong. I say this without reference to the merits of the case."

The present appeal was from this decree.

Sir R. Palmer, Q.C. (Mr. J. D. Bell with him), for the Appellant:—There is nothing to be found in the 2nd section of the Act, No. XXIII. of 1861, or any other sections of the Act relating to the Civil Procedure Code, appli-[75]-cable to the Courts of British Burmah, which prevented the Appellant, the Executor of Aga Yacoob Ally, bringing this suit against the Respondents for damages for conversion of the 95 Logs to Aga Yacoob Ally, decreed to him by the Order of the Chief Commissioner. Neither was the Appellant precluded by the Civil Procedure Act, No. VIII. of 1859, sec. 145. By the issues recorded the question was between the parties to that suit. If a special claim for damages arise against a third party, a new suit lies. Here the Appellant's Testator, a *bona fide* Purchaser without notice, could not, under the decree of the Court of appeal, passed in the suit in which Lenaire was the Plaintiff, have obtained under the Act, No. XXIII. of 1861, any relief whatever against Snadden, or even against Lenaire, to any further extent than an Order to make him personally responsible for the 95 Logs of Timber mentioned in the decree, which Order would not have done full and complete justice.

Mr. Leith, for the Respondents, was stopped from arguing on the merits.

The Right Hon. The Lord Justice Giffard.—Their Lordships in this case are of opinion, that the Court below has proceeded on a misapprehension of the effect of the 2nd section of the Act, No. XXIII. of 1861, on which the judgment of that Court appears to have been founded.

That section is in these terms (His Lordship read the section, *ante* [13 Moo. Ind. App.], p. 69, and proceeded):—The decree in this case on which the judgment in the Court below was founded, is in these terms:—"The Court Orders and decrees that the decision in this case, dated 1st of May, 1861, be revised, and de-[76]-crees to the Appellant, Aga Yacoob Ally, the ninety-five Logs of Timber claimed by the Respondent, Lenaire, in the original suits, together with his own (Aga Yacoob Ally, Appellant's) costs and fees in all three Courts."

That decree is against Lenaire alone, and its effect is, in point of fact, simply to direct restitution by him of the particular 95 Logs of Timber.

The present suit is not only against Lenaire, but also against Snadden, who was the Purchaser from Lenaire, and who was no party to the original suit, no party to the original decree, and not in any sense bound by it. The object of this suit is not restitution of the 95 Logs, therefore not an execution of the decree at all; but its object is to recover damages for a tort alleged to have been done both by Lenaire and Snadden.

That being so, their Lordships are clearly of opinion, that the 2nd section has no application to such a case. It has no application as against Snadden, because Snadden was no party to the original suit. It has no application further, because it cannot be said that proceeding for a tort is any method of executing this decree.

Their Lordships do not think it necessary for them in the present state of these proceedings to go further than this. Of course, when the matter goes back, every ground of defence, excepting this particular one, will be open to the parties; but their Lordships are clearly of opinion, that there has been a miscarriage in this respect, and, therefore, the decree of the Court below must be reversed and discharged, and the Appellant must have his costs of the appeal, and so their Lordships will advise Her Majesty.

[77] GOSHAIN TOTA RAM,—*Appellant*; RAJAH RICKMUNEE BULLUB.—*Respondent* * [June 28, 1869].

On appeal from the Sudder Dewanny Adawlut of the North-Western Provinces.

The rule of the Judicial Committee is, never to disturb the concurrent decisions of the Courts below upon a mere question of fact, unless it very clearly appears that there has been some miscarriage of justice, or that the conclusion drawn by the Courts below is plainly erroneous [13 Moo. Ind. App. 82].

The Judicial Committee will not determine an appeal against a decree upon the mere fact that some evidence has been improperly admitted by the Court below. It is the rule of this Tribunal to do substantial justice between the parties, and to see if there is sufficient evidence on the whole record to justify the conclusion to which the Court below has arrived [13 Moo. Ind. App. 83].

According to the true construction of section 39 of Act, No. VIII. of 1859, it is not fatal to the admission of documentary evidence, that it is brought in subsequent to the filing of the plaint, if it appears to have been received with the sanction of the Court [13 Moo. Ind. App. 82].

In this case, the suit was brought by Rajah Gourbullub, the Father of the Respondent, against the Appellant and Mussumat Radha Muneé and others, to recover possession of a Temple and land situated in Mohulla Bhounraghat, at Bindrabun. The Appellant claimed the property as having been sold to him by one Mussumat Radha Muneé. The decisions of both the original and appellate Courts were in favour of the Respondent's Father.

The facts of the case are as follows:—

In the year 1807, Maharajah Bindrabun Beharry [78] bought the land in Bindrabun, a place held in great veneration by Hindoos, and built the Temple in dispute. He appointed Byragees Priests to perform the ceremonies, and supplied them with funds. The same course was adopted by his successors.

On Rajah Gourbullub's death, the Respondent's Father, as his adopted Son, succeeded to his estate, and one Sreedhur Doss was then the officiating Priest, and he, being old and infirm, nominated Gobind Doss to succeed him, which nomination, having been submitted to the then Rajah, was approved of by him. In 1852, Gobind Doss died, leaving a Widow, named Mussumat Radha Muneé, and a Son-in-Law, Bindrabun Doss, the latter of whom recognized the then Rajah as the Owner of the Temple, and sought to be appointed in Gobind Doss's place. Rajah Gourbullub, on this occasion, made no written appointment, but he recognized Bindrabun Doss as the Priest, and he was in the habit of writing to him in that capacity, sending him money for purposes of the Temple, as had been the case with Gobind Doss, his predecessor.

Some time in the year 1857, Bindrabun Doss went to Calcutta, when Rajah Gourbullub called upon him for an account of his expenditure at the Temple, whereupon he, although admitting his liability to account, never did so, and shortly afterwards disappeared. Before he left, he told Rajah Gourbullub, that he had made over charge of the Temple to Gobind Doss's Widow, Mussumat Radha Muneé.

In March, 1860, Rajah Gourbullub for the first time visited the City of Bindrabun, when he discovered that several persons claimed to hold the Temple, as against him, amongst whom was the [79] Appellant, who alleged that he had bought the estate, including the Temple, from Mussumat Radha Muneé.

Upon this, Rajah Gourbullub commenced the present suit against the Appellant, Mussumat Radha Muneé, and four other persons, in order to recover possession of the estate.

Mussumat Radha Muneé filed a written statement, admitting the Plaintiff's title, and denying that she had sold the property to the Appellant.

The Appellant, by his written statement, denied the Plaintiff's title, alleging

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

that the Plaintiff had exercised no right of ownership for twelve years, and alleging that Gobind Doss and his Wife had borrowed money from him for repairs of the building, and the expenses of the worship, and that they had on the 21st of November, 1858, sold the property to him.

The Appellant filed the deed, by which he alleged that the property was conveyed, and which purported to have been executed on the 21st of November, 1858, by Mussamat Radha Munee, as Widow of Gobind Doss.

Evidence was entered into on both sides, Rajah Gourbullub, in addition to the evidence of witnesses, putting in documentary evidence as proof of his title, and Mussamat Radha Munee filed documentary evidence, consisting of accounts and letters, showing the relations subsisting between the Plaintiff and the then Priest at the Temple, such as the Plaintiff making remittances, and requiring receipts from the officiating Priests of the expenditure on the Temple.

On the 6th of July, 1861, Mahomed Bukoh, the Principal Sudder Ameen, decreed in favour of the Rajah Gourbullub, giving him possession, and deciding against the validity of the conveyance to the Appellant.

[80] By his judgment, the Sudder Ameen held, that Mussamat Radha Munee's Husband, Gobind Doss, and herself were servants and ministers of the Temple, and never were Proprietors; that she had no power to sell; that the deed produced was a fraud; that the Widow did not understand it; that even if she did, she conveyed nothing; and that, as to the possession relied on by the Appellant, it was one accompanied by an acknowledgment of the Rajah's proprietary rights, and was not a possession creating a title by lapse of time.

The Appellant appealed to the Sudder Court at Agra against this decision, on the following grounds: First, that the Plaintiff's claim was barred by lapse of time, as he had not held proprietary possession for twelve years; secondly, that the Plaintiff had no title, that his documentary evidence was fabricated, and that it was improperly admitted in evidence; thirdly, that the property was Gobind Doss's ancestral property, enjoyed by him, that it descended to his Widow, who sold it to the Appellant; and lastly, that the Principal Sudder Ameen's reliance on the statements of Mussamat Radha Munee and another Defendant, was erroneous, there being collusion between those Defendants and the Plaintiff.

Before the appeal was heard the Rajah died, and the appeal was revived against the present Respondent.

The Sudder Court, consisting of Messrs. A. Ross and W. Roberts, decided against the Appellant's plea in bar, by effluxion of time. The Court, in delivering judgment, commented on the fact of the property being of such a nature that an intending Purchaser should have been careful in investigating the title, and held, that the taking of a conveyance from an ignorant [81] weak woman like Mussamat Radha Munee, without further inquiry, warranted the inference drawn by the Principal Sudder Ameen of the Appellant's acting in bad faith. The Court also declared, that it was satisfied with the proof of the Plaintiff's title, and that as the opposition of the Appellant was untenable, they affirmed the decision of the Principal Sudder Ameen with costs.

The appeal was from this decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—The suit being in the nature of an action of ejectment to oust the Appellant, the *onus* of proving a title superior to that of the Appellant's Vendor lay upon the Respondent. This he has failed to do. He ought, as it was an action of ejectment, to have been required to prove his title before he was permitted to challenge the sale and conveyance under which the Appellant was in possession. Next, the documentary proofs of the Respondent were irregularly admitted, the proofs having been filed subsequent to the filing of the plaint, and such evidence ought not to have been received by the Court: Act, No. VIII. of 1859, sec. 39; but, further, the documentary proofs were not put in until the examination of the witnesses had concluded: the Court, in such circumstances, ought either to have withheld its sanction altogether to their being admitted, or, as the Appellant objected to their reception on the ground of their being fabricated documents, the Court ought to have required the Respondent to prove each document by witnesses; which was not done.

Mr. J. D. Bell, for the Respondent, was not called upon to address their Lordships. [82] Judgment was pronounced by

The Right Hon. Sir James W. Colvile.—This is an appeal against the concurrent decisions of the two Courts below, which have found that the Respondent, the Plaintiff in the action, is entitled to be restored, rather to an office in the nature of the headship of a Temple, than to the possession of lands in the ordinary sense in which lands are sued for in ejectment, and that the title set up by the Appellant cannot prevail against him.

Their Lordships have so constantly said, that in such circumstances, they will never disturb the concurrent decision of both Courts below upon a question of fact, unless it very clearly appears that there has been some miscarriage of justice, some mistrial, or that the conclusion is very plainly erroneous, that it is hardly necessary to repeat it.

In the present case, it is contended, that the documentary evidence which has been put in by the Plaintiff in the suit—the Respondent on this appeal—was improperly admitted. It does not seem to their Lordships that that is the case, or, at least, that there has been such an admission of evidence as would be fatal to the decision of the Courts below. No doubt the evidence was not, in accordance with the new Code of Procedure, brought in at the time of filing the plaint. It was brought in at two subsequent periods. There seems, therefore, to have been an irregularity in that respect, which is adverted to in the judgment of the Sudder Court.

Their Lordships, however, do not find that the 39th section of Act, No. VIII. of 1859, makes the admission of any documentary evidence that is not [83] so brought in, so improper as to be a ground of appeal against the ultimate determination of the suit by the Court which has admitted it. On the contrary, what that section at the end of it says, is—"Any document not produced in Court by the Plaintiff when the plaint is presented, shall not be received in evidence on his behalf at the hearing of the suit, without the sanction of the Court."

In the present case there seems to their Lordships to be abundant proof, that the evidence was received with "the sanction of the Court." A great part of it (some of the documents and accounts being in the Bengalee language) seem to have been referred to a subordinate Officer, an Ameen, for inspection and verification, and it was ultimately acted on by the Court. It is perfectly clear, therefore, that if the sanction of the Court can purge the original defect, it has been so purged.

Their Lordships sitting here, have not been in the habit of determining appeals upon the mere fact, that certain evidence may have been improperly admitted. It has always been a rule of this Committee to do substantial justice between the parties, to take the Record as it is sent over, and to see, whether there is sufficient evidence on the whole Record to justify the conclusion to which the Court below have come. The Sudder Court, although in these cases they adverted to the irregularity in the proceedings of the Principal Sudder Ameen, have expressed their opinion that the Defendant was not ultimately prejudiced by the course which had been pursued.

The contention on the side of the Appellant is, that this is in the nature of an action of ejectment, and that there is really no evidence whatever of the title [84] of the Respondents, who, being Plaintiff in the cause, was bound to make out the title. It appears, however, to their Lordships, that there was ample evidence to go to a jury, that the persons who actually resided in the Temple were the mere Agents of the Rajah Gourbullub, and that there was also ample evidence to go to the jury, that Rajah Gourbullub was the adopted Son of the person whom he claimed to represent. In that state of things their Lordships think, that the burthen of proof was properly treated as shifted upon the Defendant, and the transaction upon which he relies seems to their Lordships, as it seemed to the Courts below, to be one of a suspicious character. Both those Courts have found, that it was not a true transaction, and that even if the instrument had been really executed by Mussamat Radha Muneé with a knowledge of its contents, no title to the Temple would have passed thereunder. Their Lordships are not prepared to say that either of those conclusions is wrong.

Under these circumstances, their Lordships see no grounds for disturbing the decision of the Courts below, and must humbly recommend Her Majesty to dismiss this appeal with costs.

[85] NILMADHUB DOSS,—*Appellant*; BISHUMBER DOSS, BISHENROOP DOSS, HURROGOBIND DOSS, BHUGOBAN CHUNDER ROY, and JOYGOPAL BANNERJEE,—*Respondents* * [June 29, 1869].

On Appeal from the High Court of Judicature at Bengal.

Observations upon the presumption of adoption, arising from the religious duty of a childless Hindoo to adopt a Son, and of the circumstances which rebut such presumption [13 Moo. Ind. App. 100].

Held, that an alleged adoption by an Uncle of his Nephew, who at the time of such adoption was his Brother's only Son, was not, as a fact, proved to have taken place.

Semble:—Such adoption, if made, was invalid by Hindoo Law.

The effect by the Hindoo Law of an adoption, Dwyamushyayna (Son of two Fathers) is not to extinguish the adopted Son of his lineage to his natural Father, or to bar him of his right of inheritance to his Father's estate [13 Moo. Ind. App. 101].

It is too late for the Respondent at the hearing of the appeal to object to its competency, on the ground that the amount in dispute was below the appealable value [13 Moo. Ind. App. 95].

Whether, in estimating the appealable value, Rs. 10,000, costs of suit can be added to the principal and interest decreed. *Quære?* [13 Moo. Ind. App. 103].

This suit was instituted by the Respondents to recover three-fourths of certain real and personal property in the possession of the Appellant, as joint heirs with him, to one Ramlochan Doss, the Brother of the Appellant, and the first Cousin of the three first-named Respondents; and as subsidiary thereto to set aside a decision of the Judge of Zillah [86] Moorshedabad, made in a summary suit under Act, No. XIX. of 1841, which upheld the possession of the Appellant to the entirety of the real and personal property, as Brother and sole heir-at-law of Ramlochan Doss.

The principal questions raised in the suit were, whether Ramlochan Doss had been, as alleged by the Respondents, adopted by his and the Appellant's late paternal Uncle, Goorooprashad Doss, according to the requirements of the Hindoo Law received in Bengal, and, if so, whether the effect of such adoption was to put an end to his filial relationship to his own parents and all other natural ties, and consequently the fraternal relationship between him and the Appellant, and to create instead between them a new and more distant relationship of Cousins, thus removing him to the same degree of relationship to the deceased as that of the three first Respondents, and so to make him only an heir jointly with them; or whether, as a fact, Ramlochan Doss was given away in adoption by his natural parents, or whether he was brought up and treated by his Uncle, Goorooprashad, only as a Pulluck Puttro (foster son), and not as a Dattaack Puttro (Son given by his parents); and, lastly, on the assumption that there had been a regular adoption of Ramlochan Doss, whether the Appellant, having been joint in estate and food with him, was not, even assuming him to be in the degree of Cousin only, his sole heir to the exclusion of the three first Plaintiffs and Respondents, also Cousins, but belonging to a separate and divided family.

By the decree of the Principal Sudder Ameen of Zillah Moorshedabad, that Judge decided against [87] the fact of such adoption, and dismissed the suit. The decree of the High Court reversed that finding, declaring in favour of the adoption.

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice Selwyn, and the Right Hon. the Lord Justice Giffard.. Assessor,—The Right Hon. Sir Lawrence Peel.

and decreeing to the Respondents three-fourths of the property, valued at Rs. 4357:15:17:3.

The facts of the case were as follow:—

Sreeshteedhur Doss, deceased, a Hindoo, had three Sons, the eldest, Gungadhur Doss, the second, Gooroooproshad Doss, and the third, Purmanund Doss. Gungadhur Doss died, leaving three Sons, the Respondents, Bishumber Doss, Bishenroop Doss, and Hurrogobind Doss, his heirs and representatives in estate. Purmanund Doss died, leaving five Sons, two by his first Wife, named Rajiblochun Doss and Ramlochun Doss, and three by his second, named Puddolochun Doss, Modosoodun Doss, and the Appellant, Nilmadhub Doss. The family was a joint undivided Hindoo family.

It was alleged, that in the month of Aughran, B.E. 1211, Gooroooproshad Doss, the second Son of Sreeshteedhur Doss, being childless, adopted his Nephew, Ramlochun Doss, as his Son. Rajiblochun Doss, the eldest Son of Purmanund Doss, was then dead.

By an instrument, called a Hibbahnamah, or deed of gift, bearing date the 9th of Falgoon, B.E. 1234, Gooroooproshad Doss, being then about to start on a pilgrimage to Benares, transferred to Ramlochun Doss certain property mentioned in the instrument.

Gooroooproshad Doss died in the year 1237 B.E. and Ramlochun Doss thereupon took possession of his estate, which he enjoyed till the month of Aughran, 1238 B.E., when he died intestate, without issue, leaving his Wife, Anundmoye Dossee, him surviving. [88] Anundmoye Dossee held possession of her Husband's property till her death.

Puddolochun Doss and Modosoodun Doss both died childless.

Upon the death of Anundmoye Dossee, the Respondents, Bishumber Doss, Bishenroop Doss, and Hurrogobind Doss and the Appellant, as co-heirs, became entitled to succeed to the property left by Ramlochun Doss, share and share alike, but the Appellant having taken possession of the whole of the property, the Respondents, other than the Respondents, Bhugoban Chunder Roy and Joygopaul Bannerjee, on the 30th of June, 1859, presented a petition to the Judge of Moorshedabad under the provisions of Act, No. XIX. of 1859, praying for possession of three-fourths share in the property. The Appellant opposed this application, and by his answer disputed the fact of Ramlochun Doss having been the adopted Son of Gooroooproshad Doss, and asserted his own right to succeed by inheritance as step-brother of Ramlochun Doss to the whole of the property left by Ramlochun Doss. On the 1st of March, 1860, the Judge dismissed the petition with costs.

The Respondents then filed their plaint against the Appellant in the Court of the Principal Sudder Ameen of Moorshedabad, laying their claim at Rs. 9793. 7a. 5p., and thereby stated, amongst other things, that Gooroooproshad Doss, paternal Uncle of the Plaintiffs, Bishumber Doss, Bishenroop Doss, and Hurrogobind Doss, having neither Son nor Daughter born to him, took, in the month of Aughran, 1211 B.E., with the view of securing to himself offerings of water and funeral cake, etc., his own Brother's Son, Ramlochun Doss, with the consent [89] of Ramlochun Doss's parents, as Dattack Pootro, or what is more usually called Pooshoo Pootro, and that Gooroooproshad Doss having thus taken Ramlochun Doss, brought him up, performed his sungskar, etc. (ceremonies of adoption), and making him his own representative, transferred to him by a deed of Hibbahnamah, dated the 9th Falgoon, 1234 B.E., the property set out in the schedule to the plaint; that after the death of Gooroooproshad Doss, Ramlochun Doss, in his right of a Pooshoo Pootro (adopted Son), enjoyed possession of the property till his death in the month of Aughran, 1238 B.E., that Ramlochun Doss left a childless Widow, Anundmoye Dossee, who, as his heiress, held possession of the property left by him till the 3rd Falgoon, 1265, when she died; and that, in accordance with the Hindoo Shastres received in Bengal, the Plaintiffs, Bishumber Doss, Bishenroop Doss, and Hurrogobind Doss, and the Defendant, Nilmadhub Doss, were entitled to share, by right of succession, equally the property left by Anundmoye Dossee, and which she had obtained from her Husband, Ramlochun Doss, and they sought to have the summary decision of the Judge of Moorshedabad of the 1st of March, 1860, set aside, and to obtain possession by

virtue of their right of inheritance of three-fourths of the property left by Ramlochan Doss.

The Appellant filed a written statement by way of answer, and stated that Ramlochan Doss was the stepbrother of the Appellant, and that Gooroooproshad Doss had never adopted him or performed the Pootrashee (initiation ceremony of adoption), and that, in fact, Ramlochan Doss, at the time of the alleged adoption, was the only Son of their Father, Purmanund Doss, [90] and that he and his Wife did not give in adoption his eldest and only living Son; that no deed of gift had been executed and registered, which would have been the case had such alleged adoption taken place; and that, if there had been such adoption, there would have been no necessity for the Hibbanamah, in which deed, admitted and witnessed by the three first Plaintiffs, Ramlochan Doss is described as Pulluck Pootro (Foster Son) only. And the Appellant submitted and contended that, according to the Hindoo Law, such a Son was not equal to a Dattaca (given Son), or Pooshoo Pootro (adopted Son); that the late Gungadhun Doss, the Father of the first three Plaintiffs, had, in his several petitions, admitted that Ramlochan Doss was not the adopted Son of Gooroooproshad Doss, and that they were bound by his admission. The answer also denied that Ramlochan Doss performed the Shradh of Gooroooproshad Doss, and stated that, on the contrary, he had actually performed those of his own Father, Purmanund Doss, and that both those facts were admitted in the petition of Gungadhun Doss; that Gooroooproshad Doss and Purmanund, Ramlochan Doss, the Appellant, and two other Sons of Purmanund, continued to live as Brothers, and as a joint and undivided Hindoo family in food and in estate; that their Brother, being dead, the Appellant was, on the death of the Widow of Ramlochan Doss, entitled, under the Hindoo Law, to his estate, and further, that his Widow, without objection from the Appellant, had assigned the property to the service of Issur (idol) under the superintendentship of the Appellant.

Issues were framed and witnesses examined. Documentary evidence was also filed, including the Hibban-[91]-namah, and the case came on for final hearing before Baboo Panchanund Bannerjee, the Principal Sudder Ameen of Moorshedabad, who held, that Ramlochan Doss had not been adopted by his Uncle, Gooroooproshad Doss; that the deed of gift of the 9th of Falgoun, 1234, was false and fraudulent, and, as upon the admission of the Plaintiffs, Ramlochan Doss had been in possession of the estate of the deceased Gooroooproshad Doss for so long a period under the deed of gift, that save and except the Defendant, Nilmadhub Doss (the Appellant), who was the half-Brother of the late Ramlochan Doss, the Plaintiffs (the Respondents) could not be entitled to the property left by him; and it was, therefore, ordered, that the suit be dismissed, and the costs of the Defendant, together with interest thereon, at one per cent per month from the date up to the date of payment, be awarded from the Plaintiffs.

The Respondents appealed from this decision to the High Court at Calcutta.

The appeal came on for hearing on the 11th of February, 1863, before Sir Barnes Peacock, Chief Justice, Mr. H. B. Bayley, and Mr. F. B. Kemp, two of the Puisne Justices of the High Court, who held, that the adoption of Ramlochan Doss by Gooroooproshad Doss did as a fact actually take place, and that it was a good and valid adoption; that if the deed of gift of the 9th of Falgoun, 1234, had been false and fraudulent, the title of Ramlochan Doss would have been based upon a fraud, and that consequently there would have been no valid adverse possession by him as against the Respondents (other than the Respondents Bhugoban Chunder Roy and Hurrogoobind Bannerjee), who, as the representatives of Gungadhun [92] Doss, the only surviving Brother of Gooroooproshad Doss at the time of his death, and his sole heir would have been entitled to the whole of the property left by him, but that both parties were bound by the deed; and by its decree of the same date, the High Court decreed to the Plaintiffs three-fourths of the estate claimed, as set out in the Hibbanamah, with mesne profits from the date of the death of Anundmoye Dossee, the amount to be ascertained by local inquiry; that as the claim to certain Lakhiraj lands and pukka buildings had been abandoned by the Appellants, those properties were not included in the decree, and decreed the Appellants' costs in proportion to the valuation of the property decreed, with interest upon those costs at the rate of 12 per cent. per annum to the date of realization.

The Appellant being dissatisfied with this decree, presented a petition to the High Court, for leave to appeal to England, praying that the same might be admitted, stating that although the amount in suit was less than Rs. 10,000, yet that the value of the zemindary was more than Rs. 10,000; and further, that the costs of the Appellants in both Courts were, by conjecture, more than Rs. 1200, and that the interest was to be added, and, therefore, calculating it at that rate, the appeal was admissible to the Privy Council.

The petition was heard by Mr. Walter Scott Seton-Karr, one of the Judges of the High Court, on the 2nd of May, 1863, who made the following Order:—"Seeing that the costs, when added, will raise the sum in dispute beyond the limit of Rs. 10,000, this appeal is admitted. The amount of the actual decree is Rs. 9793."

The appellant afterwards applied for a review, [93] which was on the 2nd of October, 1863, refused. It did not appear that any application was made to appeal from the Order refusing a review, and the present appeal was confined to the decree of the High Court of the 11th of February, 1863.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant. The right of the Respondents to share in the property in suit depends on their proving a regular and complete adoption, according to Hindoo Law, of Ramlochan Doss, by Gooroooproshad Doss, his Uncle, which fact they failed to do. Ramlochan Doss was not, and indeed could not, have been legally adopted or given, inasmuch as at the time of such alleged adoption, he was the only Son of his Father, and, therefore, ineligible. Dattaka-Chandriká, sec. I. pla. 20, 21, 27 [Trans. by Sutherland]. Strange's "Hindu Law," Vol. I., p. 85 [2nd Ed.]. Which fact he was well aware of, as he continued during his lifetime to use his original name, and he performed, as eldest Son, his natural Father's Shraddh and obsequial rites, and took by inheritance his share of his Father's estate, jointly with the Appellant and his other Brothers. Even if the forms and rites of adoption had been proved to have taken place, yet as Ramlochan Doss could not have become, and was not intended to be, an adopted Son (Sudha Dattaka) to his Uncle: he must be considered as having been merely affiliated by him, or he might have been Dwyamushyayana, or Son of two Fathers. W. H. Macnaghten's "Hindu Law," Vol. I., p. 71; Strange's "Hindu Law," Vol. I., pp. 86, 100 [2nd Ed.]; in which case there would be no extinction of the [94] lineage of his natural Father, with whom the filial relationship would continue, as well as the paternal relationship with the Appellant, who is entitled to the entire property in question, as his only Brother and sole heir. The decree of the High Court proceeds on an erroneous construction of the language of the Hibbahnamah made by Gooroooproshad Doss, who was an educated Hindoo, in favour of Ramlochan Doss, inasmuch as the meaning of the term "Pulluckpootro," used there, in describing him, means Foster Son only, and not adopted Son, or which latter term is always described among the Hindoos by the term "Pushoo pootro," or adopted Son, or "Dattack pootro," or a given Son. We insist, therefore, that the Principal Sudder Ameen was right in deciding, that the weight of evidence was in favour of the Appellant's claim, that Ramlochan Doss was not given by his parents, or that there was any regular adoption by his Uncle, which contention is strongly corroborated by the latter having deliberately used in the Hibbahnamah the distinctive term "Unomuttee," or permission of the parents, instead of the ordinary and proper term "Daun," gift of parents, where a Son has been actually given in adoption.

Mr. Mortimer, for the Respondent.—There is a preliminary objection to this appeal being entertained. The sum at issue in the suit does not amount to Rs. 10,000. Neither the decree of the 11th of February, 1863, or the Order of the 2nd of October, 1863, involve directly or indirectly any claim, demand, or question to property amounting to the value of Rs. 10,000; nor has the High Court made any declaration as required by the 39th section of [95] the Letters Patent of 1865, constituting the High Court, that this is a fit case for appeal here, and no special leave to appeal has been granted by this Tribunal. Mr. Justice Seton-Karr has improperly added costs to make up the appealable value.

The Lord Justice Selwyn.—It would be very prejudicial to the Appellant to allow, at this stage of the appeal, the objection now urged to the right of appeal on the ground of the want of appealable value. If there is any foundation for such objection, it ought to have been taken when the petition of appeal was lodged: this

would not only have saved expense, but would have given an opportunity to the Appellant to have shown that there was nothing in the objection, which is our present opinion.

Mr. Mortimer. — Then, upon the merits, I submit, that the adoption of Ramlochan Doss by Goorooprashad Doss, was a valid adoption by Hindoo Law, and by virtue thereof, and in the event that has subsequently happened, the Respondents, Bishunder Doss, Bishenroop Doss, and Hurrogobind Doss, became, on the death of Anundmoye Dossee, co-heirs with the Appellant of Ramlochan Doss, and entitled as such to succeed with him to the property left by Ramlochan Doss, in equal shares. Adoption, in the event of a Hindoo having no natural Son, is most important, and there is a strong presumption in favour of the adoption in this case. A Nephew may perform the obsequies of his deceased Uncle, but it is admitted that it is not so effective as those of an adopted Son. The Son of a Brother is the [96] most preferable to be adopted, Dattaka-Chandrika, sec. I., pla. 20. Here Ramlochan Doss filled that character. It is true that an only Son cannot by Hindoo Law be adopted, *Rajah Upendra Lal Roy v. Srimati Rani Prasannamayee* (1 Ben. Law. Reps. App. Civil-Side, 221), but here that objection cannot prevail, as Ramlochan Doss had other Brothers. If the principal Sudder Ameen was right in his finding that the Hibbahnamah was a forgery put forward by Ramlochan Doss, which it is submitted was not the fact, then the Respondents, Bishunder Doss, Bishenroop Doss, and Hurrogobind Doss were, at the time the suit was brought, entitled, as Sons and heirs of Gungadhur Doss, the surviving Brother, and heir of Goorooprashad Doss, to the whole of the property included in the Hibbahnamah, three-fourths of which have, by the High Court, been decreed to the Respondents. The Respondents do not claim under the Hibbahnamah, but only refer to it as corroborative testimony of Ramlochan Doss's adoption. That deed was only intended as a family settlement of the estate of Goorooprashad Doss, and was not prepared with that care which it might otherwise have been.

The consideration of the case stood over.

Judgment was now delivered by

The Right Hon. Sir James W. Colvile (July 12, 1869).—The question raised by this appeal is whether the Respondents (the Plaintiffs in the suit) are entitled to recover from the Appellant three-fourth shares of certain property, the whole of which he claims to hold as the sole heir of his natural half-Brother, Ramlochan Doss, deceased. This property is ad-[97]-mitted to have been part of the separate self-acquired estate of one Goorooprashad Doss, who was the second of three Hindoo Brothers: the elder, Gungadhur, being the Father of the Respondents: the younger, Purmanund, being the Father of Ramlochan Doss, and (by another Wife) of the Appellant and two Brothers, now deceased. From Goorooprashad Doss, who died in January, 1830, it passed, under the circumstances which will be hereafter considered, to Ramlochan Doss, who died in the month of November of the same year. He was succeeded by his Widow and heiress, on whose death the succession opened to those who were then the nearest collateral heirs of her Husband.

If the right of succession is to be determined by the test of natural consanguinity, the Appellant, as the only living half-Brother of the deceased, is the sole heir. But if, as the Respondents contend, Ramlochan Doss was adopted by Goorooprashad Doss, so as to cease to be a member of his natural family, and to become the Son of Goorooprashad Doss, then, in contemplation of law, the Respondents and the Appellant are related to Ramlochan Doss in equal degree; *i.e.*, as first Cousins, and are entitled to equal shares in the property. Hence the determination of this appeal depends upon the determination of the question, whether the Respondents have established that there was, in fact, such an adoption.

The adoption is alleged to have taken place in 1804. The witnesses who have deposed to it have been treated by the Principal Sudder Ameen who tried the cause in the Court of First Instance as unworthy of credit. Their Lordships are not prepared to say that they have been so treated unjustly. [98] The testimony of some of them is directed to prove both the original adoption in 1804; and that, in the ceremony of boring the ears of Ramlochan Doss, which took place ten or eleven years later, Goorooprashad Doss performed a part which was inconsistent with any character but that of adoptive Father. Other witnesses speak only to one or the

other of these facts. They are contradicted by the witnesses for the Appellant, and in this conflict of evidence, and, considering the imputations cast on their credit by the Judge who saw and heard them, their Lordships are of opinion, that their testimony, unless very strongly confirmed by the documents produced in the cause, cannot be taken to have established the alleged adoption.

The proof of another material fact, viz., the existence at the time of the alleged adoption of an elder Brother of Ramlochan Doss, named Rajiblochan, also mainly depends on the testimony of the same witnesses. This fact is denied by the Appellants; and it is inconsistent with the statements made by Gungadhur, the Father of the Respondents, and the eldest member of the family, in 1831. There is no mention of Rajiblochan in any document of earlier date than the plaint in this suit. And their Lordships are of opinion, that his existence has not been proved, and that they must deal with this case on the assumption that in 1804, Ramlochan Doss was the eldest, if not the only, Son of his natural Father.

Of the documentary evidence a large portion tends to negative the alleged adoption. The Kabalas produced show that between the years 1817 and 1825 Ramlochan Doss purchased various small parcels of land, sometimes in his sole name, sometimes in the [99] joint names of himself and his half-Brother, Puddolochun; but that in all such transactions he was known and described as the Son of Purmanund Doss, his natural Father, and not as the Son of Goorooproshad Doss. There is no documentary evidence, other than Hibbahnamah afterwards considered, which shows that he was ever held out to the world during Goorooproshad Doss's life as the adopted Son of his Uncle.

What, then, is the confirmation of the Respondents' case which is to be derived from the terms of the Hibbahnamah, or from the acts of the Appellant under it? Their Lordships agree with the learned Judges of the High Court, and differ from the Principal Sudder Ameen in holding that that instrument must be taken to be genuine.

Mr. Mortimer has argued for the Respondents, that the general effect of the Hibbahnamah, and of the contemporary document therein referred to, was a sort of family settlement of the property of Goorooproshad Doss. Their Lordships are disposed to think that this view of the transaction is correct. It certainly seems true that under colour of a sale for Rs. 2000 of half the property to the three half-Brothers of Ramlochan Doss, they took a beneficial interest of considerable value, subject to the obligation, as the receipts show, of making certain allowances to the three Respondents. But if this be so, such a disposition by Goorooproshad Doss of his property goes rather to negative than to support the hypothesis of a formal and absolute adoption. It is not likely that, if Goorooproshad Doss had regularly adopted Ramlochan Doss, so as to make him in law his own Son, and to deprive him of a right to participate in the inheritance of his natural Father, he would have left away from him ten sixteenths of the [100] estate. On the other hand, the disposition is reasonable, if supposed to be made by a childless Uncle desirous of making some kind of provision for all his Nephews, but of giving the principal share of his property to a favourite Nephew, to whom he stood in some peculiar relation, short of that of Father and Son.

The evidence, therefore, of adoption to be gathered from the Hibbahnamah is to be found, if anywhere, in the statement:—"But as I had no Son or Daughter, I took you as my Pulluck-pootro in the month of Aughran, 1211, B. E., with the Unomutty (permission) of your parents, for the purpose of securing funeral oblations of water and funeral cake, and having brought you up like a Son, performed the ceremonies of your Sungskar, etc., and have constituted you my representative."

If these words must be taken to import a declaration of a regular and ordinary adoption, and are incapable of any other interpretation, they are of great weight, and when coupled with the proof of the action taken by Ramlochan Doss under this instrument, would go far to determine the case.

Much has been said of the old presumption which arises from the religious duty which is upon every childless Hindoo to adopt a Son. Their Lordships do not deny the force of that presumption, but they cannot shut their eyes to the fact that

childless Hindoos die daily without having fulfilled this obligation, or made provision for its fulfilment after their death.

Again, if there is, on the one hand, a presumption that Gooroooproshad Doss would perform the religious duty of adopting a Son, there is, on the other, at least as strong a presumption that Purmanund would not break the law by giving in adoption an eldest or only [101] Son, or allowing him to be adopted otherwise than as a Dwyamushyayana, or Son to both his Uncle and his natural Father. This latter kind of adoption would not sever the connection of the child with his natural family.

It is admitted on all hands, that the expressions in the Hibbahnamah are not those which properly import the adoption of a Son by gift—Dattaco-Pootro—and that it is only by reason of the gift that the filial relation to the natural Father is extinguished; or the right of the Son in the estate of the giver ceases is shown by the Dattaca Chandrika, sec. II. art. 19. The consulted Pundits differ as to the interpretation of the expressions in the Hibbahnamah. All agree that they do not in terms import the adoption of a "Dattaca Pootro;" but whilst some argue from the direction as to the performance of the funeral obsequies, that the person designated as "Pulluck Pootro," must be taken to be a "Dattaca Pootro;," others use that very direction as an argument for the contrary conclusion, because, in the case of a "Dattaca Pootro," such a direction would have been superfluous. To their Lordships it appears that nothing is to be gathered from these Vyavasthas but the conviction that the Hibbahnamah in question admits of more than one construction. And they think that that construction of it is to be preferred which is consistent with the presumption that Purmanund did not commit a breach of duty by giving away an eldest, or only Son: with the fact proved by the Kabalas, that long after the alleged adoption, Ramlochan Doss continued to be represented and known as the Son of Purmanund, and with the further fact (certainly not disproved), that he participated in the inheritance of [102] his natural Father. Nor is it necessary to decide, whether Ramlochan Doss was the mere foster Son of Gooroooproshad Doss; or was so filiated by him as to become Dwyamushyayana, since in neither case would his natural relation to his own family be extinguished. It is sufficient to find that the Hibbahnamah does not necessarily affirm him to have been "a Son given and received."

It remains to be considered, whether what was done by Ramlochan Doss under the Hibbahnamah is inconsistent with this construction. He neither claimed nor took the property of Gooroooproshad Doss as adopted Son and heir-at-law. He took by virtue of the Hibbahnamah, or deed of gift. The only plausible argument which the Respondents can derive from his petition for mutation of names is his application of the term "Father" to Gooroooproshad Doss. But this is not absolutely inconsistent with the hypothesis that he was only the foster Son of Gooroooproshad Doss; and is perfectly consistent with the theory that he was the Son of both Fathers. On the other hand, though it may be true that the Respondents are not bound by the statements of their Father, Gungadhur, as they would be if they were claiming title through him, yet those statements, made as long ago as the year 1831, by the senior member of the family, are not altogether without weight. They are not to be presumed to be false; and they both deny that the adoption took place, and affirm that Ramlochan Doss was the eldest Son of his Father.

Upon the whole, therefore, their Lordships are compelled respectfully to dissent from the view taken by the learned Judges of the High Court of the effect of the Hibbahnamah and the other evidence in the [103] suit. They have come to the conclusion that the Respondents have failed to establish that any adoption which severed the relation of Ramlochan Doss with his natural family took place; and that the superior title of the Appellant ought to prevail. They must, therefore, humbly advise Her Majesty to allow this appeal; to reverse the decree of the High Court; and in lieu thereof, to direct that an Order be made dismissing the appeal to the High Court, with costs. The costs of the appeal must follow the result.

Their Lordships deem it right to add that, although they overruled the objection to this appeal, which was taken on the ground that the amount in dispute was below the appealable amount, because it was, in their judgment, taken too late, they must not, therefore, be taken to assent to the propriety of the Order made by Mr.

Justice Seton-Karr, who, in estimating the amount in dispute, took into consideration the costs of suit (see *Doorga Dass Chaudry v. Ramanauth Chaudry*, 8 Moore's Ind. App. Cases, 262, where it was held, that costs of suit could not be added to the principal sum and interest in calculating the appealable value of Rs. 10,000, the amount restricted by the Order in Council of the 10th of April, 1838).

[104] H. A. BRETT, Collector of Salem.—*Appellant*: ELLAIYA. *Respondent*.
[June 30, 1869].

On appeal from the High Court of Judicature at Madras.

Suit by a co-sharer in the income of a charitable foundation for Brahmins, in Enam, held in severalty, to recover from the Government Collector the amount of quit-rent charged by him in excess of a Permanent Pattah on his shares. Held, that the default of his co-sharers in payment of their quit-rents, did not authorize the Collector in re-assessing the Plaintiff's shares at an increased rent.

Held, further, that the Court had jurisdiction to entertain the suit, as Mad. Reg. IV. of 1831, applies only to suits brought to try the validity of grants emanating from, or confirmed, or affected by, the direct act of the Governor in Council.

The facts of this case and the nature of the pleadings sufficiently appear in the judgment.

The suit out of which the appeal arose was brought under Mad. Reg. XXX. of 1802, sec. 7, by the Respondent, a holder of four shares of Neikarappatu, a village held in Enam of a religious or charitable tenure, called Agraharam, or maintenance allowed to Brahmins, to recover from the Collector of the Zillah of Salem the sum of Rs. 335. 9. 2. collected from him, in the years 1853 to 1856 inclusive, as being in excess of assessment under a Permanent Pattah with which his shares had been originally charged; and the difference between the full rate at which he had been re-assessed, and his original share of the rent, on the [105] ground, that he was not liable for the default of the other shareholders of the village; on which ground he was re-assessed.

The Government pleaded to the jurisdiction of the Court, that as the claim referred to Enam property of a charitable character, and not having been accompanied by a written Order of the Governor in Council as required by Mad. Reg. IV. of 1831, the suit was barred by the provisions of that Regulation.

By the decree of the High Court, dated the 5th of February, 1866, Coram, the Chief Justice, Sir C. H. Scotland, and Mr. Justice Innes, it was held, that the Government had no right to resume the land for re-assessment under Mad. Reg. XXVII. of 1802, and the Court gave judgment for the Plaintiff. Hence this appeal.

The Respondent not appearing, the appeal was heard *ex parte*, and was argued by

Mr. Forsyth, Q.C., and Mr. Merivale, for the Appellant, who contended, first, that the village was held jointly, and that the Respondent and the other shareholders of Neikarappatu Agraharams were severally responsible for the rent payable by each of the shareholders; and secondly, that the High Court was wrong in holding that Mad. Reg. XXVII. of 1802, applied to the case, as it was not a resumption proceeding.

Judgment was reserved, and now delivered by

The Right Hon. the Lord Justice Giffard (July 12, 1869).—This is an appeal from a decision of the High Court of Judicature at Madras, made on special appeal,

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colville, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

whereby is reversed a decision of the Civil Court of [106] Chittoor given in favour of the Appellant, the Defendant in the original suit.

The appeal comes before their Lordships *ex parte*, and it is desirable to state in detail the case as it is to be collected from the pleadings and issues, in order that the objections to the judgment appealed from may be examined with reference to the case actually before the High Court.

The suit was brought in the Zillah Court of Salem by the Plaintiff, a Brahmin, against Mr. Brett, the then Collector of that District. The plaint states succinctly the nature of the claim, which is this: The Plaintiff therein describes himself as a co-sharer of Neikarappatu Agraharam, which means a maintenance for Brahmins. He claims to recover Rs. 335. 2a. 2p., being the rent collected from him in excess of the permanent Jodikai Pottah granted to him by the Government. He then proceeds to state the circumstances of that grant as follows:—"On the assumption of the Country by the Honourable Company, a permanent revenue was settled in the time of Mr. Macleod for the four shares enjoyed by my ancestors and myself in the said Neikarappata Agraharam for a long time; for my one Karai, consisting of four shares, a Pottah has been granted to the effect that a Jodikai revenue should be paid to the Government at 53 pagodas and $7\frac{1}{2}$, or Rs. 67. 13a. 2p." He then proceeds to state the due payment of his revenue, and that on a pretence that arrears were due on the whole village, it was, inclusive of his shares, attached unjustly, without ascertaining from whom the arrears were due, and collecting the same from the Defaulters; and that a revenue in excess was fixed with a difference of rates, and was strictly demanded, as stated by him thereafter in his [107] plaint. He then alleges, that he paid the money under duress to avoid disgrace and sale of his lands, and stating the excess exacted during three years to be the sum for which he sues, he seeks to recover that demand, and prays that the annual revenue for the future may be adjudged to be collected from him under the Pottah of Mr. Macleod.

The answer filed by the Acting Collector on behalf of Mr. Brett, after stating the object of the plaint, insists first on a want of jurisdiction in the Court to entertain the complaint, as it was unaccompanied by a written Order of the Governor in Council under the Mad. Reg. IV. of 1831; and on the other part of the case it prays, that the suit may be dismissed for want of due specification of the particular lands on which the alleged excess had been imposed.

A supplemental answer was subsequently put in, which states further, in answer to the complaint, that the village was held not in severalty, but jointly, and that consequently the shareholders were jointly as well as severally liable for the quit-rent due on it.

The reply insisted, that the settlement was made for each plot, and a separate Pottah given to each sharer; that no joint Pottah was given for the whole, nor the money collected accordingly, nor a joint receipt given. It contains besides answers of an argumentative nature to the objection on the point of jurisdiction which it is not necessary to state in detail.

The rejoinder re-asserts and insists on the objection to the jurisdiction of the Court, and concludes by saying, that the Defendant does not consider it necessary to rejoin to any other part of the reply.

Upon this state of the pleadings the issues were [108] framed. The points stated for the Defendant to prove are:—

First, that the village was not held in severalty, but jointly.

Second, that the Plaintiff, as a shareholder, was jointly responsible with the several holders.

Third, that the excess of *teerwah* was legally due, and under what authority or Regulation.

It appears, therefore, that the Court imposed on the Defendant the *onus* of proving the legality of the re-assessment, and of showing under what authority or regulation it proceeded.

The Defendant did not appeal from the framing of these issues; nor does it now appear to their Lordships that, in the framing of them, the Court miscarried by imposing any species of proof upon the Defendant from which the law exempted him.

If the new assessment was not legally imposed on the Plaintiff, his liability under the old assessment remained, and his title to recover in this suit was established.

The Court of Salem decided in favour of the Plaintiff on the point of jurisdiction, and on the issues it found in favour of the Defendant.

On appeal to the Civil Court of Chittoor, to which the appeal was referred by the Order of the High Court, the decision appealed from was affirmed.

The Plaintiff then preferred a special appeal to the High Court, and that Court reversed the decision of the Civil Court at Chittoor on the third issue, on the other issues agreeing with the judgments below. The objection as to the jurisdiction was not enumerated amongst the grounds of appeal, and was not renewed before the High Court.

[109] The objection to the jurisdiction of the Court was, however, renewed before their Lordships on the hearing of this appeal. As the proceedings before their Lordships disclose the grounds on which this objection rests, and as, if valid, it would apply to the whole litigation from its inception to its close, rendering all the proceedings null and void *ab initio*, their Lordships think it right to say that, in their judgment, the decision of this point in the Court of First Instance was entirely correct; and that the Regulation, which must be construed strictly, applies only to suits brought to try the validity of grants emanating from, or confirmed, or affected by, the direct act and order of the Governor in Council, and that no proof exists in the cause to bring this Enam claim within the provisions of the Regulation IV. of 1831.

The Judgment appealed from was besides impeached for error before their Lordships, on these grounds: that the High Court had treated the acts of the Government as founded on Mad. Reg. XXVII. of 1802; that they had considered the case as one of resumption, and not as one of forfeiture; and had not given due effect to the Hookoomnamah, as evidencing the right under which the Collector had acted.

There is some difficulty in their Lordships' minds in supposing that the High Court would have dwelt so much on the Regulation in question, had it not been in some manner relied on for the then Respondent. It must be remembered that the third issue imposed on the Defendant the necessity of showing under what law or Regulation he had acted in varying and augmenting the old assessment on the [110] Plaintiff's shares; and the Court was entitled to receive distinct information on that point. Had the power exercised in this instance been an acknowledged power of the Government, acted on and submitted to in that part of the Country, the Collector could, in the opinion of their Lordships, have had no difficulty in proving its continued exercise. Had it grown up as a custom of the Country, though without any written law to sanction it, the terms of the issue were wide enough to admit proof of such custom as legalizing the acts complained of. The High Court, however, states in its judgment, that no such proof was produced, and none has been presented to their Lordships beyond the Hookoomnamah on which Mr Forsyth mainly relied.

Their Lordships are anxious to guard themselves from being understood as questioning, or in any way drawing into doubt, any practice which that instrument may indicate as to Enamdars. Such an instrument being only a direction from a Government Board or Officer to others engaged in the Revenue Department cannot indeed create of itself any new law, or impose any new obligation on existing tenures from which they were antecedently free; but it may indicate in many cases subsequent to it the terms of engagements, and be proof of conditions of tenure in such cases.

As to Enams of an admitted precarious tenure, it might serve as notice of an intention to resume them on failure of the obligation of the Enamdars to pay their actual assessment. This case, however, must be determined on the facts alleged and proved. The Plaintiff alleges his tenure to be ancient,—antecedent, indeed, to the assumption of the Country [111] by the East India Company; he admits, indeed, that the lands held by him were re-assessed by Mr. Macleod, but he states that assessment to be permanent, and that he held a permanent tenure under a Pottah from Mr. Macleod. This case is inconsistent with an assessment variable at the will of the Government. The Defendant nowhere denies in his pleadings the permanency of the tenure in this sense, nor pleads that the Enam was in its nature revocable at pleasure, or that the assessment

could be raised at the pleasure of the Government: he pleads only that the village, though enjoyed in shares, was held jointly and not in severalty, and so the Plaintiff's share was liable for defaults of other shareholders.

Mr. Forsyth argued, correctly, that this increase of assessment was not properly a resumption proceeding. But in this particular case the Government claims a right to increase the assessment on one who holds under an ancient and permanent tenure (for that averment is not denied), by reason of a default not arising from himself or any person holding his share. This is not a common incident of tenure, and is not involved in the right to hold the whole lands as hypothecated for the whole rent, though shares are held in severalty and subject to several assessments: it, therefore, lies on the Defendant to prove by what authority this increase in the amount of the rent has been made. The ordinary remedies for revenue in arrear fall short of such a power: the non-payment of revenue may arise from causes implying only the misfortune of the holder, and in reason and justice, in the absence of contract or consent, a forfeiture should not be implied from a mere default of that nature, still less should the terms of an instrument [112] alleged to evidence a right to declare a forfeiture be constructively enlarged. Now, if the terms of the Hookoomnamah be referred to, they do not necessarily include such a case as the present. They are capable of being read as extending only to the forfeiture of the shares of the actual defaulters; in express terms the case of a co-sharer under a separate assessment, and not in default, is not included in it, and its language would not lead one in such a case to consider it as meant to subject him to its operation. Furthermore, the Court rightly observes that, by reason of its posteriority in time to the tenure of the Plaintiff, that tenure cannot become subject to its operation; and their Lordships concur in the opinion expressed by the High Court on this point. Their Lordships think, that a power of such an exceptional and anomalous kind as that which has been brought into operation, and insisted on in this case, ought to be shown to have a certain and legal origin, and cannot, in the absence of any Statute, or Regulation—none such appears to exist—be presumed or established by a Court upon anything short of clear evidence of its continued exercise and prevalence. There has been no evidence amounting to proof of anything of the kind.

For these reasons their Lordships will humbly recommend to Her Majesty that the appeal be dismissed.

[113] RAJAH SURANENI VENKATA GOPALA NARASIMHA ROW, BAHADOOR.—*Appellant*; RAJAH SURANENI LAKSIMA VENKAMA ROW.—*Respondent* * [July 13, 1869].

On appeal from the High Court of Judicature at Madras.

By the Hindoo Law, an agreement for a partition of joint estate is good without actual division or separate seizen of the divided estate, and such agreement can be enforced [13 Moo. Ind. App. 132].

A Samakha, or agreement was entered into by two Brothers, who constituted a joint Hindoo family for a division of the joint ancestral estate. No actual division took place, or separate seizen by the co-sharers of the estate, but the agreement was partly acted upon, by separate perception of the rents, and the parties also lived separately. Held, that the agreement operated as a division of the joint estate.

The distinction between the Bengal and Benares Schools as to the right of children to claim partition of the family estate in the lifetime of their Father discussed.

The case of *Katama Natchier v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 543) distinguished and commented on [13 Moo. Ind. App. 140].

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

The questions involved in this appeal arose upon a suit instituted in the Civil Court of Guntoor by the Appellant, to recover from the Respondent, the Widow of his deceased Brother, $1\frac{1}{4}$ share of the zemindary of Mailavaram, and the Trusteeship of certain Pagodas at Dwaraka, Tirumala, and Mailavaram, which the Appellant alleged had been wrongfully delivered over by the revenue authorities to the Respondent, in accordance with a Certificate granted by the Civil Court of Masulipatam. The Appellant claimed to [114] have his right recognized to $1\frac{1}{4}$ share of the zemindary, and to the Trusteeship of the Pagodas, alleging that he was undivided at the demise of his Brother, although he admitted that there had been a Samakhya, or agreement, dated the 5th of January, 1855, for a division of the joint estate.

The Respondent, by her answer, alleged that the Appellant had not the right claimed by him, on the ground that he had been adopted into another family; and that there had been a complete division under the Samakhya, between the Appellant and the Respondent's Husband. That the Samakhya had not only been admitted by the Appellant, but was also confirmed by a decree of the Sudder Court. She further pleaded, that the Civil Court had granted a Certificate declaring her to be the heiress of her Husband, Rajah Jaganatha Lakshma, which Certificate had been confirmed by the Sudder Court, and that the Board of Revenue made over to her accordingly the $1\frac{1}{4}$ share of the zemindary, and the Trusteeship of the Pagodas. She also alleged, that her Husband, after the division, had made a Will, bequeathing to her the property the Appellant claimed.

The main issue, settled by the Civil Court, was, whether any division of the joint estate had ever taken place, according to the terms of the Samakhya, between the Appellant and the Respondent's Husband.

This instrument purported to be an agreement between the late Husband of the Respondent and the Appellant, Sons of the late Rajah Suraneni Venkatapati Rayannagaree, Zemindar of Mailavaram, etc., whereby, after reciting that they had disputed with each other about their shares in the House, grounds, [115] right to the zemindary, etc., which they then possessed, and that they had agreed to act for themselves, according to the decision made by Rajah Subhanadri Appa Row Garee, to whom they had referred their disputes regarding the same, and had presented an arzi to T. D. Lushington, Esq., on the 2nd of November, 1853, and that they both came to Rajah Subhanadri Appa Row Garee, and entered, before him, into an agreement, that they might not again dispute about the property. This agreement was in these terms:—"It is stated in the arzi presented to the then Collector of Masulipatam, on the 10th of November, 1849, and in the motion we have presented, on the 23rd of October, 1849, to the Zillah Court of Masulipatam, in suit No. 17 of 1844, that we have already arranged to retain jointly the zemindary right in the Mutha of Mailavaram, and in the village of Narasaiya Gudem, that Jaganatha Lakshma Row the elder, should enjoy one and three-quarter share, inclusive of his jayestablagam (share allotted to one in consideration of his right of primogeniture), and that the younger, Venkata Gopala Narasimha Row, one share. But as it was stipulated that we should divide, according to the aforementioned shares, the amounts remaining, after deducting the expenses of livelihood, servants' wages, etc., which were usually incurred from the surplus amount remaining, after paying the peshkash, as the wages of the servants employed by both of us respectively, and other expenses, were equal and borne out conjointly, as it would not only tend to further disputes if it is allowed to remain jointly, but also to diminish the improving state of the Talook, we have arranged that our joint enjoyment should cease hereafter; that the right of each [116] should be enjoyed separately by him; that the property should be divided between Jaganatha Lakshma Row and Venkata Gopala Narasimha Row, the former to take $1\frac{1}{4}$ share, inclusive of his jayestablagam, and the latter one share; that although the other villages were divided on a consideration of their list, yet the two villages of Mailavaram and Narasayagudem should be divided equally according to the said shares, fixing their boundaries; that each of us should improve his respective portion of property, and enjoy the same with such right as to alienate the same to others by sale, gift, etc., and that each of us should bear his own expenses. Further, we have entered into the arrangement that, although our Father has provided us respectively with dwelling houses, upstairs, etc., suitable to our position, yet Venkata Gopala Nara-

sinha Row, not having a sufficient House to live in, the elder, Jaganatha Lakshma Row executed a document for Rs. 2500 to the former, to enable him to build those Houses, etc., and paid to him a portion of that sum, that the balance is not to be paid to Venkata Gopala Narasimha Row by Jaganatha Lakshma Row; but in lieu of which Jaganatha Lakshma Row should give up to Venkata Gopala Narasimha Row the verandah, together with the empty ground on the south thereof, situate on the south of the southern kotti (room) of the divankhana (hall), in the use of Jaganatha Lakshma Row, and lying within the boundaries of the House and grounds, stated in the motion presented by us, that the House, ground, upstairs, etc., which are situate north of the wall, described in the motion as the partition wall, joining the western wall of the fort, and running, eight yards inside the southern line of the gate, should [117] be occupied by Jaganatha Lakshma Row; that the House, ground, bungalow, and others, situate on the south side, should be held by Venkata Gopala Narasimha Row; that out of the three openings in the partition wall, the middle one should be allowed to be used by Venkata Gopala Narasimha Row, until the 2nd Vaisakha Bahulam of Rakshasa (5th of May, 1855), within which he is to erect a similar devaram, or main gate, that the remaining two openings should be presently shut up, and the shutters of the windows on the south, and the doors in the southern wall on the west of the upstairs, and the doors of the southern gate of the southern room of the Divankhana, be presently nailed up by Jaganatha Lakshma Row, who is to shut them up within one year from this date. That if Venkata Gopala Narasimha Row fails to erect the aforesaid Linhadwaram within the 2nd Vysakha Bahulam (5th of May) aforesaid, Jaganatha Lakshma Row should be at liberty to shut the third opening; and that hereafter each of us should form Houses, etc., according to his wish, enjoying his right separately for generations, without disputing with the other, and with liberty to alienate them by sale, gift, etc. We have arranged that Venkata Gopala Narasimha Row has for ever nothing to do with the Dharmakartaship of the Pagoda of Dwaraka Tirumala, in Chintalapudi Pargana, but Jaganatha Lakshma Row should look after it, and hold it for successive generations, and that the affairs of the Pagodas of Mailavaram village, should be conducted jointly by Jaganatha Lakshma Row, and Venkata Gopala Narasimha Row. Therefore, we shall appoint two Gomastahs respectively, and jointly conduct the affairs, dividing the expenses [118] and profits according to the afore-mentioned shares. With respect to the maintenance of our stepmother, Challayagarn, we have arranged that until our Talook is put into our possession, any one of us with whom she chooses to remain should continue to protect her. That after the Talook is put into our possession, we shall, without failure, continue to pay her, according to our respective shares, Rs. 23 a month for her maintenance, clothes, and other expenses; that the House at Mailavaram, in which she lived, should be left for her occupation, and that after her demise we shall take and divide all her property between us, according to the above-mentioned shares. Our Father during his lifetime gave away the chattels which he possessed to each of us as we required, but they were subsequently used for his funeral rites, etc.; we shall never, therefore, claim from each other the same. In recovering the real and personal property of our Uncle's Wife, Venkataramaiya, we both shall lay out for costs according to our shares as afore-mentioned, and institute a regular suit. If we succeed in getting the property, we shall divide the same among us, according to the above-mentioned shares. As we have thus made a settlement about our affairs in the presence of Rajah Subanadri Appa Row, and as we have of our free will agreed to conduct ourselves properly, without quarrelling with each other, and to enjoy ourselves according to the above-mentioned shares, the attached estate, consisting of the Mutta of Kaikalar, Bhujubalapattanam Zummidi, China Panduka, and Velavadam, as well as the Pergunnah of Cheautlapudi, if the Government is pleased to restore the same to us on new terms we shall act up to those terms. Further, we have arranged, that if [119] either of us, or our heirs, raise objection to any of the said terms, such shall not be admitted by the authorities, and that such of us shall continue to enjoy our respective rights for successive generations, with liberty to alienate the same by sale, gift, or otherwise. We have executed this Samakya with our free will. Furthermore, we are bound to pay off the debt due to

Rajah Subhanadri Appa Row, Bahadoor, on the mortgage of Mailavaram Mutta, according to our above-mentioned shares."

Afterwards, on the 28th of July, 1859, Rajah Jaganatha Lakshma Row made his Will, the material part of which was in the following terms:—

"As the heirship rest in my Wife, according to Hindoo Law, my funeral rites, as well as the affairs to be conducted afterwards, should be performed through my Wife. Having already divided into two shares the whole estate of Mailavaram Paragana, etc., and represented the same to the authorities, I and my younger Brother, Venkata Gopala Narishma Rao, have been living separate: consequently, my younger Brother has no occasion to interfere with my estate. As the Paragana of Mailavaram is placed under Zuft for the settlement of debt contracted by my Father with Rajah Subhanadri Appa Rao, Bahadoor, $1\frac{1}{4}$ share should go to my Wife, and 1 share to my younger Brother, after the discharge of the debt, according to the document passed between him and myself. My Wife should, as by Manul, celebrate the festivals performed by me for the Deity at Mailavaram, and hold the wardenship of the Pagoda at Dwaraka Tarumala. Thus the affairs should be managed."

There was conflicting evidence as to whether the [120] estate had been divided, but it appeared that, notwithstanding the Samakhya, or agreement, there had been only a partial division, for although the Brothers, after the agreement, lived separately, yet, as the landed estate was mortgaged by their Father, and the Mortgagee was in possession, no division by metes and bounds of the real estate had taken place. The Plaintiff examined witnesses to prove that he never had been adopted by Rajah Venkata Ragava Rao, or any other person, that there never was a division of the zemindary of Mailavaram Mutta, or other property derived from their Father; and that it was customary among families of rank in that part of India to take their meals separately, and live separately, to some extent, without actually affecting a division, and that the obsequies of their Father, Rajah Suraneni Venhatapati Rao, were performed by his two Sons.

On the 22nd of December, 1864, the suit came on for hearing before Messrs. Elliot and Hodgson, the Civil Judges of the Court of Gunttoor, by whom the following judgment was pronounced:—

"First—the Plaintiff brings this suit to have his right established to the whole estate of the Mailavaram Mutta, and to the Trusteeship of the Pagoda of Dwaraka Tirupati and Mailavaram. The Plaintiff states, that the Defendant's late Husband, Jaganatha Lakshma Row, and himself are the Sons of the late Rajah Suraneni Venhatapati Rao, who left a Will dated March, 1845, to the effect that his estate was not to be divided, but to be enjoyed equally by his two Sons, and that this deed was produced before the Collector of the District with their perfect consent. That after their Father's death, they, during 1849, entered into an agreement to divide the surplus funds [121] of the Mutta into two unequal portions, and, in 1855, they agreed that the estate itself should be divided between them in similarly unequal shares, but the Defendant's Husband died in 1859, before such division had taken place. The Defendant states that, as the Plaintiff was adopted on the 28th of August, 1831, by Rajah Venkata Ragava Rao, he is not entitled to any share in his natural Father's estates, but that her late Husband, through sheer generosity, agreed, by a Samakhya, dated the 6th of January, 1855, to give his younger Brother, the Plaintiff, a share of his Father's property, retaining for himself $1\frac{1}{4}$ share; the property, too, in their possession was divided, and the Plaintiff cannot claim anything beyond that one share. The Court, after discussing the question of the adoption of the Plaintiff into another family, arrives at the conclusion, that the contemplated adoption of the Plaintiff by Rajah Venkata Ragava Rao never actually took place. The next issue is, whether the family is divided or not. It appears from the Plaintiff's documents, that, at the desire of their Father, the Plaintiff and Defendant's late Husband agreed to enjoy the zemindary estate jointly and equally, without thinking of division; but, after the death of their Father, they mutually consented to divide the profits of the estate, seven shares being allotted to the Defendant's late Husband on the score of primogeniture, and four shares to the Plaintiff; but to continue in the enjoyment of their dwelling-houses, as allotted by their Father. That the parties eventually entered into a

new agreement, dated the 5th of January, 1855, to the effect, that the estate should be divided, five shares going to the Defendant's late Husband, and four [122] shares to the Plaintiff. The Defendant asserts that such division actually took place prior to her Husband's death, which occurred in 1859. But she admits that the landed estate of Mailavaram Mutta and Narasayagudem, referred to in that agreement, were not divided, but only certain dwelling-houses, etc." The judgment then proceeded to comment on the evidence given by the Defendant, and stated that, under all the circumstances of the case, the Court was of opinion that no actual division of any property had taken place, but that the litigant parties had occupied different portions of the dwelling-houses, a custom common in families of Zemindars, but not amounting to any proof of the family being truly divided (referring to pars. 282, 283, 284 of Strange's "Manual of Hindoo Law"); and decided that, for the foregoing reasons, the Plaintiff's right to the entire estate of the Mailavaram Mutta, and the Trusteeship of the pagodas in question, was to be recognized, and the Defendant was ordered to pay all costs of suit.

The Defendant appealed to the High Court at Madras, against this decree, on the grounds: first, that the decision of the Civil Court was against the weight of evidence; second, that, on a full appreciation of the evidence, the Defendant was entitled to a decree; third, that the evidence established the adoption of the Plaintiff into another family; fourth that, if he was so adopted, he was not entitled to any portion of the estate; fifth, that the Defendant, as heir to her Husband, had been, and was, under any circumstances, entitled to the benefit of the Will of her Husband's Father; sixth, that such Will was valid in Hindoo Law; seventh, that such disposition of the profits of the estate had been long recognized and acquiesced in by [123] both the Defendant's Husband and his Brother, the Plaintiff; eighth, that the Defendant was also entitled to the benefit of the agreement of the year 1849; ninth, that the Defendant was, in equity, entitled to a specific performance of the agreement of 1855.

On the 25th of January, 1866, the appeal came on for hearing before Mr. Justice Freeman and Mr. Justice Holloway, when the Court delivered the following judgment:— "This was a suit to recover, by the Plaintiff, Brother of Jaganatha Lakshma Row, from his Widow, the Defendant, 1½ share of the Mailavaram Mutta, which he alleged to have been wrongfully delivered by the Revenue Authorities to the Defendant, in accordance with a Certificate granted by the Civil Court of Masulipatam. The Plaintiff alleged that he was undivided, although there was an agreement for a division. The Defendant answered that the Plaintiff was adopted into another family; but it was admitted in appeal that the judgment of the Chief Judge negating this statement, could not be successfully assailed. She further pleaded, that there was a complete division under the agreement of 1855, and that her Husband, after division, made a Will bequeathing to her what the Plaintiff now claims. The Civil Judge found separate residence, but that there was no actual division of the estate; and, on the authority of pars. 282, 283, and 284 of Mr. Justice Strange's "Manual of Hindoo Law," decided that the family was undivided, and decreed for the Plaintiff. The import of those passages is, that nothing short of actual seisin of the divided property will constitute division, and that an agreement to divide is altogether inoperative. It appears clearly, that at the period of execution of the agreement in question, [124] the estate was not in possession of the Plaintiff and his deceased Brother, but was actually under attachment, and it further appears from evidence adduced in the suit for a Certificate between the same parties, that the property had been mortgaged, and was in possession of the Mortgagee. The result of the doctrine would, therefore, be, that no partition was at that time possible, how beneficial soever to the parties. In *Rewan Persad v. Mussamat Radha Beeby* (4 Moore's Ind. App. Cases, 137), a case from a Province governed by the Bengal rule of law, the Judicial Committee, confirming a decision of the Sudder Court of Agra, held the Widow of a deceased divided Brother entitled to take a share of an estate to which he and his Brother, the resisting Defendant, were entitled in remainder, although the Husband had died in the lifetime of the tenant for life. This, therefore, is a distinct decision, that partition may be effected without physical possession of the property parted. This was a share still to be ascertained precisely, as is that in the present case: it was a vested interest in an undivided half-

share which the Court decreed. Several passages of the judgment also strongly conflict with the supposed principle that has been applied in the present case. If the judgment is supposed to go upon the distinction that delivery in this case was not possible, that principle is equally applicable to the present case. If weight, too, as in some decisions of the late Sudder Court, was given to the fact that there had been partial division, that circumstance is also to be found in the present case, for the Judge has found separate residence, and as the Deed for division shows, that separate residence was procured by a division of a portion, at all events, of the [125] real property. Feeling a strong impression, after carefully searching all the authorities within our reach, that there exists in the Hindoo Law applicable to this part of India, no authority that the most solemn agreement to divide property is absolutely ineffective, if there has not been an absolute physical apportionment to each Claimant of his respective share, we requested the Vakeel for the Respondent to furnish us with any such authority, if he could find one. He has finally produced two passages, which we will consider after dealing with the authorities contained in the decisions and Text Books. We must observe, that the decisions of the Sudder Court are based entirely upon the opinions of the Pundits, and the value of those opinions is now too well known to need further discussion. In Bengal it seems to have been the opinion of the Court, that a division as to food and business was sufficient to entitle a Widow to succeed to her Husband's share, although the real property had not been divided (Mitaeshara, ch. II., sec. i.). A case in the Supreme Court (p. 480) seems to have decided that a decree for partition, not actually executed, did not render the property divided. We will advert to the case of *Bhonaunghurn Bunhoojea v. The Heirs of Ramkaunt Bunhoojea* (2 Sud. Dew. Ad. Rep., p. 202), from which, as far as we can trace it, the whole of this doctrine as to the necessity of absolute delivery of shares to render a family divided, has been derived. The case really decided, that an unequal partition not carried into effect was invalid, and that the heirs were entitled to their shares under Hindoo Law. Sir F. Macnaghten, in his work on Hindu Law, p. 283, examines the case with reference to the power of a Father [126] to dispose unequally of his property. The decision is very carefully considered by that great Sanscrit Scholar, Professor Wilson, who shows (Works, Vol. V., p. 76) that the deed was invalid, as being a disposition of the ancestral estate altogether beyond the power of the Father; and at p. 88 of the same volume he examines the discordant opinions of the Pundits as to the necessity of actual possession. The whole argument of the learned Author ought to be quoted:—The deed was invalid on other grounds, as we have had occasion to observe; but the two Pundits, Chaturbhuj and Subha Sastri, two of the ablest Pundits we have encountered, disagreed with regard to the effects of actual possession. The former stated that the Hissanamah could not be available without possession, and Subha Sastri urged much more rationally, that the gift was valid though possession was not taken, as that being obstructed by the suit instituted by the Plaintiff, argued no neglect nor relinquishment of right on the part of the Defendants.' We have no doubt of the correctness of his conclusion according to Hindoo Law. Possession is, in Hindoo Law, as well as in English, a very substantial title, no doubt, but Chaturbhuj himself admits that, to become a valid one, it must be in sight of the adverse party, and without molestation on his part, and that even possession for three generations is not sufficient, if not in sight of the adverse party, and with his acquiescence. Upon his own showing, therefore, mere possession does not constitute right. One would think the converse of this must naturally follow, and that the absence of possession could not invalidate what its presence could not bestow. No, this would not have answered his object, and, there-[127]-fore, he proceeds, 'a title-deed unaccompanied by possession must be disallowed as evidence of right.' Where did he find this to be the law? In Macnaghten's translation from the Mitaeshara we find, 'Loss accrues to him who for twenty years observes his land enjoyed by another without interfering, and in the case of moveable property, for ten years.' In such a case it would be reasonable, certainly, to infer relinquishment of right or defect of title; but this is very different from the delay of possession arising out of a disputed claim. Even in such case, however, it would appear, that if right could be ultimately established, it might be claimed; for no length of enjoyment, without title, can constitute property, as 'He who enjoys without right, even for many

hundred years, the ruler of the earth should inflict on that sinner the punishment of a Thief.' At the same time it may be admitted, as in the *Mitaeshara* it is argued, that there may be some difficulty in reconciling these texts, and although in the latter case a right is not created, yet it is forfeited by long protracted neglect unless adequate cause can be shown: as, supposing the parties to be Minors, or incapable of acting for themselves, or to have been absent from the Country, then the property is open to recovery, otherwise a certain period, that of three uninterrupted descents, for example, is sufficient to confirm the right of a fourth, although he has no better title to produce. This applies to fixed property: in the case of moveables the term will be limited by their nature, the difficulty of their recovery, and their liability to decay. The main arguments in favour of the necessity of possession are the following:—What is obtained by partition, purchase, or inheritance, or what is re-[128]-ceived from a King, is secured by possession and lost by neglect. *Vrihaspati*.

'Ownership lost by neglect is not resumable at will.' *Dayatattwa*.—'Possession without a deed, and not a deed without possession, but proof is firmly established by the union of both.' *Brahma Sanhita*.—'A title to land may be established by possession alone, or by an incontrovertible deed, if it is established by the concurrence of both, not otherwise.' *Vrihaspati Sanhita*.—'All this, however, only proves that wilful neglect may forfeit right, and that title-deeds and actual possession confirm each other.' The strongest text, however, is that of *Narada*.—'Though there be a writing, though there be living witnesses, yet, in the matter of immoveables especially, such as is not possessed is not confirmed.' *Not Sthira*—stable, firm. The purport of this law turns very much on the meaning of the word '*Sthira*,' and in its most obvious acceptation it does not mean that the right is lost, but that it is less secure, writings and witnessess being proofs of an inferior description to possession. That the latter does not convey right the same authority positively declares. *Narada* has said, 'possession with a clear title affords evidence, but possession constitutes no evidence if unaccompanied by a clear title;' this must be understood, it is true, of the first acquired of property, but it leaves no doubt of the real intentions of the law-giver. Again, we have a text from *Yajnavalkya* * * * 'A deed is not strong where there is not a little possession.' But what does this imply? The title requires one of its conditions to be rendered indisputable. This being wanting, it is so far weak. *Mr. Macnaghten* translates this:—'Where there is not the least posses-[129]-sion there a title is not sufficient;' but this might be understood to signify what the law does not propose, the text being literally as we have given it, and being explained by the Commentator that 'the strength in the deed is not entire.' The same, indeed, with its context, explains clearly its purport. The Author states that deeds, witnesses, and possession are three kinds of proof; that deeds are of more weight than possession, except where possession has been hereditary; and that deeds are weak where there is no possession whatever. That is, the Commentator observes, of three persons the first may plead the deed of gift, and the last may urge possession: the second may plead the gift and the 'little' possession the family has had of it. The term 'little' here, although literal, is, therefore, to be understood in the sense of 'limited,' and as applied to individuals or to time, not to a portion of the thing possessed. The *Vyuvuharu Mnyookhu*, however, argues upon the literal sense, and concludes that, 'as the law declares the occupation of a part of a field, etc., granted by a Royal Edict, to be the virtual occupation of the whole, so the possession of no part is the relinquishment of the whole,' founding this on one of the above-cited texts, that the neglect of fixed property is its relinquishment. This conclusion, however, implies voluntary indifference or abandonment, and does not regard the delay of possession occasioned by adequate cause. It is, therefore, in our estimation, quite clear that the Hindoo Law and common sense go hand-in-hand. A man may forego his rights if he pleases, and any capricious abandonment of them for an unreasonable time is to be punished by their forfeiture; but he is not to be deprived of what is [130] really his because legal proceedings, interested opposition, accident, distance, or disease, debarring from taking possession of it when it first becomes his due. This seems to us precisely the doctrine derivable from the text writers, and the commentary of the learned Author is peculiarly valuable, because it deals with the very passage which the *Vakeel* has adduced from *Yajnyawalkya*, and the passage from the *Viromitrodaya* is only a commentary upon this. *Subodhini*, leaf 40.

Citation of *Mitaeshara*.—What is verbal is the utterance of (the words) 'this is mine,' etc. Commentary thereon.—The meaning is this: verbal acceptance is the definite understanding indicated by the utterance of (the words) 'this is mine.' Citation of *Mitaeshara*.—'Here a rule is provided by *Smṛiti*.' Commentary thereon.—'Here' means on the subject of corporeal acceptance.' Citation of *Mitaeshara*.—'Let (him) address the animate beings (that are capable of speech) and let (him) touch,' etc. Commentary thereon.—The meaning of this is, that if the object to be received be a *Prāṇi* (that is) a being capable of motion and speech, then let the receiver say to the object to be received, 'thou, now here, art mine,' and let him (that is, the object so received), say that 'I am thine.' If the object so received be an *Aprāṇi*, that is, Cattle, etc., which are incapable of speech, or a Maiden among even the animate beings, the Receiver should touch these both.' Citation of *Mitaeshara*.—'Than a derivation accompanied by it,' etc. Commentary thereon.—Means, 'than a derivation accompanied by corporeal acceptance.' *Vṛonitrodaya*, leaf 65.—'It has been said by *Yājñavalkya* and others, that derivation by gift, etc., cannot create a complete title [131] where any kind of enjoyment does not exist. There is no strength in derivation itself where there is not the least enjoyment. Strength means completeness.' *Nārada*.—'Even where writing exists and witnesses are alive, what has (not) been enjoyed, is not firm, chiefly in the case of immoveable property.' Query.—'As gift, sale, etc., are of themselves capable of creating a title independently of enjoyment, why, then, the least enjoyment is necessary?' Explanation given to this by *Vijñāneswara*.—'The creation of right in another by gift, etc., is necessarily affected by the act of acceptance by that other. Acceptance is of three kinds: mental, verbal, and corporeal. What is mental is the conviction that it is mine; what is verbal is the utterance of (the words) "this is mine;" and what is corporeal is of various kinds, such as taking, touching, etc. Here, as there can be no title without mental acceptance, the same is only indispensable. That verbal and corporeal acceptance are also necessary, is concluded from there being a provision of particular kinds of expression and particular acts, such as showing the feet, etc., for particular gifts. Here, in the case of gold, cloth, etc., as the receivers taking, etc., occur immediately after the pouring of water by the giver, all the three kinds of acts are accomplished. In the case of land, etc., corporeal acceptance being impossible, except by enjoyment of produce, there must at least be a little enjoyment, otherwise the gift, purchase, etc., are not complete from the want of subsequent (corporeal) acceptance.' These passages relate to gifts, that is, the divesting of one's own right and vesting another with that right. It might well be, that a gift might be held invalid [132] because unaccompanied by delivery, but that a contract, based upon a perfectly good consideration, would be valid and enforceable. As to partition in Bengal and the Provinces governed by the *Mitaeshara*, there is an important distinction, based upon the difference of the theory as to the origin of property. According to the former school, it arises at partition; according to the school which prevails here, it is by birth. In Bengal, therefore, a partition made by a Father in his lifetime, he being not compellable to divide, would be an act of gratuitous liberality, and an enriching of the Sons by pre-dating the period at which their shares would vest in possession, and the transaction would, therefore, assume all the properties of a gift, and many systems of positive law require delivery to effectuate a gift. In the Benares school, however, the right of demanding a partition, even in the lifetime of a Father, is fully established, and a yielding of that which the law would enforce can in no way be regarded as an act of gratuitous liberality. He cannot be said to give who yields that which the law will compel him to yield. The passages adduced apply to gifts only, and the definition given of gift by this Hindoo authority is the renunciation of one's own right and the creation of right in another; and for the perfecting of a right to real property obtained by gift, possession is necessary. The true explanation of the passage is, however, undoubtedly that given by Professor Wilson, that the Author is dealing with the evidence of the transaction. It would scarcely be intended that a Cow given by the head and not by the tail would be ineffectually given. There can exist no doubt that there may be a division by mere agreement where no property exists. This is distinctly [133] declared by the authorities. It is clear also that the document, if there is one, is only one mode of evidencing the agreement already made. In section

III. of ch. II. secs. 1, 2, of the *Mitaeshara*, having explained partition of heritage, the Author next propounds the evidence by which it may be proved a case of doubt. 'When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by written proof, or by separate possession of house or field . . . If partition be denied or disputed, the fact may be known and certainly be obtained by the testimony of kinsmen, relatives of the Father or of the Mother, such as maternal Uncles, and the rest, being competent witnesses as before described; or by the evidence of a writing, or record of the partition. It may also be ascertained by separate or unmixed House and field.' In this passage the Author is discussing the modes of proof of a partition. It is to be proved by oral or written evidence, or by separate enjoyment of a house or field. In the *Daya-Bhaga* too (ch. XIV. sec. 6), there is the same doctrine, and all the passages in *Colebrooke's Digest* have the same import. It seems clear, therefore, that the Hindoo lawyers make the question of divided or not, one strictly to be determined by the evidence. On the evidence in this case (namely, the Agreement of 1855, *ante*, p. 114), it is clear that the parties, to avoid further dispute, determined that for the future they would act as men with separate interests: they agreed to compromise various questions outstanding between them, and being determined by the prior mental determination by the accordance of their Wills, which alone was required, they proceeded to record that determination and contract with one [134] another, a process which, according to the Hindoo Law, would have been impossible, as to their undivided property, until partition. Such a contracting is stated by all the authorities as in itself strong evidence of division. The effect of that division was to render the Wife, for her life, at all events, her Husband's heir, and, being his heir, she became entitled to sue upon his contracts. Whether, therefore, the property was actually undivided, or not, is really a matter of no practical consequence, for there can be no doubt that the Husband could have enforced the contract, and there exists no reason whatever why his Wife should not. There appears to have existed in the minds of the parties very considerable doubt whether the zemindary was partible, and, in his pleadings, the Plaintiff sets up that contention. If it was not partible, and the Brothers were, as the Plaintiff contends, undivided, at the Brother's death, the Widow would, according to the decision of the Privy Council in the case of *Katama Natchier v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 543), be entitled to the whole estate, so that, whether the Plaintiff's own view, or that which we take here, is correct, the Plaintiff is not entitled to succeed in this action. Our conclusions, therefore, are, that the agreement partially acted upon and not denied is conclusive evidence, as it is a full and specific record of the division previously come to by mutual consent; that, whether the property was actually divided or undivided property, the family was divided, the Brothers became capable of contracting, and did contract, and that the right to sue upon the contract clearly survived to the Defendant, who must have recovered: that she has, there-[135]-fore, a perfectly valid defence to this action. The decree of the Lower Court must, therefore, be reversed, and the original suit dismissed with costs."

The present appeal was from the decree founded on this judgment.

Mr. W. Latham, for the Appellant.—No actual separation of the Brothers, who constituted a joint Hindoo family, or of any part of the joint property, was ever effected. By Hindoo Law there are three kinds of divisions—first, division by metes and bounds; second, of rights to property, including apparently some kind of dominion or *jus in rem*; and, third, of *status*, or right of action to assert the right to property *jus ad rem* or *in personam*. Here there has certainly been no division by metes and bounds, on the contrary, the Brothers seem to have changed their intention to divide, and continued to live together. Without actual division, the *Samatkhya* of the 5th of January, 1855, was, notwithstanding the judgment of the High Court to the contrary, absolutely inoperative, and cannot now be specifically performed, especially as the circumstances under which it was framed have been entirely altered by the death of Jaganatha Lakshma Rao. The English cases as to partnership and part performance apply. In *Const v. Harris* (1 Tur. and Russ., 523, 4) it was decided, that Partners may be held by their conduct to have changed the terms of a written agreement into which they have entered for carrying on the concern: and parties claiming under a Partner who has assented to substituted terms cannot

revert back to the original terms: *Buckmaster v. Harrop* (7 Ves., 341). If there was such an agreement for a division it does not operate as a deed of [136] partition: *Gudgen v. Besset* (6 El. and Bl., 986); and as a general rule a Court of Equity will not enforce specific performance: *Scott v. Rayment* (Law Rep. 7 Eq., 112); *Flower v. Marten* (2 Myl. and Cr., 459), especially when there has been laches; *Milward v. Earl Thanet* (5 Ves., 720, n.); *Alley v. Deschamps* (13 Ves., 225); *Spurrier v. Hancock* (4 Ves., 667). The case of *Appovier v. Rama Subba Aiyar* (11 Moore's Ind. App. Cases, 75) is distinguishable as the agreements are different. Without division, the Respondent is not entitled to specific performance of the agreement. The conduct in dealing with the joint estate of the Appellant and Jaganath Lakshma Rao in the long interval between the execution of the Samakhya, in 1855, and the latter's death in 1859, constituted a waiver thereof as the parties receded from such agreement. In fact, if there had been a division, they afterwards lived together, and a reunion of the Brothers, as joint tenants, took place by operation of Hindoo Law, *Daya-Bhaya*, ch. XII. sec. 1; Grady's "Hindu Law of Inheritance," p. 426, therefore, the reunion of the *status* went with the reunion of the estate. The claim of the Respondent was participation in the Dhusmakurtaship of the family Pagodas cannot be allowed. According to the Hindoo Law, Davastanamis are not divisible property. The Court will certainly not enforce an illegal agreement: *Ewing v. Osbaldiston* (2 Myl. and Cr., 53). Moreover, the Respondent is a Gosha female, and consequently cannot personally attend to the affairs of the Davastanamis. The defence urged by the answer, that the Appellant was adopted into another family, I admit, cannot be sustained.

[137] Mr Serjeant O'Brian, and Mr. S. G. Grady, for the Respondent, were not called on.

Their Lordship's judgment was pronounced, as follows, by

The Right Hon. Sir James W. Colvile.—This appeal has been very ably argued by Mr. Latham, who has stated in support of it everything which in their Lordship's opinion could be said: but the facts and the authorities are too strong for him, and their Lordships are unable to see any ground upon which the appeal can be supported.

The proof in this case has, perhaps, been somewhat complicated, and rendered less effective than it otherwise might have been by the introduction of an issue which is now admitted to be out of the case; the issue as to the alleged adoption.

The only question now arguable is, whether at the date of the death of the Respondent's Husband this family was a divided or an undivided Hindoo family, because the course of succession entirely depends upon that fact. The property is admitted to be ancestral, and it is now also admitted that the zemindary which forms part of it is not one of those impartible zemindaries of which there are many in the south of India, but must be treated, as in fact it appears upon some of the earlier documents to have been decided to be, as in its nature partible; therefore, the question is simply, whether at the date I have mentioned, the family was still an undivided family, as it was up to a certain period, or whether it became divided by virtue of the agreement, and which has been the chief subject of the argument before us.

[138] Now, although Mr. Latham has pointed out here and there some minute differences in the wording of the two agreements, their Lordships find it impossible to distinguish the arrangement come to in this case from the arrangement which had been entered into in the case of *Appovier v. Rama Subba Aiyar and others* (11 Moore's Ind. App. Cases, 75), in which this Committee held, that although the agreement for a partition had not been carried out by actual partition, by metes and bounds of the property, it was, nevertheless, binding upon the contracting parties, and operated as a division of the family. Their Lordships observe, that the Judgment delivered by Lord Westbury was, in fact, an affirmance of the judgments of two of the Courts below, and was fully supported by the authorities then before the Court. It is, however, satisfactory to find in the present case, that the High Court of Madras, not adverting to the above case in Moore, which probably had not then come to their knowledge, has in its learned judgment arrived at the same conclusion, and that upon independent grounds, and upon the earlier authorities. The passage which they quote from the Mitaeshara fully supports the proposition involved in the judg-

ment. The passage runs thus: "If partition be denied or disputed, the fact may be known and certainly be obtained by the testimony of kinsmen, relatives of the Father or of the Mother, such as maternal Uncles, and the rest being competent witnesses as before described;" that is one mode of proving partition. It then goes on in the disjunctive, "or by the evidence of a writing or record of the partition," which we have here. And then it says, "It may also be [139] ascertained by separate or unseparated House and field;" that is, if other evidence of partition be wanting, it may be supplied by proof that the Houses and fields had been actually divided and were held separately.

It follows, from what has been said, that in their Lordships' view, this question is really concluded by authority.

It has, however, been argued by Mr. Latham, that even if this agreement amounted to proof of a partition, yet upon the evidence in the cause their Lordships ought to come to the conclusion either that the agreement was waved, or that there had taken place that which might, according to Hindoo Law, have taken place, namely, a reunion of the two Brothers. Their Lordships, however, looking at the issues in the cause, cannot find that those points have ever been raised. Certainly, there is no suggestion of such a thing as a reunion, which would imply that there had been an actual division, and then a coming together by mutual agreement of the two Brothers; and their Lordships are further of opinion, that they must presume, that although there was no division of the zemindary, or of the lands, by metes and bounds, yet that the arrangement proceeded upon the footing of the deed, that the rents were divided according to the stipulations of the deed, and that if the contrary took place, it lay upon the Plaintiff to show that such was the case. It seems to their Lordships that he has entirely failed to do so, and, therefore, they can see no ground whatever for interfering with the judgment of the Court below.

Their Lordships deem it right (although it has really no bearing upon the decision of this appeal) to [140] make a remark upon one passage in the otherwise very learned and able judgment of the Court below. The passage is this, "if it" (that is, the zemindary) "was not partible, and the Brothers were, as the Plaintiff contends, undivided at the Brother's death, the Widow would, according to the decision of the Privy Council in the case of *Katama Natchier v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 529), be entitled to the whole estate; so that, whether the Plaintiff's own view, or that which we take here, is correct, the Plaintiff is not entitled to succeed in this action" (*ante* [13 Moo. Ind. App.], p. 134). Now, that seems to proceed upon a singular misapprehension of the effect of the Shivagunga case. It is immaterial, as I said before, to the decision of this case, because it is admitted that the zemindary was not impartible; but the Shivagunga case was this: the family was shown to be undivided, but the impartible zemindary was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute. The ruling of this Court was, that in that case the zemindary should follow the course of succession as to separate property, although the family was undivided; but if that zemindary had been shown to have been an ancestral zemindary, as in the case, the judgment of the Board would no doubt have been the other way.

Their Lordships think it necessary to make this observation, in order to avoid future misconception as to what was decided here in the Shivagunga case.

They must humbly recommend Her Majesty to dismiss this appeal, with costs.

[141] INDERUN VALUNGYPOLLY TAVER.—*Appellant*: RAMASAWMY PANDIA TALAVAR and THUNGAMMA NACHIAR.—*Respondents** [July 13, 14, 1869].

On appeal from the High Court of Judicature at Madras.

Legitimate children of the Soodra caste, in default of legitimate children, inherit their putative Father's estate [13 Moo. Ind. App. 159].

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colville, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

Such children are entitled to maintenance out of the estate, if there are legitimate heirs [13 Moo. Ind. App. 159].

By Hindoo Law a marriage between Soodras, where the Husband is of a superior caste to that of his Wife, is valid [13 Moo. Ind. App. 158, 159].

Held, that a marriage with the Daughter of a Bastard was good by Hindoo Law.

The question raised by this appeal was, who was the heir of one Iudiran Ramasamy Talaver, the late Zemindar of Talavankottai, the Appellant, his younger Brother, or the first Respondent, the Son of the late Zemindar by his second Wife, who was alleged by the Appellant to have been a Concubine. There was in the Court below a third Claimant, Nanjanattu Villiataven, who assumed the name of Ramasami Inderun Taver, and alleged himself to be the Son of Kulalvoi Moli, the first Wife of the Zemindar, who had been divorced, but he was no party to the appeal.

The facts were these:—

Previous to the year 1832, the zemindary was in the possession of the late Zemindar's Mother. She had two Sons: the Zemindar and the Appellant. The Zemindar, at a very early age, married Kulalvoi Moli. She lived a short time with the Zemindar, [142] who, about the year 1846, divorced her for misconduct.

Kulalvoi married again, by which marriage she had a Son, Nunjanattu Veliataven. She died about two or three years afterwards. It appeared from the evidence that the Son of Kulalvoi was never recognized by the Zemindar.

A short time before the divorce of Kulalvoi, and whilst his first Wife was living, the Zemindar married the second Respondent, the Daughter of Komarasami Talaivar of Kodumbur, an inferior caste to him. By that marriage the Zemindar had issue two children, a Son, the first Respondent, and a Daughter.

It was in evidence, that on the 3rd of January, 1857, after the divorce of the first Wife, the late Zemindar addressed an arzi to the Collector, in which he styled his second Wife, his "Royal Wife," or *patta sri*, and referred to a Son and Daughter by her, asking for protection to his Wife and children, and on the 1st of June, 1858, the Zemindar, on recovering from a fit of paralysis, addressed another arzi to the Collector, referring to a report that a male child had been borne to him by his first Wife, whom he had divorced, and disowning such child, and asking for protection to his children and younger Brother. Accordingly, the Tahsildar of the Talook was directed by the Collector to investigate into this arzi, and report on the order of the progeny and Wives of the Zemindar.

On the 3rd of July, 1858, the Zemindar addressed another arzi to the Collector of Tinnevely, Mr. De Maine, in which he referred to his former arzi of the 1st of June, 1858, and he again repudiated his first Wife, and disowned her child, and stated that he had [143] kept the second Respondent, who was not of his caste, and got two children by her, and recognized his Brother, the Appellant, as his successor.

On the 7th of July, 1858, four days afterwards, the Zemindar died.

Inquiries were made by the Collector, and the result arrived at was, that the second Respondent was married, in fact, to the Zemindar; but that the marriage was doubtful in consequence of her inferior caste; that the arzi of the Zemindar of the 3rd July, 1858, was a valid document, and that Appellant ought to succeed to the zemindary, and accordingly, on the 17th of December, 1858, the Board of Revenue put the Appellant in possession of the zemindary. This gave rise to the present suit.

The Respondents, by their plaint, stated, that the late Zemindar, the Father of the first Plaintiff, and Husband of the second Plaintiff, had, on the death of his Mother, and, according to the rule of primogeniture, succeeded to the zemindary of Talavankottai; that, under the arzi of the Zemindar, the first Plaintiff was entitled to the zemindary and other property; that the Defendant had, during the insensibility of the zemindar, addressed an ante-dated arzi and yadast, in his name, to the revenue authorities, in contravention of the previous arzis, and recommending the Defendant to be put in possession of the zemindary and other property; that Kulalvoi Moli, the first Wife of the late Zemindar, bore no issue to him, and was repudiated for laxity of conduct; that she married a second Husband, and died, leaving a Son by him, and the Respondents prayed to be put in possession of the zemindary and the property attached thereto.

[144] The Appellant, by his answer stated, that the late Zemindar did not marry

a second time, and that the second Plaintiff was not his Wife, but a Concubine, nor the first Plaintiff his Son; that the Plaintiffs were of an inferior caste; that he, the Defendant, as the younger Brother, succeeded according to the usages of the zemindary and the Hindoo Law; that the arzi and yadast of the 3rd and 4th of July, 1858, were addressed when the Zemindar was in full possession of his faculties.

The Respondents afterwards filed a supplemental plaint against Ramaswami Taver, *alias* Ramaswami Talaivar, the minor Son of Nanjanattu Vellaiva Teven, styling himself the Son of the late Zemindar, and Palavanna Changanimal, his Guardian and maternal-Grandmother, being the Wife of Pandia Talavar.

The Plaintiffs put in evidence an arzi to the Collector, by the Zemindar, dated the 3rd of January, 1857, which was as follows:—"Kulavoy Moli, whom I had married before my succession to the zemindary, had, in defiance of the prescribed observations of my caste, separated from me before giving birth to any issue, and married Vellaiva Teven, of Nanja Nadu. That Tangammal Nachiyar, whom I married after inheriting the zemindary, and made my patta sri (or Royal Wife), might beget issue, vows were made to Tirumalai Sevamaiyar of Tenkosi, and by the grace of that Deity, and by your good wishes, she has borne me a Son and a Daughter. Before this I had, on your order, No. 1, dated the 24th of January, 1856, proceeded to offer up my prayers to the said Swamiyar. To do the same once more now, it is necessary that I should send my Royal Wife and my children. As for their [145] assistance, about thirty persons, both Bearers of Palanquins and Servants, will be sent to accompany them. I request that an order may be issued providing against any obstruction of them on their way."

The second arzi addressed to the Collector by the late Zemindar, was dated the 1st of June, 1858, and was as follows:—

"1. I had been for a long time suffering from paralysis, and now I have slightly recovered. When first I was married to the Daughter of Govindapera Pandya Talaivan, I was exceedingly young, and the Bride was my senior in age, but perceiving her levity of conduct, I repudiated her. Subsequently, in contravention of the prescribed usage of the zemindary, she married Vellaya Tavan, of Nanja Nadu.

"2. I then married Tangammal Nachiyar, the Daughter of Kumaraswami Tadiya Talaivar, of Kadambur, who has borne me a Daughter and Son.

"3. I now learn that, as I am taken ill, it is intended fraudulently to report to the Government, in disparagement of my dignity, that my first Wife, who, on being divorced by me for misconduct had married another, has borne me a male child. I deny that he is my Son; I further disclaim any other relationship to him. As a report of these matters at the time of her repudiation would have derogated from my respectability, I abstained from notifying the same. These matters have also been brought to the notice of the sub-Collector. I, therefore, pray that your benevolence may afford protection to my Children and my younger Brother."

And another arzi to the Collector, D. Mayne, Esq., [146] by the late Zemindar, dated the 3rd of July, 1858, which was in these terms:—

"With reference to the arzis addressed by me to your Honour and to the sub-Collector, in regard to my disease, on the 1st June, an order having been issued to the Tahsildar of the Talook of Sankara Pania Kovil, he came and saw me, showed to me the arzi which had been addressed by me, and asked me about it. I saw my signature in the arzi, and admitted it. I have also reported to the Tahsildar that the Daughter of Pandia Talavan, of Chengottai, had been married to me at my infancy; that she, being guilty of misconduct, married Nanjanadu Vellaiva Taven again, and got children by him; that I brought and kept the Daughter of Kadambur Kumarasami Talavan, and got two Children by her; but that she was of a different caste. Subsequently, I took sufficient medicine for a few days, but, as I feel worse, I have, according to the custom and rules of our caste, empowered my Brother, Indiran Valangaipuli Talavar, who is my successor to the zemindary, and was, from his infancy, managing all the affairs in conjunction with myself, to manage all the affairs of the Zamin Kottayuthogai and ayan (lands), to sign (all instruments), and to pay the kist, etc., without arrears. He is an honest and competent man for it. I, therefore, pray that you will be pleased to issue an order in favour of my younger Brother, Indiran Valangaipuli Talavar, for the Zamin Kattaguthagai, ayan (lands), etc., and protect him."

The Respondents called witnesses to prove that the Zemindar had divorced his first Wife, and had no Children by her, that the Zemindar had married [147] the second Respondent, and that the ceremony had been performed according to the Sastras; that they were of the same caste, but of different branches, that the Zemindar had recognized the first Plaintiff as the Son. The Appellant also examined witnesses to prove that the Zemindar's first Wife was divorced for her loose character, and had no children; that the second alleged Wife was only a Concubine; that the late Zemindar in conversation had stated that he had no lawful Son, but that his Brother, the Appellant, was his successor; that the Zemindar and the second Respondent were of different castes, and that persons of different castes do not intermarry.

The following questions were submitted by the Civil Court to the Pundits of the Sudder Court:—First, does the Hindoo Law prohibit the marriage of a Hindoo with a woman of his own caste, whose Father was illegitimate? and is such marriage valid or invalid, under the Hindoo Law?

Secondly, is the marriage of a Hindoo of the Marava caste with a female of the Pareevara caste legal under the Hindoo Law?

The following answers were given to these questions by the Pundits:—

First, the Hindoo Law not only directs a man to espouse a Wife of the same class with himself, but likewise forbids him to marry a female devoid of caste or race. The child, male or female, begotten by him upon his lawfully wedded Wife of the same class with himself, of course belongs to the class of its parents. The Son of a kept woman, being one not so begotten, cannot claim the class of his Mother or Father; and his Daughter, destitute as she is of caste, cannot be considered by a Hindoo as a [148] "woman of his own caste." The marriage of a Hindoo of caste with such woman seems from the above law to be forbidden, and it is not, therefore, valid.

Second, if the "Marava caste" and the "Pareevara caste" be similar in their manners, the marriage of a Hindoo of Marava caste with a female of the Pareevara caste would be valid, as being in accordance with the Hindoo Law. If they be dissimilar, and if the "Pareevara caste" be inferior to the "Marava caste," such marriage would not be valid under the Hindoo Law. If such marriage be, however, sanctioned by the custom of the said castes, then it would be good under such custom, and the Pundits referred to Vydyanadha Deeshetiym. Menu.—Let the twice-born man espouse "a Wife of the same class with himself, and endued with marks of excellence." Veyasa.—A girl destitute of relations or caste, or born on the day of "Rohinee," that is, when the moon is in the 4th of the lunar monsoons, or devoid of race, must be rejected.

The following further question was afterwards submitted by the Civil Court to the Sudder Court's Pundits:—

"The Pundits of the Sudder Court are requested to state with reference to the reply given by them on the 9th ult. in regard to the legality under the Hindoo Law of a marriage contracted by a Hindoo with a female of his own caste whose Father was illegitimate, whether Hindoos of all castes are bound by the said law, and whether, in particular, it applies to a Hindoo of the 'Marava caste.' The question has been again put because the Pundits are stated in Strange's 'Manual of Hindu Law,' par. 40, to have declared on the 26th of June, 1854, that among the [149] lower classes of Soodras marriage with females who have lived in concubinage is allowed. A copy of the question put to the Pundits on the point above referred to, and the reply given by them is herewith forwarded."

The Pundits answered as follows:—"Our answer, dated the 19th ult., was intended to show that the law therein set forth applies to Hindoos of all classes who are within the pale of caste. The said law, therefore, binds all Hindoos who conform to the Sastras, but not those of inferior caste who depart from them. The said law would likewise bind the Marava caste, only if it be governed by the Sastras in all its acts, but not otherwise. It is for this reason that we have stated in our former answer, that the marriage referred to in the question would be good under the custom of the said caste. The answer of the 26th of June, 1854, referred to in Strange's 'Manual of Hindoo Law,' applied to Soodras of inferior castes who depart from the precepts of the Hindoo Law."

On the 10th of April, 1861, the Civil Judge, Mr. J. H. Goldie, dismissed the plaint with costs, except as to the supplemental Defendants, who were adjudged to pay their own costs.

The reasons of the Civil Court for the judgment were,—First, that the first Wife had been divorced, after which the Zemindar took no notice of her, and that there was no evidence that the first supplemental Defendant was his Son; on the contrary, that the Zemindar by his arzis had disowned him. Second, that a marriage in fact had taken place between the Zemindar and the second Respondent, according to the rites of the Hindoo Law and religion, and that the [150] Zemindar had acknowledged her as his lawful Wife. Third, that the Zemindar and second Respondent were of the same caste. Fourth, that the second Respondent was not a Concubine; and lastly, the Court decided, acting upon the authority of the two opinions of the Pundits of the Sudder Court, that in law there was no valid marriage, on the ground that, as the Father of the second Respondent was illegitimate, she was a person of no caste, and that by Hindoo Law it was not competent to the late Zemindar, who was of a caste governed by the Sastras, to contract a legal marriage with her, and accordingly a decree was given against the right of the first Respondent.

The Respondents appealed from this decree to the High Court at Madras.

The hearing of the appeal took place on the 3rd of August, 1863, before the Chief Justice, Sir R. C. Scotland, and Mr. Justice Holloway, two of the Judges of the High Court of Madras, when that Court reversed the judgment of the Civil Court, and decreed in favour of the Respondents, with costs.

The reasons of the Chief Justice for the judgment were as follows:—First, that a contract of marriage between the Zemindar and the second Respondent had in fact taken place, although the direct evidence was considered to be of a somewhat loose and general character, and open to objection, the Court considering that the direct evidence on behalf of Appellant, that the second Respondent was brought to the Palace openly as a Concubine, was not worthy of credit; that the Zemindar and second Respondent were of the same Marava caste, although of different sects or divisions of it. That the fact of the second Respondent's Father being reputed as illegitimate, [151] did not render it improbable that the Zemindar should make her his Wife. That much weight could not be attached to the absence of evidence of any special rejoicings on the birth of first Respondent. That the statements of the Zemindar in his arzis of 3rd January, 1857, and 1st of June, 1858, were an acknowledgment of the second Respondent being his Wife, although reference was also made therein to the protection of the Appellant; that the arzi of the 3rd of July, 1858, was open to suspicion. That the second Respondent was not taken by the Zemindar to live with him as his Concubine; that the marriage of the second Respondent was not illegal on the ground of caste, as a valid marriage could take place between the Zemindar and a woman of no caste. That, assuming the illegitimacy of her Father, the second Respondent was not thereby disqualified from effecting a valid marriage. That the rule prohibiting marriage between persons of different castes was only directory; and lastly, that the first supplemental Defendant had been proved to be illegitimate, the presumption arising from his birth, and his Mother's marriage with the late Zemindar having been rebutted.

The reasons of Mr. Justice Holloway were, first, that the alleged illegitimacy of the second Respondent's Father was no ground for invalidating the marriage. Secondly, that an illegitimate Son of a Soodra could inherit. Thirdly, that the marriage was not invalid because of the difference of caste, and that the Pundits' opinions were unsatisfactory, and only applied to the Children of the twice-born man, and to the four classes recognized by Menu; and, lastly, that the first supplemental Defendant was not heir, [152] as the conduct of his alleged parents and their treatment of the child rebutted any possible presumption from his birth after the marriage (see case *Pandaiya Telaver v. Puli Telaver*, 1 Mad. High Court Cases, 478).

This was the decree appealed from.

Sir R. Palmer, Q.C., and Mr. Mackeson, Q.C., for the Appellant.—First, there is no satisfactory evidence of the marriage, as a fact, between the late Zemindar and the second Respondent, who was the Daughter of a Bastard. The evidence on that

point is conclusive. In the arzi of the 3rd of July, 1858, the Zemindar treats her as a favourite Concubine. There is no evidence of any ceremony of marriage, though it is so important a contract, nor was such marriage ever intimated to the Collector of the District, as is customary. The other arzis, acknowledging her as his Wife, were made by the Zemindar when under duress, and cannot be relied on: but,

Secondly, assuming such a marriage, if in any form it took place: it is invalid by Hindoo Law. Both parties were of the Marava caste, a division of the Soodras, but the second Respondent was of another branch of the caste, and, on account of the illegitimacy of her Father, could not contract a legal marriage. As a child of an illegitimate Father, the Respondent could not inherit. In no case, except in the instance of a Son of a Soodra's by a female slave, does the Hindoo Law recognize the right of illegitimate children to inherit. The Mitacshara, ch. I. sec. vii., Strange's "Hindu Law," Vol. II. p. 67 [2nd Ed.]; W. H. Macnaghten's "Hindu Law," Vol. I. p. 18. There is very little authority to be found in the Books [153] of the Hindoo Law upon this point, and we, therefore, rely upon the Pundits' exposition of that law (*ante* [13 Moo. Ind. App.], pp. 147, 8), who refer to Menu and Veyasa as authorities, to show that the marriage was illegal. As to the value of the Pundit's opinions, they referred to *Myna Boyee v. Ootaram* (8 Moore's Ind. App. Cases 400); *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (12 Moore's Ind. App. Cases, 439).

Mr. Leith, and Mr. S. G. Grady, for the Respondents.—The High Court arrived at a true conclusion from the evidence, first, that a marriage in fact had been effected, according to the rites and ceremonies of the Hindoo Law, between the late Zemindar and the first Respondent's Mother, whom the Zemindar recognized as his Wife; and, secondly, that the Appellant had failed to establish that illegitimacy, *per se*, among Soodras, is an absolute bar to a legal marriage. It is not alleged, that either the second Respondent or her Father were not of sufficient caste, or that any deprivation by expulsion from caste ever took place. But the Appellant based his case on the allegation of the legal incapacity of the first Respondent, by reason of the want of caste of his Mother, who he untruly alleged was, by Hindoo Law, unable to contract a valid marriage with the Zemindar, also a Soodra by caste. Such assertion, however, is equally without foundation. Among Soodras, all the tribes are in law equal, Strange's "Hindu Law," Vol. II. p. 66 [2nd Ed.]. Soodras may adopt a Son from a gotrum, or family different from their own, *Rungama v. Atchama* (4 Moore's Ind. App. 1). Therefore, even if her Father's illegitimacy had been proved, [154] the same would not, by Hindoo Law, have created any legal incapacity in the Daughter of an illegitimate Father to contract a marriage with a Soodra of the caste the Zemindar was. But we go further than that, and submit, that assuming an actual marriage was not established, or if proved, was invalid in law, yet, as it was admitted that the Respondent was the Son of the late Zemindar, a Soodra, and that the Zemindar died without leaving any legitimate issue, the Respondent would be entitled to succeed to the whole of his Father's estate as such illegitimate Son, in preference to the Appellant, the Brother of the deceased. According to Hindu Law, the illegitimate Son of a Soodra inherits, although illegitimate children of any of the three superior classes cannot, W. H. Macnaghten's "Hindu Law," Vol. I. p. 18; Strange's "Hindu Law," Vol. I. p. 69 [2nd Ed.]; Mitacshara, Ch. I. sec. xii.; Yajnyawalkya, there referred to, and also in 3 Collb. Dig. clxiv. p. 143; *Chuoturya Run Murdun Syn v. Sahub Purhalad Syn* (7 Moore's Ind. App. Cases, 18); Grady, on "Hindu Law of Inheritance," p. 234. Even if there are legitimate heirs, illegitimate children are entitled to maintenance, Strange's "Hindu Law," Vol. I. p. 66, *Muttusawmy Jagavera Yettappa Naicker v. Vencataswara Yettaya* (12 Moore's Ind. App. Cases, 203). The Pundits' opinions are inconclusive, and cannot be treated as of authority. *The Collector of Masulipatam v. Cavalry Vencata Narrainapah* (8 Moore's Ind. App. Cases, 529).

Judgment was pronounced by

The Right Hon. The Lord Justice Giffard.

The question on this appeal is, first, whether there [155] was a marriage in fact; and, secondly, if there was a marriage in fact, then whether there was a marriage in law?

We have the judgment of both the Courts below coming to the conclusion, from the evidence, that there was a marriage in fact; there was evidence before them, on the consideration of which they might fairly come to that conclusion. Unless a finding of that sort where two Courts are unanimous in their opinion—is unsupported by, or contrary to, the evidence, it is not the course of this Board to interfere with that finding.

There were eight witnesses who spoke to the marriage having taken place, then two of the three arzis, and besides the very material fact of the Appellant having admitted before the Tahsildar, or done that which was tantamount to an admission, that such a marriage had taken place.

With reference to the arzis, the two first arzis which have been alluded to are very plain and very explicit. The first of them is in these terms:—"Kulavoy Moli, whom I had married before my succession to the zemindary, had, in defiance of the prescribed observations of my caste, separated from me before giving birth to any issue, and married Vellaiya Tevan, of Nauja Nadu. That Taugammai Nachiyar, whom I married after inheriting the zemindary, and made my patta sri (or Royal Wife), might beget issue, vows were made to Tirumalai Sevamaiyar, of Teukosi, and by the grace of that Deity, and by your good wishes, she has borne me a Son and a Daughter. Before this I had, on your Order, No. 1, dated the 24th January, 1856, proceeded to offer up my prayers to the said Twamiya. To do the same once more, now it is necessary that I should send my [156] royal Wife and my Children. As for their assistance, about thirty persons, both bearers of Palanquins and servants, will be sent to accompany them, I request that an Order may be issued providing against any obstruction of them on their way."

The second arzi is as follows:—"I had been for a long time suffering from paralysis, and now I have slightly recovered. When first I was married to the Daughter of Govindapera Pandya Talaivan, I was exceedingly young, and the Bride was my senior in age, but perceiving her levity of conduct, I repudiated her. Subsequently, in contravention of the prescribed usage of the zemindary, she married Vellaya Tavan, of Nauju Nadu. I then married Taugammai Nacheer, the Daughter of Kumaraswami Tadiya Talaivar, of Kadambar, who has borne me a Daughter and Son. I now learn that as I am taken ill, it is intended fraudulently to report to the Government, in disparagement of my dignity, that my first Wife, who, on being divorced by me for misconduct, had married another, has borne me a male child. I deny that he is my Son; I further disclaim any relationship to him. As a report of these matters at the time of her repudiation would have derogated from my respectability, I abstain[ed] from notifying the same. These matters have also been brought to the notice of the sub-Collector. I, therefore, pray that your benevolence may afford protection to my Children and my younger Brother."

Those arzis are plain and explicit enough, and probably little doubt would have been entertained on the matter, but for the arzi of the 3rd of July, 1858 (*ante* [13 Moo. Ind. App.], p. 146). With reference to that arzi, without saying whether the signature is or is not genuine, [157] but assuming that it is, if we take first of all the date of it, the 3rd of July, 1858, the Zemindar having died on the night of the 7th in a state of paralysis, and then look to its contents, little effect can be given to it. We cannot read the third arzi without seeing that it was obtained with an object, and that it bears internal evidence of not being the voluntary, and scarcely, we should think, the conscious act of the Zemindar. First of all it refers to the preceding arzis in this way:—"With reference to the arzis addressed by me to your Honour and to the sub-Collector, in regard to my disease on the 1st June, an order having been issued to the Tahsildar of the Talook of Saukara Pania Kovil, he came and saw me, showed to me the arzi which had been addressed by me, and asked me about it. I saw my signature in the arzi, and admitted it." And then follow these statements: "I have also reported to the Tahsildar that the Daughter of Pandia Talavan of Chengottai had been married to me at my infancy; that she, being guilty of misconduct, married Nanjanadu Vellaiya Taven again, and got Children by him; that I brought and kept the Daughter of Kadambar Kumarasami Talavan, and got two Children by her, but that she was of a different caste." These last expressions certainly do appear to their Lordships to be put into the mouth of the Zemindar with a view to the case which has since been brought forward, especially

the alleged difference of caste; and, taking the whole together, their Lordships are of opinion, that, as against the two other arzis no effect or weight is due to this arzi, and that there is no sufficient reason for differing from the finding of the two Courts.

[158] Then, if there was a marriage in fact, was there a marriage in law? When once you get to this, viz., that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law. The Zemindar, according to the usages of his Country and nation, on parting with his first Wife, would be naturally desirous of marrying again, and having male issue. It would be a most unlikely thing for a person of his caste to go through the ceremony of marriage, if it was known that that marriage was a marriage which was invalid in law. Then upon what is it urged by the Appellant that the invalidity of the marriage, in law, depends? It depends upon this, and upon nothing else, viz., that all the parties being, as is clear from the evidence, of the Soodra caste, it is said, that because it is shown that the Father of the Mother of the Present Plaintiff and Respondent was illegitimate, therefore, the child of that Father could not contract a valid marriage, and was in substance of no caste at all. The only foundation for this is the opinions of the Pundits; those opinions are not satisfactory; no decision or authority is brought forward supporting any such proposition. The opinions are matter of reasoning; and where they refer to authority, it is to authority which applies to persons of two different but higher castes, not to the Soodra caste at all, and still less to what may be called different classes or divisions of one and the same Soodra caste.

Their Lordships are not aware that there is any authority—there has been none quoted, and it does not appear that there is any authority supporting any such proposition as that which is contended for by the Pundits; and, though their Lordships do not [159] agree in everything that has been stated in the High Court of appeal, they are satisfied that in the Soodra caste illegitimate children may inherit, and have a right to maintenance; and that in this very instance the illegitimate Father of the Mother of the Plaintiff, as well as his Daughter, were treated as members of the family: and on the whole, seeing that these parties are both of the Soodra caste, and that the utmost that has been alleged really is, that the Zemindar was one part of the Soodra caste, and the Lady to whom he was married was of another part, or of a sub-caste, their Lordships hold the marriage to have been valid: to hold the contrary would in fact be introducing a new rule, and a rule which ought not to be countenanced.

For these reasons, their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and dismissed with costs.

[160] ROBERT WATSON AND CO.,—*Appellants*; THE COLLECTOR OF ZILLAH RAJSHAHYE, DOST MAHOMED KHAN CHOWDHRY, RANEE ANUNDOMOYE, and HORACE JOHN ABBOTT,—*Respondents* * [July 14, 15, 1869].

On appeal from the High Court of Judicature at Fort William in Bengal.

Effect of Ben. Reg. VIII. of 1819, sec. 11, in respect of Putnee tenures [13 Moo. Ind. App. 175]. Held, that a sale or transfer of Putnee tenure by a Putneedar is not binding, unless made in strict conformity with the provisions of that Regulation.

A suit brought in the year 1856, to set aside an auction sale of a Putnee Talook for arrears of rent, under Ben Reg. VIII., 1819, was dismissed for want of

* Present:—Members of the Judicial Committee,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the Admiralty Court), the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

evidence on the part of the Plaintiffs, with a reservation by the Court, that the Order made was not to be a bar to the Plaintiff, or any other person who might substantiate their rights, from proceeding to recover. On a fresh suit by the same parties for the same matter, held, that such reservation was of no effect, as under the Civil procedure Code, sec. 2 of Act No. VIII. of 1859, the former suit was a bar, and a plea of *res judicata* allowed [13 Moo. Ind. App. 171].

There is no power in the Courts in India, similar to that exercised by Courts of Equity or Common Law in England, to dismiss a suit with liberty for the Plaintiff to bring a fresh suit for the same matter, or to enter a non-suit. Such power of the Indian Courts is limited to questions of form, as in the case (1) of misjoinder of parties, or of the matters in suit (2) where a material document has been rejected for not having a proper stamp, and (3) if there has been an improper valuation of the subject-matter of the suit; but not to a case where the issue has been joined, and the Plaintiff fails to produce the evidence is bound to give to support the issue [13 Moo. Ind. App. 169, 170].

The suit out of which this appeal arose was brought in the Civil Court of Zillah Rajshahye by Messrs. Watson and Co., Indigo Planters of the Bansbarreah Indigo Factory, to cancel a sale made by auction to the first Respondent, Dost Mahomed, by the former Collector of Zillah Rajshahye, under the provisions of Ben. Reg. VIII. of 1819; and to recover possession of the land then sold, consisting of an eight-annas or half share of the Putnee Talook of Dehee Hattee, in Pergunnah Govindpore, alleged by Messrs. Watson to have been held with, and as appurtenant to, the Bansbarreah Factory and for mesne profits.

The facts were these:—

About the year 1837, two Brothers, Rajah Krishnachunder, Bahadoor, and Koonwar Ranchunder, joint proprietors of the zemindary of which Dehee Hattee belonged, divided the property equally between them; and on the 12th Bysack (11th May, 1837) in that year, Koonwar Ranchunder sold his 8 annas share in Dehee Hattee, to John Compton Abbott, an Indigo Planter.

By this sale Abbott obtained the ordinary Talookdary rights, and in the year 1841, he sold his share in the Putnee Talook to Messrs. French, Hodges and Co., at the price of Rs. 11,465. 12a.

In the year 1849, the Putnee Talook was still standing in the name of Abbott, as principal Talookdar; and on the 16th November in that year, it was sold by auction for arrears of rent, under the provisions of Ben. Reg. VIII. of 1819, and purchased by Dost Mahomed Khan.

The surplus proceeds of the sale were carried to the credit of Messrs. French, Hodges and Co., the under Talookdars, in accordance with the provisions of Ben. Reg. VIII. of 1819; and it appeared that they were assenting parties to the sale, and had not at that time parted with their Putnee rights.

[162] On the 7th of December, 1849, Messrs. Cochrane and Cowie claiming the property in the Talook as vested in them, as Assignees of Messrs. Cockerell and Co., of Calcutta, under certain deeds of conveyance from Abbott and others, presented a petition against the validity of the auction sale, on the ground of certain alleged informalities in the proceedings. This petition was dismissed by the Revenue Commissioner of Moorshedabad on the 23rd January, 1850, in a proceeding, in which he stated, that the auction sale had been made according to Reg. VIII. of 1819, and in pursuance of the Letter, No. 19 of the Sudder Board, dated 17th of February, 1848.

The grounds on which the Appellants claimed to be entitled to the property in the Putnee Talook were these:—

In and before the year 1842, Abbott was the Owner of twenty-two several Indigo Factories, together known by the name of "Bansbarreah Indigo Concern," and joint Owner with one Macdougall, of five other indigo Factories, together known by the name of the "Sulkea Indigo Concern," all of which were afterwards united, and together formed one concern, known as the "Bansbarreah Indigo Concern." Part of

these Factories had previously been mortgaged to one Greenaway, but reconveyed in 1842.

By various Indentures of Lease and Release, executed on the 8th and 9th March in that year, Abbott, in concert with one Macdougall, sold the whole of the concern, in the following proportions:—To Messrs. Cockerell and Co. (Dove, Trustee), $3/16$ ths = 3 annas portion; to Gilson Rowe French, $5\frac{2}{3}/16$ ths = 5 annas 13 gds. 1 cowrie 1 krant; to Septimus [163] Hodges, $1/3$ rd = 5 annas 6 gds. 2 crs. 2 krts; to Henry Gloster French, $2/16$ ths = 2 annas.

On the 23rd of May, 1842, Gilson Rowe French mortgaged his share ($5\frac{2}{3}/16$ ths) to Messrs. Cockerell, and on the 14th of April, 1853, released his equity of redemption, whereby his share became vested in Mr. Cochrane, as Assignee of the Messrs. Cockerell, who had become Insolvent.

On the 30th of May, 1842, Hodges mortgaged part ($2\frac{1}{3}/16$ ths) of his $1/3$ rd share to Messrs. Cockerell; and after his death his Executor, Mr. Andrew, conveyed the entire share to them.

Henry Gloster French, who had deposited his title-deeds with Messrs. Cockerell, by way of equitable mortgage, conveyed his $2/16$ ths share to Mr. Cochrane, Assignee of Messrs. Cockerell, on the 14th of April, 1853.

Thus the whole property in the "Bansbarreah Indigo Concern" became on that date vested in the Assignee of Messrs. Cockerell.

On the same day (14th of April, 1853), by three separate deeds of assignment, Cochrane conveyed and assigned the property to Abbott, the former proprietor. Gilson Rowe French's share ($5\frac{2}{3}/16$ ths) was assigned by one deed, Gloster French's ($2/16$ ths) by another; Septimus Hodges' $1/3$ rd, and the $3/16$ ths share originally conveyed directly to Messrs. Cockerell (amounting, together, to $8\frac{1}{3}/16$ th) by a third.¹

Abbott died on the 3rd of October, 1854, and the "Bansbarreah Indigo Concern" was, with other property, conveyed by his Executors to the present Appellants. The Executors of Abbott, treating the Dehee Hattee as his property, executed on the 4th of April, 1855, a deed of conveyance and assign-[164]-ment of that and another Putnee Talook in favour of the Appellants, under which deed they claimed the property as against the auction purchaser.

For this purpose the Appellants instituted a suit against Dost Mahomed Khan in the Zillah Court of Rajshahye, on the 30th of November, 1856. A preliminary issue was framed to try, whether the Plaintiffs (the Appellants) were in a position to sue; and a Commission to examine witnesses was addressed to the Judge of the Small Cause Court, in Calcutta, returnable on the 24th of April, 1857; but on that day the Court returned the Commission, with a Certificate that the witnesses had not been presented for examination, and that the Judge, finding no excuse for the Plaintiffs' neglect, had dismissed their suit for want of evidence; but at the same time he had recorded in his proceeding, that the Order was not intended to bar the Plaintiffs, or any other person who might substantiate his title, from proceeding as if the action had not been brought. The Plaintiffs appealed summarily to the late Sudder Court of Calcutta, and the Judges of that Court held, that it was not a case for a summary appeal, but they allowed the Plaintiffs to bring a regular appeal within one month. They added—"It appears to us that we must look upon the judgment of the lower Court as determining that the Plaintiffs had failed to establish their title to sue; and that an Order of dismissal was pronounced upon the evidence."

A regular appeal was preferred, and heard and dismissed by three Judges of the Sudder Court, consisting of Messrs. Loch, Samuels, and Trevor, on the 27th of April, 1859. The Court was unanimously of opinion, that the Plaintiffs had entirely failed to [165] make good their ground of appeal as to inability to produce their witnesses, they having made no exertion whatever to procure their attendance.

On the 10th of October, 1860, the Appellants brought a fresh suit, making the auction purchaser, the Owner of the zemindary of the Talook in question, the Son and representative of Abbott, and the former Collector, Mr. Leicester, severally Defendants.

The act complained of (the conduct of the auction sale) having been done by Mr. Leicester in his official capacity, the Government were admitted as Defendants

in his place, under Act, No. VIII., 1859, secs. 68 and 69; and an answer was put in on their behalf.

The material issue recorded by the Court was; whether the suit was barred by the Judge's decision of the 14th of May, 1857, and by those of the Sudder Dewanny Adawlut of the 26th of February, 1858, and the 27th of April, 1859?

The before-mentioned deeds were produced in evidence, and witnesses examined for the Plaintiffs.

On the 8th of May, 1861, the Principal Sudder Ameen (Punchanun Bannerjee) of the Zillah Court gave judgment, and held, that the suit of the Plaintiff was not barred by the previous proceedings; but on the question of title he dismissed their claim. He further held, that they had entirely failed to prove that the Talook belonged to the Bansbarreah indigo concern, the proofs produced tending to show the contrary, and he, therefore, held it unnecessary to go into the other issues.

The Plaintiffs appealed to the late Sudder Dewanny Adawlut, at Calcutta, but the Judges of the High Court of Judicature (substituted in the interim for [166] the Sudder Court), consisting of Messrs. Raikes and Seton-Karr, on the 30th of September, 1863, dismissed the appeal, holding (on the issue in bar) that the dismissal of the previous appeal in the Appellant's suit of 1856 by the Sudder Court in 1859 was final under Act, No. VIII. of 1859, sec. 2, and that the suit was barred. The Court by its judgment said—"In deciding this point, we have it admitted that the cause of action in the present suit is precisely the same as laid in the Plaintiffs' suit of the 30th of November, 1856. The law which governs the points is contained in sec. 2, Act No. VIII. of 1859, and is as follows:—'The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit, between the same parties, or between parties under whom they claim.' It is, however, contended that, although the cause of action in both suits is the same, and the parties identical, the cause of action in the former suit was never heard and determined; that the suit having been dismissed for default without any trial, a dismissal for default is no bar to a fresh suit. It appears to us, however, that the preliminary issue which was then necessary to be tried for the purpose of ascertaining whether Plaintiffs were or were not legally entitled to sue, having been recorded and evidence called for, and a day fixed for the hearing, the case had proceeded beyond the stage at which any laches on the part of the parties to the suit could be treated as a simple default, and the suit struck off the file, to be reinstituted at the option of the Plaintiffs. A decision of the late Sudder Court of the 31st of May, [167] 1853, is a precedent in point, and the marginal note appended to the case fully shows that a failure to adduce evidence is not a default to proceed within the meaning of Act, No. XXIX. of 1841, which refers only to steps in procedure necessary to enable a cause to be prepared for hearing on its merits; the dismissal of a suit for want of evidence ought not to be on default, but on the merits. This, then, was clearly the state of the law in 1857, when the Judge of Rajshahye dismissed the suit for want of evidence, and we cannot allow any words of the Judge to override the law, and give to parties indulgencies which the law of procedure does not sanction." "It cannot for a moment be argued that, as the law stood in 1857, a Plaintiff was at liberty to claim a non-suit if, after the issues were recorded, he neglected to supply evidence in support of his case, and we are of opinion, that the law and practice of the Courts there was to act upon the maxim '*De non apparentibus et non existentibus eadem est ratio*' (5 Co. Rep., 6); and if evidence was wanting, to dismiss the claim for want of proof. Such order is in reality a decision on the merits, just as much as if Plaintiff had produced evidence which the Court considered inadequate as proof, and dismissed it upon that ground."

The present appeal was brought from this decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants.—The only question is, whether the plea of *res judicata*, by reason of the decision the Court arrived at in the suit instituted in 1856, is a bar to the present suit. That plea is founded on the Civil Procedure Code, [168] Act, No. VIII. of 1859, sec. 2, and, we submit, was not established. Section 2, on which the decree of the High Court proceeded, having reference to the facts and circumstances of the suit of 1856, did not justify the dismissal of the Appellants' suit. All that the Court did in the former suit

was, in effect, to non-suit the Plaintiff, which alone would not be a bar to the Appellants bringing a fresh suit. There is nothing in that section to deprive the High Court of the power of declaring that the cause of action has not been heard and determined by the Court in the former suit between the same parties, so as to constitute a bar to the institution of another suit respecting the same matter. The Court ought to have exercised such a discretion in this case, and so prevent a failure of justice from a mere technical objection. But the Act, No. VIII. of 1859, was not in force when the suit of 1856 was decided; therefore, the provisions of Ben. Reg. III. of 1793 apply. It has been held, that if a technical objection on which a case has been thrown out in the lower Court be overruled on appeal, the cause ought to be referred back to the lower Court for trial on its merits: *In re Syud Busharut Allee* (14 Ben. S.D.A. Rep., 189), and in *Shibchunder Banerjee v. Kalipersaud Roy* (16 Ben. S.D.A. Rep., 480), it was said, that a failure to adduce evidence was not a default to proceed within the meaning of the Act, No. XXIX. of 1841, sec. 2, and that a dismissal of a suit for want of evidence ought not to be for any default, but on the merits.

Mr. Forsyth, Q.C., and Mr. Merivale, appeared for the Respondent, The Collector of Rajshahye, and

[169] Mr. Field, Q.C., and Mr. J. D. Bell, for the Respondents, Moutree Mahomed Alli Khan Chowdry, and Dost Mahomed Khan Chowdry, but their Lordships, without calling upon them, delivered judgment by

The Right Hon. Sir James W. Colvile.—Their Lordships have formed so clear an opinion on both the points on which the determination of this appeal depends, that they do not think it necessary to prolong the discussion by calling on the other side.

The first question, and that which is the sole question, raised by the case of the Appellants is, whether the High Court was wrong in holding that the plea of *res judicata* ought to prevail.

The suit is brought to set aside the sale of a Putnee Talook, which took place as long ago as 1849. There was considerable delay, even in the institution of the former suit to set aside that sale, which was not brought till the year 1856. The case is obviously one in which it was the duty of the Courts below, as it is the duty of their Lordships, to look closely to the right of the Appellants, the Plaintiffs in the suit, to impeach proceedings which took place so long ago, and under which so many fresh rights may have accrued.

Be that, however, as it may, the first question is, whether the High Court was right in holding that, notwithstanding the reservation contained in the decree dismissing the suit of 1856, the question was to be treated as *res judicata*.

We have not been referred to any case, nor are we [170] aware of any authority which sanctions the exercise by the Country Courts of India of that power which Courts of Equity in this Country occasionally exercise, of dismissing a suit with liberty to the Plaintiff to bring a fresh suit for the same matter. Nor is what is technically known in England as a nonsuit, known in those Courts. There is a proceeding in those Courts called a nonsuit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit, except in the particular instance that is now before them.

The decision in this first suit was carried by appeal before the Sudder Court. It was treated in the first instance as not being the subject of such a summary appeal as would have taken place in the case of what is ordinarily known as a nonsuit, but as being necessarily the subject of a regular appeal. A regular appeal was accordingly brought, and was heard by three Judges, and, as their Lordships read the opinion of those three Judges, each of them seems to have had very con-

siderable doubt, to say the least, [171] whether it was competent to the Judge in the circumstances to make any such reservation.

The result, however, was that they refused to remand the suit for re-trial, and dismissed the appeal. They did not, however, make any correction of the reservation, and so the case stood until the question arose again in the present suit. In the present suit the Principal Sudder Ameen seems to have considered that he was bound by that reservation, and, therefore, he decided that issue in favour of the Appellants.

He decided against them on the other question, which is now to be disposed of, namely, of their title to sue. They, therefore, appealed against his decision, and the High Court, without going into the second question upon which the case had been decided in the Court of first instance, appears to have called upon the Appellants to show that, notwithstanding the former decree, they were still entitled to sue.

It has been argued that that decree not having been appealed against by the Respondents in the original suit, was, at all events, whether regularly or irregularly made, binding in the particular case, and that it was not competent to the High Court in this suit to question its propriety. Their Lordships are not disposed to take that view. Without laying down positively, that in no case could such a reservation be properly made by a Judge in one of the Indian Courts, they think that it was open to the High Court in a case in which the former decree had been pleaded as *res judicata*, and in which all the circumstances under which it was made were before the Court, to consider the propriety of the reservation, [172] and they entirely agree with the Judges of the High Court in thinking that, admitting that the Judge of the lower Court had in any case such a discretion as was exercised in making the reservation in question, that discretion was improperly exercised in the particular case.

They are of opinion, that the appeal must fail upon the first ground. They are, however, further of opinion, that the appeal must also fail, and that the decree of the Principal Sudder Ameen is to be supported upon the second ground, namely, that the present Appellants have shown no sufficient title enabling them, supposing it was open to any person at this distance of time to do so, to question the propriety of the sale of the Putnee Talook.

It will be convenient to consider first, what has been the ostensible devolution of the Talook; next, what is the nature of such a tenure; and, lastly, how it is sought to establish that the title to that Talook, and the consequent right to impeach the sale, have passed to the present Appellants.

The Talook was created in favour of Mr. John Compton Abbott, in May, 1837, by a Deed of sale. It is in the ordinary form, their Lordships apprehend, of a grant of a Putnee tenure, and it provides for that for which the Regulation makes provision, namely, the notice to the Zemindar of any alienation of the Talook, in order that it may be duly registered. The words are, "If you make a gift or sale, or give away in durputnee, the eight annas of the above-mentioned dehee, being your own Putnee, you must give instant notice of the same in my Sudder Cutcherry." On the 7th of Pous, 1248, which we are told was in 1841, Mr. Abbott sold, for [173] the expressed consideration of C. R. 11,465: 12, this Putnee to a firm known as French, Hodges and Co. In the deed there is a requisition to the Purchasers to cause themselves to be duly registered in the archives of the Zemindar, and although the instrument was not registered in the ordinary register of deeds till 1844, it is probable that they were before that date duly entered and accepted by the Zemindar as the Putneedars.

Of this there is some evidence in the petition which will be referred to hereafter, of the Assignees of Cockerell and Co., for they speak of French, Hodges and Co., as "our Benamée owners of the Talook at the time of the sale."

The sale took place in 1849, and the proceedings from the Collector's office show, that it was treated as the sale of a Putnee standing in the names of French, Hodges and Co.; inasmuch as it appears from them that the surplus proceeds of the sale passed to and were divided amongst the judgment Creditors of that firm.

That is, then, the ostensible devolution of the Putnee Talook. Of course the later deed of the 4th of April, 1855, in which Mr. Compton Abbott, assuming to be the absolute Owner of the Putnee Talook, which had been long previously sold,

conveyed it formally to Watson and Co., the present Appellants, can have no bearing on the question of title.

It only shows, that if under the deeds by which the Appellants now endeavour to trace such title or right, the Putnee Talook had got back into Mr. Abbott, or the right to question the sale of 1849 of that Talook, belonged to Mr. Abbott, he has [174] transferred that right, whatever it was, to the Appellants.

It has been admitted at the Bar, that in order to show that the title to this Putnee Talook, and the consequent right to question the sale, has passed to the Appellants, it is necessary to rely on certain general words in the various deeds that transfer certain interests in the Bansbarreah indigo concern, and to hold that the Talook was in fact an incident to the Factories, and that those words must be taken to have passed them.

It appears, that at the time when the Putnee was granted, Mr. John Compton Abbott was the sole proprietor of the Bansbarreah concern, and it may be conceded that (as Mr. Leith has argued) the general object with which an Indigo planter takes this kind of tenure, is to acquire that power over the Ryots which a Zemindar has, and which enables him to stipulate that upon parts of their lands at least they shall grow Indigo at his rates, for the benefit of his Factory. Nevertheless, in acquiring these rights, Putneedars acquire other very considerable rights: they acquire the Zemindar's rights over a large District, comprising lands, all of which do not grow Indigo, and it is perfectly conceivable that one Partner in a Factory may have that sort of Talook, and the consequent power which the ownership of the Talook gives; that he may use that power for the benefit of the Factory, and yet that the Talook itself may form no part of the assets of the Factory. Then, again, it is to be considered as between the parties between whom this question arises, that the Zemindar who has sold and the Purchaser who has bought at the Collector's sale have [175] nothing to do with the motives under which the Talook was originally taken,—have nothing to do with those arrangements which the ostensible owner of the Talook may make; that the Zemindar has granted a tenure of a particular kind, the incidents of which are well defined by law, to a tenant, and that he has a right to look to the ostensible tenant, and is not bound to take notice of the various interests which may be created otherwise than by an authorized alienation. This much is clear, it is certainly not proved by positive evidence: it is only an inference drawn from the assumed nature of things—that this Talook was part of the assets of the Bansbarreah concern.

Now, before going to the deeds on which the Appellants rely, it may be convenient to look at some of the provisions of the Ben. Reg. VIII. of 1819, which apply to this kind of tenure. The scope of the Regulation is, first, to legalize the tenure, the legality of which had been doubted; after declaring that Putnee tenures are valid, it provides that they shall be transferrable and answerable for the debts of the Putneedar. It next declares, that such tenures are not voidable for arrears of rent, but that the Zemindar's remedy, where there is an arrear of rent, shall be a sale under the provisions of the Regulation. It further declares, that the Zemindar is not entitled to refuse to give effect to a transfer; and then follow certain provisions which are in favour of the Zemindar. The Regulation provides, that in conformity with established usage, he shall be entitled to exact a fee upon every such alienation. It fixes the maximum fee; it provides that he shall also be entitled to demand substantial security from the trans-[176]-feree, or purchaser, to the amount of half the jumma rent, or yearly rent payable to him from the tenure transferred, and that the same thing shall happen when the tenure passes in a sale made in execution of a decree or judgment of Court; that the Zemindar may refuse to sanction a transfer until the fee and security be tendered; that if there is a dispute as to the sufficiency of the security, it is to be determined by appeal to the Civil Court, and it gives him further powers.

In the 6th section there is this express provision, "That the rules of this, and of the preceding section, shall not be held to apply to transfers of any fractional portion of a Putnee Talook, nor to any alienation other than that of the entire interest; for no apportionment of the Zemindar's reserved rent can be allowed to stand good, unless made under his special sanction."

The 11th section shows what the consequence of one of these sales is. It gives to

the Purchaser assuming, of course, that the sale has been regularly conducted—what we may call a Parliamentary title. It declares that the tenure shall be sold “free of all incumbrances that may have accrued upon it by act of the defaulting Proprietor, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder, by a stipulation to that effect in the written engagements, under which the said Talook may have been held. No transfer by sale, gift, or otherwise, no mortgage or other limited assignment shall be permitted to bar the indefeasible right of the Zemindar to hold the tenure of his creation answerable in the state in which he created it, for the rent, which is, in fact, his [177] reserved property in the tenure, except the transfer or assignment, should have been made with a condition to that effect under express authority obtained from such Zemindar.”

This being so, it seems extremely questionable whether, if it had been even expressly stated in the various deeds about to be considered, that shares in this Putnee Talook were transferred in that manner, such transfers of interest would have been binding on the Zemindar; whether he would not have been entitled to look to French, Hodges and Co. as the registered Owners of that Talook; and whether any of the persons who took these limited interests, some by mortgage, some absolutely, but of portions only, would have been entitled to come forward and say, “We claim to be treated as your Putneedars.” In fact, however, the deeds do not, any of them, expressly purport to convey this Talook; and if the dates of the transactions are considered, there is strong ground for inferring that it was the intention of the parties to keep the two things separate, the tenure separate from the Bansbarreah concern, probably from a knowledge that the former could not be dealt with in the way in which it is now pretended that it was dealt with.

It has already been stated, that Abbott sold the Putnee, in 1841, to French, Hodges and Co. for value. The foundation of Messrs. Cockerell’s interest in the Bansbarreah concern is the deed of the 9th March, 1842. That is the deed by which Abbott sold out-and-out to Cockerell and Co. three-sixteenth shares of the Bansbarreah concern. Now, as he had, the year before, sold the Putnee Talook as a whole to French, Hodges and Co., it is difficult to see upon what [178] principle the general words contained in this conveyance can be construed to include and convey three-sixteenths of the Talook, supposing that it was competent to the Putneedar to sell the three-sixteenths of the Talook separately.

Then, on the 23rd of May, 1842, Gilson Rowe French, who probably was one of French, Hodges and Co.—though it is not shown distinctly that he was—mortgaged to Cockerell five-sixteenths, and a fraction of another one-sixteenth of the Bansbarreah concern. As far as a mere mortgage went, supposing that any interest in the Talook passed by the general words, that clearly would not operate as against the right of the Purchaser under the sale, because the Regulation provides, that the effect of the sale shall be to sweep away any mortgage created by the defaulting Putneedar. Again, on the 30th of May, 1842, Septimus Hodges mortgaged two-sixteenths, and the remaining fraction of another sixteenth, of the same indigo concern to Cockerell and Co.; and on the 28th of May, 1847, his Executors sell to Cockerell a third absolutely of the Bansbarreah concern, which, I take it, included that which had been already mortgaged by their Testator. Therefore, at the date of their insolvency, which, I think, preceded the sale of the Putnee Talook, and certainly at the date of the sale of the Putnee Talook, Cockerell and Co., or their Assignees, were Owners of three-sixteenth and one-third of the Bansbarreah concern absolutely, and were Mortgagees of the shares transferred by Gilson Rowe French, and thus, either as absolute Owners, or as absolute Mortgagees, were entitled to fourteen-sixteenths of that concern, but the remaining two-sixteenths were still outstanding, and belonged to one Henry Gloster [179] French, and in respect of those two-sixteenths Cockerell and Co. seem at most to have been equitable Mortgagees by deposit of title-deeds.

In this state of things the sale of the Putnee Talook took place. An application was made by the Assignees impeaching the sale, in which they speak of French, Hodges and Co. as the Benamée Owners of the Talook for them; but at that time, as I have just shown, even supposing that the beneficial interest had passed under the general words of the conveyances of shares in the Bansbarreah concern, they were not absolute Owners even of fourteen-sixteenths of that concern, and they were only

equitable Mortgagees of two-sixteenths. The two-sixteenths were not vested in them until, I think, the 14th of April, 1853, and probably the difficulty of completing the title to the whole concern was the reason of the very great delay which took place before the Appellants came into Court to impeach the sale in a regular suit.

It is unnecessary to go in detail through the subsequent deeds. The general effect of them is, that in 1853, the Assignees, the representatives of Glyn, Halifax and Co., who had acquired some beneficial interest in this Bansbarreah concern by the pledge of deeds from Cockerell and Co., of London, and a variety of parties, all concerned in getting the whole interest in the Bansbarreah Factories into the Assignees of Cockerell and Co., who at the same date transferred it to John Compton Abbott. All these transfers were, however, of nothing but the Bansbarreah concern. Neither the title to the Talook nor the right to impeach the sale of it could pass to John Compton Abbott, or from him to the Appellants, unless they [180] were previously vested in Cockerell and Co. It has been shown that, in their Lordships' opinion, the general words in the several conveyances to Cockerell and Co. cannot be taken to have passed even an equitable interest in the Talook; which cannot be assumed to have been an asset of the Factories merely because it was originally taken by Mr. John Compton Abbott when sole proprietor of the Factories. In their Lordships' opinion the Putneedar, at the date of the sale, were Messrs. French, Hodges and Co.; a firm which, although some of its members may have had shares in the Bansbarreah concern, appears from the evidence to have been something distinct from that concern; and is not even proved to have been Trustees for it. In these circumstances their Lordships, without laying down any general rule as to the degree of interest which might entitle a party to impeach the sale of a Putnee Talook under the Regulations, are of opinion, that the Appellants have failed to show that they have acquired that interest in this Putnee Talook which entitles them to dispute the sale in 1849, and that the decision, therefore, of the Principal Sudder Ameen upon that point, was correct.

They must, therefore, humbly advise Her Majesty to dismiss this appeal with costs of both Respondents.

[181] RAM CHUNDER DUTT,—Appellant: CHUNDER COOMAR MUNDUL and Others,—Respondents * [July 15, 19, 20, 21, 1869].

On appeal from the Sudder Dewanny Adawlut of Bengal.

In a question relating to boundaries of land, the Judicial Committee on a review of the evidence, reversed the concurrent decrees of the Court of First instance and the Sudder Court, but without costs.

Held, following the case of *Appovier v. Ram Subba Ayan* (11 Moore's Ind. App. Cases, 75) that in a Hindoo family, the *status* of joint ownership is only determined by an actual partition, or an agreement by mutual consent to a division of the joint estate [13 Moo. Ind. App. 198].

It lies on a party claiming a share of the joint estate to prove a severance of interest [13 Moo. Ind. App. 199].

On special application for leave to appeal from two decrees of the Sudder Court, and also two decrees made by the Court of First instance, the Order in Council made on the leave given was confined to the Sudder Court decrees. Held, that such Order was for the purpose of the hearing of the appeal to be considered as embracing all four decrees [13 Moo. Ind. App. 182, 196, 197].

These were two appeals from decrees of the late Sudder Court, which was consolidated by an Order in Council, and heard as one case, made in two suits in the nature of actions of ejectment to recover possession of land and mesne profits, in which suits the Appellant was Plaintiff and the Respondents were Defendants. The question at

* Present :—Members of the Judicial Committee—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard. Assessor:—The Right Hon. Sir Lawrence Peel.

issue respectively was one of boundaries and the alleged partition of certain estates. The facts and the points raised in the argument are so fully stated and discussed in their Lordships' judgment as to render any further statement superfluous. [182]

The appeal was argued by Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant, and by Mr. Field, Q.C., and Mr. J. D. Bell, for the Respondents.

The consideration of the appeal was reserved, and judgment was now delivered by

The Right Hon. Sir James W. Colvile (Dec. 13, 1869).—This case was heard as one consolidated appeal, pursuant to Her Majesty's Order in Council of the 27th July, 1863. The consolidation was of two appeals which the Petitioner, the present appellant, by a special application to Her Majesty in Council, asked leave to bring.

The application to Her Majesty was for leave to appeal, not only against two decrees of the late Sudder Dewanny Adawlut at Calcutta, made on special appeals to that Court, but also against two decrees of Mr. La Tour, the Judge of the Civil Court of the Zillah of the 24 Pergunnahs, each of the four decrees being specified in the petition by its date.

The Order of the Judicial Committee really was, to grant leave to appeal as prayed, but inadvertently it was drawn up in words which, construed literally, would limit the appeal to the decrees of the Sudder Court only; but for reasons to be stated presently, it must be taken that there was leave to appeal against the four decrees.

[183] The original suits, Nos. 68 and 69 of 1852, were brought in the Zillah Court of the 24 Pergunnahs before Lokenauth Bose, the then Principal Sudder Ameen. They were of the nature of ordinary ejectment suits, for the recovery of the lands sued for in each, and of wasilat, or mesne profits.

In No. 68 the Plaintiff sought to recover 6 cottahs 4 chittacks; in No. 69, 1 beegah 4 cottahs 8 chittacks and $13\frac{1}{2}$ teals of lands: the total being 1 beegah 10 cottahs 10 chittacks and $13\frac{1}{2}$ teals, part of 1 beegah 14 cottahs, to which he made title as follows:—

His Son had purchased the 1 beegah 14 cottahs at a sale in execution of a decree in a civil suit for a money demand, and had subsequently conveyed it by deed of gift to the Plaintiff, his Father.

The decree-holders were Gooroodoss Ghose and Bluggobutty Dossee, Widow and heiress of Ramtonoo Ghose, who had obtained their decree in a suit brought by them against Hurramoney Dossee, Widow and heiress of Tarrachund Ghose, Brother of Gooroodoss and Ramtonoo.

The Plaintiff thus accounted for the entire quantity of 1 beegah 14 cottahs. He stated in his plaint that he had possession of 3 cottahs 5 chittacks $6\frac{1}{2}$ teals; that one Ramlochund Seal, the ancestor of the Seal Defendants, had concealed half a cottah; that the Plaintiff's Son had originally obtained possession of 9 cottahs 9 chittacks $6\frac{1}{2}$ teals only, and that the residue of the whole quantity the Munduls had, by force and collusion with the tenants, kept in their possession. He gave this explanation as to the 3 cottahs 5 chittacks $6\frac{1}{2}$ teals: "That out of the [184] eastern portion of the southern parcel of land within the bazaar my Son had an absolute right to 10 cottahs of land, held by the following Ryots": and after an enumeration of their names, with the quantities of their lands, and the amounts of rents respectively, the plaint proceeds thus: "But in collusion with the said Munduls the tenants gave kabooleats, in the said month of Srabun, of a one-third on the said land, namely, 3 cottahs 5 chittacks $6\frac{1}{2}$ teals, at Rs. 83 15a. 4p."

The Plaintiff divided the lands sued for in No. 69 into two portions, one described as the southern, containing 8 cottahs 2 chittacks, and the other as the northern, containing 16 cottahs 4 chittacks. This division is not derived from anything contained either in the lot at the sale which described his Son's purchase, or in the deed of sale conveying the property to the Purchaser, but is apparently due to the fact that the two parcels of land are separated from each other by intervening land. The Plaintiff's title to all the land for which he sued in the two actions was the same, but he divided his claim into two suits, stating as the ground for doing so, that the dispossessions of which he complained took place at different times, and that the actors in both were not wholly the same persons.

In No. 68 the Defendants were, first, Pearee Lall Mundul (who, dying during the litigation, is represented by his two Sons, Respondents in this appeal), and two other

Munduls of the same family, the three being styled in the plaint as the "actual dispossessioners"; secondly, certain persons representing Rambochund Seal; and lastly, certain persons, the representatives of the decree-holders and of the [185] judgment debtor, that is, of the Ghose family. In No. 69, these last parties are said to be joined *pro forma*; the rest are called the actual dispossessioners, and are the same as the parties in No. 68, with the addition of four other Munduls, and the Widow of a fifth.

The pleadings, which are in the old form, are lengthy, extending to a rejoinder, with much repetition, and the customary imputations of fraud on both sides. Suit No. 68 was brought for a small portion of the land, on the west; suit No. 69 included the rest of the lands sued for, divided into the southern and northern portions. The boundaries in the plaints are meant by the Plaintiff to describe and demarcate a holding called No. 85, in which all the land to which he was entitled was, by his admission, situate. This admission, however, applies only to the Collectorate holding, No. 85, alluded to in the issues.

To suit No. 68, the Munduls, Defendants, answered that these lands were not in No. 85, nor part of the Plaintiff's Son's purchase; that they were their own old durpin lands; and that neither the Plaintiff's Son, nor the Plaintiff had ever been in possession of them. The Seals denied, first, any connection whatever with the lands in this part; and, secondly, that they had dispossessed either the Plaintiff or his Son of any portion of them.

In suit No. 69, the Defendants, the Munduls, answered as to the lands in the southern part of the holding, as divided by the plaint, by admitting a title in the Plaintiff as a sharer of one-third. They pleaded that Tarrachund was not exclusive Owner of any part of the lands sued for in this suit, but a co-sharer only with his Brothers; that he had but one-third; that [186] the two-thirds of the other members of the family had passed to them, the Munduls, by mortgage and foreclosure, and that they had obtained possession under a writ of possession issued by the late Supreme Court at Calcutta. They denied that the Plaintiff had any title to the lands in the more northern part lying beyond No. 78, 78-1, and 78-2. Of these they said they were the Purchasers at the auction sale, their lot consisting of a share in about 1 beegah, 8 cottahs, described as Lakhiraj, and as the share of Tarrachund. These lands they alleged not to be in No. 85, and to be beyond the sale boundaries, to the north. They alleged the Plaintiff's northern boundary to be the southern boundary of the holding, described as No. 78, 78-1, and 78-2, and that this holding severed wholly the two portions which the Plaintiff sought to include in his one lot, described in the sale proceedings on the attachment as "one parcel," and they insisted that the Plaintiff must be limited to one parcel.

The answer of the Seals was somewhat different; but as a decision which is not appealed from was made in their favour, it is unnecessary to state its substance.

The case will be made plainer by stating the description of the property, and of the boundaries, as given in an instrument called a Zimmanamah, or deed of security, part of the usual proceedings in an attachment previous to sale under a decree; and also the description of the property in the deed of sale executed to the Plaintiff's Son on the completion of his purchase. The property is thus described in the Zimmanamah:—"One parcel within the bazaar of Kaleychn Mistree, about 1 beegah, 14 cottahs of [187] rent-paying land, the self-purchased lands of the Defendant (meaning the said Tarrachund) bearing no shares." In a separate column in the same line, the land was further described as "belonging to the Defendant exclusively." The boundaries of the land were described as follows:—"East of the Government road, north of the Tank of the said Tarufdar, west of the bazaar tenants and the lands of Rajah Sunkur Ghosal, and south of the lands." In the Bill of sale the property is described as "mentioned in the annexed list." That list is written under the Bill of sale, and is as follows:—"List of the property, Lot 9, Pergumah Mogoorah, in the village of Kidderpore, 1 beegah 14 cottahs rent-paying purchased land." The words of the Zimmanamah, "one parcel" and "about," are not found in the Bill of sale. The number of the lot, and the word "purchased," in connection with rent-paying land, evidently refer to the lot under which the Plaintiff's Son purchased.

The deed of sale contains an additional statement, viz., that one named Bhoynub-

chunder claimed the lands, and "therefore, 'that the Purchaser has in this purchased property become like the former proprietor.' Since some stress was laid on this expression in the argument for the Respondents, it is proper to state further, that in the deed of gift from the Plaintiff's Son to the Plaintiff, the property is further described as the share of Hurramoney, the Widow of the late Tarrachund Ghose."

The property remained under attachment for eight years. None of the Defendants made any objection to the description of the property pending the attachment, or previous to the sale.

After the completion of his purchase, the Plaintiff's [188] Son tried to obtain possession of the land. He was opposed in that attempt, and, except as to a small part of the land, with success. The Plaintiff imputes this opposition to the collusion of the Munduls with his Tenants. With the exception of one suit, that brought by the Plaintiff against one Anundchunder Sircar, in which Pearee Lall Mundul intervened, it will not be necessary to allude further to this earlier litigation.

The Purchaser obtained kabooleats from certain of the Tenants, some of whom, viz., those referred to in connection with the 10 cottahs, the Plaintiff states to have subsequently attorned to the title of the Munduls. In this state of things, his title being disputed as to a large part of his purchase, and as to the rest, kabooleats having been given and accepted, apparently without protest, as for a share, viz., one-third only, the Purchaser made a gift of the land to his Father, the Plaintiff, by the description before referred to, of "a share."

After this gift the Plaintiff commenced his proceedings against Anundchunder Sircar.

He relied on an ikrar and kabooleat, executed according to the Plaintiff's statement by that Defendant. Pearee Lall Mundul intervened as an objector. Both ikrar and kabooleat were denied, and declared by the Defendants to be forgeries. The Judge doubted their genuineness, but hesitated to pronounce them forgeries. He said, that if not forgeries, they were probably extorted, alluding to a complaint of several of the Tenants, including Anundchunder, publicly preferred to a Magistrate, but not substantiated by proof that the Plaintiff was imprisoning them, and otherwise using force to obtain [189] from them engagements with him as Landlord. One of the issues was, whether the Plaintiff was thus irregularly seeking to obtain possession, without instituting a suit to try the proprietary right. The Judge decided the suit on the ground that the title was in dispute, and that a summary suit for rent could not be entertained. On appeal, the Judge, before whom the case next went, nonsuited the Plaintiff, on a merely technical ground.

The Plaintiff having thus failed to obtain possession by effecting arrangements with the Tenants, or by litigation with them, proceeded to take a step at last which, if well advised, he would have adopted in the first instance, viz., that of bringing a regular suit for the decision of the question of proprietary right. He preferred the suits No. 68 and No. 69, in which, dividing his claim as before stated, he brought forward his whole demand. As a complaint of this division was renewed upon the hearing of this appeal, it may be convenient to dismiss the subject at once by observing, that their Lordships attach no weight whatever to it, and do not think that the division complained of was made for any other reason than that assigned for it by the Plaintiff in his plaint.

The suits No. 68 and No. 69 were first heard before Lockenauth Bose, the then Principal Sudder Ameen of the 24 Pergunnahs, and were heard as one cause. Some issues not on the merits may be passed over. Those on the merits were in No. 68, "First, whether the land in dispute is included in the holding No. 85 of the Collectorate or not; second, if so, then is it comprised within 1 beegah 14 cottahs, the entire rights of the late Tarrachund Ghose purchased by the Plaintiff's Son?"

[190] In suit No. 69 they were, "First, whether the land mentioned within the sale boundaries was the exclusive share of the late Tarrachund Ghose included in Bill No. 85; second, if it be proved to be such, whether the land in dispute was within the boundaries aforesaid."

The Principal Sudder Ameen in No. 68 dismissed the case against the Seals, a decision acquiesced in by the Appellant; but gave the Plaintiff a decree against the other Defendants for his whole demand. In No. 69 he also decreed partially in favour of the Plaintiff, excepting, however, on special grounds, a half cottah from

the decree. His opinion was also unfavourable to the Plaintiff's contention as to the northern part of the lands which the Judge thought not to be within the Plaintiff's sale boundaries.

In the course of the proceedings an inquiry by an Ameen was directed. He was ordered to prepare a map of the disputed premises. This map was so prepared, and it was signed by both parties. It is No. 102 of No. 69; the inquiry directed in this stage was strictly regular and conformable to the issues. It was whether the lands notified in the Proclamation, a step in the sale proceedings, were included in Bill No. 85, and whether the lands in dispute were part of them. The Ameen reported in favour of the Plaintiff that the lands were included in No. 85; and that those sued for were part of them. He founded his opinion mainly on oral testimony.

The decrees of the Principal Sudder Ameen in the Plaintiff's favour were appealed from, and the appeals were heard by Mr. Torrens, the Civil Judge of the Zillah Court. The Plaintiff had claimed and [191] had succeeded in obtaining decrees for the entirety and not for a share. One of the objections urged in the petition of appeal to Mr. Torrens was, that the quantities allotted by the Ameen would, on admeasurement, be found to exceed the quantity of land purchased by the Plaintiff Son, viz., 1 beegah 14 cottahs. The Plaintiff had, in fact, in his pleading, contended that he had bought virtually the residue of the holding, putting a construction on his deed of purchase which its terms do not warrant. Mr. Torrens sent back both causes for further and more complete investigation.

Mr. Torrens also expressed some doubt, whether the Collector should not have been joined as a party. This seems to have proceeded on the ground of the land being a khas possession of the Government, and the Collector being, as it were, in the place of the Zemindar or Landlord.

The causes as remanded came before Mr. Bell, the Additional Sudder Ameen; he nonsuited the Plaintiff for the non-joinder of the Collector as a Defendant, but on appeal to Mr. La Tour, who had, in the meantime, succeeded Mr. Torrens as Judge of the Civil Court, Mr. La Tour reserved the decision, and sent the causes back to Mr. Bell to be tried on the merits.

On the 10th of November, 1858, Mr. Bell decided suit No. 68 in the Appellant's favour, decreeing to him possession of the land (6 cottahs 4 chittacks) claimed in that suit, with wassilat from the date of the plaint. On the preceding day he had postponed suit No. 69 for further local investigation, and on the 5th of January, 1859, he directed the second Ameen to make that investigation. The order of reference [192] to the second Ameen was accompanied by copies of the plaint and answer, copy of a chitta dated 8 Pous, 1214, a petition of the Plaintiff (the Appellant) dated the 17th of December, and the original survey plan filed with the order.

The Ameen, under the directions in the Order, made an elaborate report which has been much commented on by both sides on the argument of this appeal. The report was not acted on by the Judge, Mr. Bell.

The Appellant stated specific objections to the report, and, by petition, requested Mr. Bell to view the premises, which he did. It appears by the Respondent's petition of appeal to the Civil Judge that the Respondent's Vakeels were present at the view, which may be treated, therefore, as strictly regular and judicial. The report of the second Ameen was on all points, opposed to that of the former Ameen. It reported against the Appellant, that the holding No. 85 did not include the lands in No. 68, nor those in the more northern part; that the revenue survey was inaccurate in several particulars which it mentioned; and that the lands claimed in the northern part, and in the suit, No. 68, were not within the Plaintiff's plaint boundaries. It also reported that, on the measurement made according to the principle insisted on by the Respondent, which the Ameen treated as the correct principle, the land contained in the southern portion of the lands claimed in suit No. 69 amounted to 1 beegah and 16 cottahs. As new terms, "plaint divisions, descriptions, and boundaries," are introduced into this confused subject, as if to confuse it more, it may be as well to observe that the second Ameen is not [193] answerable for the introduction of this additional element of uncertainty into his report, since he strictly pursued in this respect the order of reference to him. The direction was the act of the Court itself, both parties, in fact, having requested that

the investigation should proceed according to the Lotbundie, that is, the sale boundaries, in the same manner as the inquiry had been pursued on the former investigation. It is obvious that on such a purchase as the present, where a Purchaser is, as it were, in quest of his lands to identify them, the plaint itself framed at the outset of the inquiry, on probably very imperfect information and knowledge, is not likely to be that certain proceeding by which an inquiry should be guided which is to identify the lands.

Mr. Bell, the additional Sudder Ameen, dissented from the opinion expressed by the second Ameen, declared his report to be opposed to the survey and his own conclusions from his own view, and declined to act upon it. The Respondents, in their petition of appeal to the Civil Judge, do not deny that the report is opposed to the survey, but they attack the latter document on grounds of misconduct in the Deputy Collector, which, if they had any foundation, should have been made matter of appeal and complaint to his superior the Collector. Mr. Bell, on the 15th of April, 1859, also decided suit No. 69 in favour of the Plaintiff.

In suit No. 68 he had acted on the last-mentioned survey, and on an Award of the Deputy Collector unappealed from, which, on a dispute between the Plaintiff and the Munduls, whether the lands in No. 68 should be mapped as within holding 85, [194] had included them in it. This Award, which is in suit No. 68, states, "that it is necessary to lay down the boundaries;" "but the second Petitioner, Pearcee Lall Mundul, appears to be in possession of the lands, there being no necessity of any investigation into possession, or dispossession, or any alteration thereof from this office; should any party have any objection as to possession or dispossession, he can sue for it according to law in Court. At present, there being no necessity for cancelling the order which has been passed in laying down the boundaries of the said land along with the holding No. 85, according to the plan of the Tussidor, it is ordered that the boundaries of the said disputed 6 cottahs 8 chittacks 16 teals of land be laid down according to the foregoing directions within the holding No. 85."

In suit No. 69, the Principal Sudder Ameen found that the lands sued for were in the exclusive ownership of the execution debtor without sharers. He seems to have been influenced, in a great degree, in coming to that decision by the non-claim of the Munduls pending the attachment after the notification and before the sale. His decision implies, on this point, that the Munduls knew of the intended sale, and description of the lands. He concluded that they would have objected unless they had known, or supposed, the description to be true.

The Munduls alone appealed from these decrees. On appeal to Mr. La Tour, the Civil Judge, he reversed both decrees; that in No. 68, wholly; that in No. 69, in part. The decree in No. 68 he dismissed with costs; in No. 69 he decided the case on what he considered an admission by the Munduls of [195] the Plaintiff's title to one-third of the lands, and limited the decree to those lands in the southern part, which the second Ameen had found to be within the Plaintiff's plaint boundaries, and to be 1 beegah 16 cottahs. Mr. La Tour declared the Plaintiff to be entitled to one-third of this quantity, 1 beegah 16 cottahs, including the 3 cottahs 5 chittacks 6½ teals, of which he was in possession. The quantity 1 beegah 16 cottahs 6½ teals is gained by adopting the second Ameen's report. In substance, therefore, it was decreed that Tarrachund was a co-sharer, and entitled to a third only. The costs were charged on the Plaintiff on the ground that he had failed on the proof of all the issues.

Mr. La Tour, on this last appeal, referred as evidence to a decision of the Sudder Dewanny Adawlut (which appears to be a reported case), in which it had been decided, on a former litigation between the two Brothers, Gooroodoss and Ramtonoo on the one side, and Tarrachund on the other, that the family was joint in property. Some land, 9 beegahs and a fraction, out of which the holding 85 was subsequently constituted, was scheduled as part of the family property. This was reduced by purchase by the Government of part—viz., about 2 beegahs and a fraction, in the formation of the Kidderpose road. Subsequently to that reduction, the residue is said to have been formed into the holding No. 85. The Judge termed this decision, which he introduced and relied on as evidence, a decision *ad rem*, declared that it threw on the Plaintiff the *onus* of proving a subsequent partition, and that the

Plaintiff had not sufficiently discharged himself from that obligation. He added that, "a subsequent partition was probable enough, [196] but that the Court must act on evidence and not on conjecture."

In suit No. 68, Mr. La Tour observed that certain of the Collectorate Chittas which the Respondents had produced in evidence, including that referred to by the Alipore Ameen, had been rejected by Mr. Bell on insufficient grounds. He did not dispute that the survey must be adopted as showing the state of Bill 85, as to boundary and contents, but thought the Award no decision on the question of title, and as evidence of no weight, especially on the northern part. He decided in both suits that the Plaintiff could recover only one parcel, and could not overleap the barrier which the holding No. 78, 78-1, and 78-2 presented, nor recover in suit 68, lands that formed a different parcel from that of which he recovered a portion on the southern part.

The decisions of the Sudder Court were made on special appeals from these two last decrees.

That Court could not decide in such appeals on questions of fact. It merely examined the evidence to see whether the objections urged turned on questions of law, and finding them to be, as they appear to their Lordships to have been, objections to decisions on questions of fact, it declared that it could not entertain them on special appeal. Its judgments cannot be appealed to as a confirmation of Mr. La Tour's decisions on the facts, since it had no jurisdiction on such appeals to decide on the facts.

Their Lordships will now consider the arguments addressed to them on the hearing of the appeal. The first objection was in the nature of a preliminary one: that the appeal allowed was from the two decrees of [197] the Sudder Dewanny Adawlut only. Their Lordships observed that if this was the correct construction of the words of the Order—a view which, however, they did not entertain, it would no doubt be amended on their recommendation to Her Majesty to that effect; a recommendation which they should, in such a case, think it their duty to make. On this intimation of opinion, the learned Counsel pressed the objection no further.

It was next urged that the Appellant had not argued before the Sudder Court the case of No. 68, the decision in which differed materially on several points from that of No. 69. This forbearance ought not, in the opinion of their Lordships, to prejudice the Appellant here; the more especially as the two appeals involved the same material question, viz., whether the title was to a share or to the entirety of the lands.

Then there was an objection affecting the weight of evidence generally urged by the Appellant, and stated in his case, viz., that the Munduls must be considered as mere wrong-doers, since they have not attempted to prove the title pleaded by them that they are purchasers of two-thirds of the whole of the property of the Ghose family. The evidence shows, in the opinion of their Lordships, a contest as to the title of the Purchaser to a large part of what he claimed, contemporaneous with his purchase, to which contest no other description than that of a *bona fide* dispute could or can be given. The title of the Munduls to two-thirds does not rest on mere pleading. *Prima facie* proof of their title is to be found in the receipts for revenue or rent, in the time as well of Hurramoney's possession as of the Purchaser's, in a [198] petition also of the Plaintiff himself, wherein he calls Gooroodoss and Bluggobutty the "acknowledged Vendors of the Mundul," and also in the kabooleats taken for the third of the rents. The Zimmanamah which is put in by both parties favours the same conclusion, for the decree-holders, who would otherwise have had the title to the two-thirds, are connected with that instrument, and pointed out the property by their Agent to the Nazir. Many of the lots describe the Munduls as owners of the two-thirds, which had been the property of the Ghose family.

The next matters for consideration are the evidence and findings in suit No. 69, and the reasons given by Mr. La Tour for his decision. The judgment, the reception of which in evidence has been objected to, was one to the reception of which, had it been tendered in evidence at the right stage of the proceedings, no legal objection could have been made. The objection as to the judgment being used at all was one dependent only on the time and manner of its introduction; this more limited

objection was not included in the grounds of special appeal, and as it does not affect the merits, cannot be entertained now. It is true that the *status*, of the family as a joint Hindoo family was not continuing. The alienation of the shares of two members of the family to the Munduls determined that *status*, and substituted the *status* of co-sharers or joint owners, whose rights, as is shown by Lord Westbury in the case of *Appaver v. Rama Subba Aiyar* (11 Moore's Ind. App. Cases, 75), are in many important respects distinguishable from those of a joint and undivided family. This joint-ownership *status* would however, only be determined by an actual partition, or an agreement by mutual [199] consent to divide; and such a severance of interest it lay upon the Appellant to prove. Their Lordships have not been insensible to the presumptions in favour of an actual severance of Tarrachund's share which the learned Counsel for the Appellant has drawn from the terms of the Zimmanamah and the conduct of the Munduls with reference to that document. But looking at the whole of the evidence before Mr. La Tour, and in particular to the receipts for revenue, and to the acceptance of at least one kabooleat for a share by the Appellant's Son, who is not produced to explain his act, and is not shown to be dead or incapable of giving evidence; their Lordships, while they dissent from much of Mr. La Tour's reasoning, are nevertheless of opinion, that he has come to a right conclusion in finding that the Appellant has failed to show that the Tarrachund was entitled to more than a one-third undivided share in the property which was the subject of the lot purchased.

The next question to be considered is, whether the Appellant has proved that any part of the lands of which his Son purchased Tarrachund's share, is situated in the northern portion of the lands claimed in suit No. 69. The Appellant relies on the revenue survey and the Award already referred to, as conclusive upon this question, the Award not having been questioned in a regular suit within three years of this date. This Award, however, as has already been stated, did not purport to determine the right of possession; it stated as a fact that Pearee Lall Mundul was in possession of the lands; but in itself it was a mere order relative to the mapping of the holding and defining its boundaries. It would be [200] unjust to give the Order indirectly an effect on possession, which directly it disclaims; nevertheless, it must be held to fix the boundaries.

In this more northern part of the holding, the question that arose between the Plaintiff and the Munduls was one of proprietary right, not of mere boundary: the Respondents relied on their title as purchasers of a share belonging to Tarrachund. They said this land never was in No. 85, or if it be so adjudged, it is our purchase. In the former case, the Plaintiff, by his own admission, would have no title to it; in the latter case the question between them would be whether the Respondent's purchase was proved.

The survey in this case is not questioned by the issues; it must, therefore, be viewed as evidence of the boundaries and of what holding No. 85 includes, but it furnishes no evidence of proprietary right in the Plaintiff in his contest with the Munduls directly or indirectly. The Award, for the reasons already given, is evidence only to the same extent as the survey.

The Respondents claim under a purchase of a share of Tarrachund in the more northern part. It is the case, therefore, of both parties that some property of his extended thus far. The Plaintiff's Son did not purchase all Tarrachund's share in holding No. 85, but only a certain quantity in that holding, the situation of which was not clearly defined. The survey, therefore, does not much advance his case. The origin of his title is a sale under the decree of the Court directing a sale in execution. The whole holding was sold: there was no unsold residue. The justice of the case requires that the Plaintiff, whose [201] Son paid for 1 beegah 14 cottahs should obtain that entire quantity, if so much exists in the holding unsold to others, and if so much does not exist, then, all that is capable of being so applied. His claim, however, can extend no further than the sale boundaries.

This being so, their Lordships proceed to deal with the subject of the sale boundaries. These begin with the north bank of the Tank, and are, therefore, not those of the whole holding. The description of the boundaries north is, the lands of the Rajah Kalesunkur Ghosal. That description tallies with the plaintiff, and favours the Plaintiff's construction. It means strictly sole, not Ijmalee lands. As an

imperfect description, it may be applied to Ijmallee lands also, if the evidence shows that it was meant to describe them. The holding No. 85 is found to extend beyond the Ijmallee lands to the sole owned lands; and as the whole surplus is inadequate to supply the whole quantity, no ground exists for narrowing the construction, since, in a doubtful case, that interpretation should prevail which may best effect a satisfaction of a claim which cannot be otherwise fully satisfied.

Their Lordships are merely considering so far how the case would stand in a contest on the construction of the words as to boundaries, supposing a clear surplus to exist in the more northern part. The language, therefore, of the Zimmanamah as to the boundaries presents, in the opinion of their Lordships, no bar to the Plaintiff prosecuting his claims on the more northern part. It lies, however, on him to show that there are lands in that part of [202] the holding capable of being applied to the satisfaction of his demand. Here, however, he is met by the Respondents claiming as auction Purchasers under a distinct lot; and alleging themselves to be in possession under that title.

Therefore, the contest in this suit on this part must be considered to be narrowed to this, whether the Respondents' purchase *de facto* is in this northern part. The issue lies on them to prove their purchase, as the Plaintiff, by the survey, has established a *prima facie* case to land in this northern parcel.

The Respondents prove their title-deed. It is a Bill of sale of a moiety of 1 beegah 8 cottahs. The lot is No. 3. The land is described as alleged to be La khiraj. The Bill of sale contains no statement of boundaries. On referring in the Zimmanamah, to the lot which is the one immediately beneath that of the Plaintiff's Son's purchase, a further description of the land is found. The lands are described as rent free, within the House of Kalee Churn Mistree, about 1 beegah and 8 cottahs, inclusive of the dilapidated Buildings, after deducting two shares belonging to Oodoy Narain Mundul, the remaining one share being 9 cottahs. The boundaries are thus described: "North and west of the lands of Rajah Kalesunkur Ghosal" (a part is left out as worm-eaten) "and south of the lands of the said Ghosal." So far, therefore, as this description is decipherable, it describes lands surrounded by those of the Rajah Kalesunkur Ghosal. If it appeared that the Rajah had no lands in the neighbourhood, except those delineated or referred to, it would appear that the holding No. 78, 78-1, and 78-2, was meant to be described, though erroneously, [203] by a description of the lands of the Rajah exclusively; and the same inference might be drawn from the description of the place, if the meaning of the words "within Kaleechurn Mistree's House and dilapidated Buildings" was clearly ascertained. Both descriptions, however, are the subjects of dispute. It would be wrong to conclude anything against the Respondents in a case where the Court is dealing with inaccurate documents, by reason of mere variances between the deed of sale and the Zimmanamah.

The Judge, Mr. Bell, found the dilapidated Buildings to be in No. 78, 78-1, and 78-2. The Plaintiff's second witness places the pukka house of Kaleechurn Mistree in that holding. The Plaintiff also, in his pleadings, supposes the Respondents' purchase to be there in that holding, but he does not show how any concealment could be effected.

The Judge, Mr. Bell, finds as a fact that the Respondents had fraudulently attributed portions of the holding 78, 78-1, and 78-2, to the lands claimed by the Plaintiff in the northern part, which he says were less than 1 beegah 8 cottahs, and had so increased their quantity fraudulently, and were aided by the Rajah in this scandalous attempt to defeat justice. Yet this is a matter to which a mere view would not afford discovery; and Mr. Bell assigns no reasons for his conclusion, which implicates the Rajah in a fraud.

The Appellant has not attempted to show, by evidence, the real original extent of this holding 78, 78-1, and 78-2. He had to prove the fraud which he alleged. The Collectorate must reasonably be supposed capable of furnishing some evidence as [204] to this holding, as to its former quantity and boundaries, if rent-paying, as to its rent. If a quantity had been abstracted, proof of its former state would detect the fraud. Without any evidence, and without the disclosure of any reason, to justify a suspicion of collusion in a fraud to defeat a purchaser under a judicial

decree, the Rajah must, in support of this hypothesis, be supposed guilty of conniving at a concealment and deception on the Court. Their Lordships, therefore, cannot adopt Mr. Bell's conclusion, that the Respondent's possession is so augmented as he concludes it to have been, and without it, this land, which the Munduls certainly purchased somewhere, becomes, unless it be where the Respondents place it, an untraceable possession, scarcely a probable conclusion. Upon the whole, therefore, their Lordships are of opinion, that the Appellant has failed to establish a title to any land, or to any share in any land in the northern plot, which he claims in suit No. 69, and that the judgment of Mr. La Tour, which it is to be observed is consistent with the original judgment of Lokenauth Bose on this point, must be established.

As to suit No. 68, the Respondents urged, that the Appellant cannot have believed that his Son's purchase included the land claimed in this particular suit, since he offered to take it from the Government on a separate settlement of revenue, whereas had he believed it to be already included in holding No. 85, he would have stood upon that title and settlement. Whatever might have been the weight of this objection, had the offer been unqualified, it loses its effect when the language of the Plaintiff's petition is carefully weighed. In that document the Plaintiff still [205] insists on his claim under his Son's purchase, and on the existing settlement, and asks merely to be preferred on a fresh settlement, if on measurement the lands are found to be beyond the holding, No. 85. This proposal, thus made and guarded, cannot be construed to amount to any admission that he could not rely on the settlement, or to imply any consciousness that the land was really beyond the limits of the holding, No. 85.

The survey which includes the land sued for in No. 68, within the holding, No. 85, makes out a *prima facie* case, at least, in favour of the Plaintiff. Whatever older title, if any, the Munduls may have had, they did not stand upon. They settled for the land with Government. It was a khas possession of the Government. The settlement with the Munduls proceeded on a measurement. The Plaintiff said the land was wrongly measured, and wrongly settled, because already included in No. 85. He denied that there was any excess of land over the measured quantity properly belonging to No. 85, and appealed to the Sudder Board of Revenue, which set aside the measurement complained of by the Appellant, and directed a new one, on which the existing survey was made. The survey showed the disputed land to be included in the settled estate, No. 85. The Respondents deny that this restoration proceeded on the Plaintiff's appeal; but the reason which they give, *viz.*, that the Government at that time resumed the whole of the durpin lands, is unsatisfactory, for it is opposed to the plain language of the Proclamation, declaring the annulment of the settlement; and it supposes further, a power in the [206] Board of Revenue which it is not shown ever to have exercised and which is not authorized by the Regulations, *viz.*, the power of resuming lands by a general notice, applying to several distinct holdings. Such a proceeding as that supposed would be virtually a resumption proceeding, and must be pursued according to the Regulations applying to resumption proceedings. The question, then, was reduced to this, whether the old holding No. 85 settled with Tarrachund included these lands; that is, it became a question of the boundary and contents of an existing settlement, and was properly to be ascertained by a measurement by the revenue authorities. Mr. La Tour's reasoning proceeds entirely on a preference of the report of the second Ameen to the revenue survey, and on the assumption that the measurements which were made by that Officer at the instigation of the Respondents' Vakeels, are correct, the report of this Ameen was deliberately discredited and rejected after a view of the lands by Mr. Bell, who necessarily had much better means of forming a correct judgment on the point in question than their Lordships can have.

It is not at all probable that the survey with which the Ameen's report is inconsistent should be inaccurate.

Their Lordships have, therefore, come to the conclusion, that Mr. La Tour's judgment in suit No. 68 cannot be supported, and that the Appellant has established his title to one-third share in the land claimed by him in that suit.

Under all the circumstances, therefore, their Lordships will humbly advise Her Majesty that the [207] appeal against the decrees of the Sudder Dewanny

Adawlut be dismissed, and that the decrees of Mr. La Tour in suits No. 68 and No. 69 be discharged, and that in lieu thereof one decree be made in both suits on this consolidated appeal in the following terms, *viz*:—

Declare that the Plaintiff's Son purchased, and that the Plaintiff, as Donee of his Son, is entitled to the right, title, and interest of Tarrachund in 1 beegah 14 cottahs of land within the holding No. 85, as the same holding was constituted, and as the same is delineated and shown by the survey in the pleadings mentioned, and referred to in the issues framed in the two suits Nos. 68 and 69 respectively; and declare further, that the Plaintiff has failed to show that Tarrachund had more than a one-third share in that holding; and that the same share must be taken as one-third only: and declare that the 14 cottahs can be made up only out of the said share, and so far only as such share will extend to satisfy the same: and declare further, that the Plaintiff has proved a right to have, so far as the quantities permit, that quantity made out of the said share of the land sued for in suit No. 68, and out of the said share of the land sued for in No. 69, except as to the land in the more northern part, described and stated on his plaint to consist of 16½ cottahs, as to which the said Plaintiff has not established his title: and further declare that as to the lands in that northern part so described in his plaint, and as to which his suit has been dismissed, that the same do stand and remains dismissed: and declare that the Plaintiff is [208] entitled to wassilat in respect of the said one-third as from the date of his plaints respectively, but that in ascertaining the amount thereof, regard is to be had to the fact of his having been in exclusive possession of 9 cottahs and 9 chittacks and 6½ teals in the southern portion: and declare that the costs awarded in the suits No. 68 and No. 69 to the Respondents should be reduced by one-third; and that the rights and interests of the Appellant and Respondents, and the sums due from or to the Appellant and Respondents ought to be settled and adjusted in accordance with the foregoing declaration, and remit the suits to the High Court to the end that such settlement and adjustment may be made accordingly; and their Lordships think that each party should pay his own costs of this appeal.

[209] RAJ LUKHEE DABEA.—Appellant; GOKOOL CHUNDER CHOWDHRY.—Respondent * [July 21, 22, 1869].

On Appeal from the High Court at Fort William, Bengal.

The power of a Hindoo Widow to charge or alienate her Husband's estate, is primarily confined to two special objects: either for religious duties or charitable donations. To entitle her to charge or alienate a portion of her Husband's estate to save the remainder from sale, there must be such a legal necessity as would be requisite to preserve the remainder of the estate for the next heir, and the *onus* of proving such necessity lies on a Mortgagee or Purchaser [see 13 Moo. P.C. 218].

Held, upon the construction of a Hibbahnamah, or testamentary deed of gift, by a Husband in favour of his two Wives, that they were mere Trustees for management of the estate, and had no power to interrupt the succession in law to their Husband's estate, and a sale by them of part of such estate, on the ground that it was necessary for the liquidation of his personal debts, to save the other part of the estate, in the absence of evidence of imperative necessity, set aside [13 Moo. Ind. App. 222, 223].

A presumptive heir has a title to sue, to set aside such a sale [13 Moo. Ind. App. 224].

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

Gouree Pershaud Surmah, a Hindoo, at the date of the Hibbahnamah, or testamentary deed of gift hereinafter stated, and at his death, had two [210] Wives, Surbo Mungola Dabea and Gouree Dabea, and two Sons, Sreeman Gouree and Sreeman Doorga.

The Hibbahnamah was dated the 22nd of August, 1823 (7th Bhadro, 1230), and was registered. The material parts of this instrument were as follows:—"You, two individuals, being my Wives, and wise and intelligent too; my Sons, Sreeman Gouree Pershaud Surmah, Talookdar, and Sreeman Doorga Pershaud Surmah, Talookdar, born of you, both are Minors; therefore, the above-mentioned zemindaries, etc., and all my property, wherever is situate: the whole, I, in health of body and sound in mind and calm temper, in the present assembly, give to you both by executing a deed of gift. They shall remain in my possession all my lifetime. After my death you, entering into possession of all the zemindaries, etc., all the properties shall uphold the worship of my Deities, etc., whatever works are fixed, and shall pay their expenses, etc., according to all that has been fixed. You shall perform the ceremonies of Sheraddo, etc., according to my means. All the orders I have given you, you shall observe and act accordingly. According to this deed of gift, you shall enter your own names in the Collectorate of the Zillahs, to the exclusion of my own name, and enjoy possession by paying the Government revenue, from month to month, and instalment to instalment, [211] according to the Tahoot. But you shall have no authority to make a gift or alienate by sale. When my two Sons arrive at majority you shall have their names entered in the Collectorate of the Zillahs and your own names expunged. God forbid that one of my two Sons should die, but if one should accidentally die, then the Son, who may survive you, shall have all the zemindaries, etc., entered in his name. Under these conditions, I hereby execute this deed of gift."

The Donor, Gouree Pershaud Surmah, died before the year 1845, leaving his two Wives surviving. Both his Sons, named in the Hibbahnamah, died Minors and without issue, in the lifetime of the Widows and before the year 1845.

On the death of the Donor, his Widows, Surbo Mungola Dabea and Gouree Dabea, registered their own names in the Collectorate of the Zillah, and entered into possession of all the lands, but the Sons having died Minors, their names were never registered in the Collectorate, and the two Widows, up to the sale by them to the Respondent hereinafter stated, remained the sole registered Owners of the lands.

On the 16th of November, 1845 (13th Aughran, 1252), the Donor's two Widows executed a Bill and also a Deed of sale of four annas, or one-fourth, of lot Ultum-pora, etc., part of their deceased Husband's estate, in favour of the Respondent, for the sum of Rs. 11,352.

The material parts of such Bill of sale were as follows:—"We, by paying the Government revenue, have been enjoying undisputed possession. Now, our Husband's debts not being paid, the liabilities are being gradually increased by loss in interest. The [212] debts of the Creditors cannot be liquidated at once by profits of the above zemindaries, particularly the debts of the time of our Husband, for which we have made an instalment Bond in Court in our own names with the Creditors, Narain Chunder Doss and others. Now, that money not being paid, the above Creditors are about to have all our zemindaries sold by auction, by putting in force the said instalment Bond in Court. As, except by this zemindary, there being no other means. Now, is there any other alternative beyond this zemindary of our release from our Husband's debts, and with intent to perform the shraddh of our Husband at Gya, we sell one-fourth share of our above zemindaries, that is, a four annas' share, to you, in a settled and sound mind and in health of body, for a consideration of the sum of Rs. 11,352, and having received the entire amount of consideration in the present assembly for sale, and taking it in our own possession, we hereby execute this Bill of sale."

A Deed of sale of the same date, and to the like purport, was also executed.

One of the witnesses to the conveyance was Juggut Ram, a relation of the Donor's, and then supposed to be his heir apparent.

The Respondent registered the Bill, and Deed of sale, and entered his name in the Collectorate of the Zillahs as Owner, and took possession of the lands so sold to

him, and thenceforth continued in undisturbed possession thereof, up to the institution of the suit, a period of upwards of fifteen years.

The present claim arose as follows:—

The Donor had a Brother named Boydo Nath, who predeceased him, leaving one Son, named Isser [213] Chunder, who died in the year 1844, without issue, having previously authorized his Wife, the Appellant, Raj Lukhee Dabea, to adopt five Sons in succession.

The Appellant accordingly, in the year 1848, adopted a Son, named Mookundo Chunder, who thereby became the heir of the Donor, and she was appointed his guardian by an Order of the Civil Court of Zillah Denajpore.

On the 2nd of May, 1861, the Appellant, as Mother and guardian of the Minor, Mookundo Chunder, filed a plaint in the Court of the Principal Sudder Ameen of Denajpore, against the Widow, Surbo Mungola Dabea (the other Widow, Gouree Dabea, having died before the institution of the suit), Juggut Ram, the Respondent, Gokool Chunder Chowdry, the purchaser of four annas from the Widows, under the Deed of sale of the 27th of November, 1845, and other purchasers, stating the adoption of Mookundo Chunder; the Hibbahnamah; the death of the two Sons of Gouree Pershaud Surmah, the sale to and possession by the Respondent, and charging that the sale to the Respondent was void, as being contrary to the Hibbahnamah and the Widows' authority, and also alleging the sale of other parts of the Donor's estate for the personal debts of the surviving Widow, the successor to the estate, and charging that she had alienated part of the estate and contracted large debts, and that it was necessary to take the estate out of her possession, and bring it into the possession of the Minor Plaintiff, and praying that the sale of the four annas share to the Respondent and the other Defendants might be declared invalid, and possession given to the Minor and the Appellant, and for other consequential relief.

The Respondent, Gokool Chunder Chowdhry, filed [214] a written statement, insisting that the two Widows had full authority, according to Hindoo Law, to sell the estate for payment of their Husband's debts, and performance of his Uradho dabee Kreeh (ceremonies after death), that they had sold to him the share in question, and received the consideration-money, Rs. 11,352, and executed the Deed, and that it was registered, and further alleged, that the Plaintiff, Raj Lukhee Dabea, knew of the purchase; that the Respondent in fact purchased with her consent, and had held possession ever since, for upwards of fifteen years, and that accordingly the suit was barred by limitation of time, and by his answer of the same date, he insisted to the same effect, and further stated, that the consent of the Plaintiff, Raj Lukhee Dabea, was given verbally in answer to his inquiry, and that at the time of purchase she had not adopted Mookundo Chunder.

The Widow, Surbo Mungola Dabea, by her answer, admitted the sale to the Respondent, but claimed the zemindary for her life.

The Plaintiff examined Witnesses, and also put in evidence many exhibits, including the Hibbahnamah and the Deed of sale. The greater part of such evidence related to the proof of the adoption of the infant Plaintiff, Mookundo Chunder, by Raj Lukhee Dabea, and its validity. The Respondent did not contest either of these facts.

Respondent petitioned the Principal Sudder Ameen for time to examine material Witnesses on his behalf, but the Judge refused to receive the petition.

The suit was heard by the Principal Sudder Ameen of Denajpore, Mr. James Reilly, and that Judge, by an Order, dated the 27th of August, 1861, decreed that the Plaintiff, by virtue of the right of her adopted Son to the property claimed, should obtain possession [215] of the entire shares of the Widows, Surbo Mungola Dabea and Gouree Dabea, in this manner, that during the lifetime of Surbo Mungola Dabea, whatever should remain of the profits of her eighth anna share, after deducting the Sudder rent and necessary expenses, should be made over to Surbo Mungola Dabea, and that all the Purchasers should withdraw their possession from the properties in their respective possession, and directed the costs, with interest, to be paid by all the Defendants proportionally. In his judgment the Judge observed, that it was indispensable, however, that the Respondent should prove that the sale was made to pay the deceased Husband's debts, and the debts contracted for

his funeral obsequies, but that he had filed no decree of Court nor any other voucher proving those points: that he had not applied for a summons in the name of any Witness whatsoever: nor had even named a single Witness, nor adduced any evidence whatever.

The Respondent appealed from this decree to the High Court.

On the 12th of June, 1863, the High Court, consisting of the Judges, Messrs. Steer and Seton-Karr, gave judgment, and by a decree of that date affirmed the decree of the Principal Sudder Ameen of the 27th of August, 1861, except in so far as it ordered, that immediate possession should be given to the Plaintiff of the property purchased by the Respondent, and to that extent reversed the decree of the Court below, and declared that the Respondent was entitled to enjoy the property during the lifetime of the Widow, and that on her death the reversioner was entitled to possession thereof, and ordered each party to bear their own costs.

The Respondent applied to the High Court for [216] a review of judgment, alleging various grounds for review, and in particular that the suit was taken out of its turn, and when it was not in the cause list, that the effect of the Hibbalmah had been overlooked, that the suit was barred by the law of limitation, that the answer of Surbo Mungola Dabea was irregularly filed, that the Principal Sudder Ameen did not allow him to file his evidence, and that the attesting Witnesses, Khadem Ally and Bhola Burkundauz, were then forthcoming and ready to be examined.

The fact of the presentation of the petition for leave to examine Witnesses on the Respondent's behalf, and of its rejection by the Principal Sudder Ameen, was proved. The High Court, on this ground, allowed the Respondent to examine Witnesses: and Khadem Ally and Dabee Churn Dass, two of the attesting Witnesses to the Bill and Deed of sale, were examined before the High Court, and Khadem Ally was cross-examined on behalf of the Appellant.

The case was re-heard before the division Bench of the High Court, consisting of the same Judges, Messrs. Steer and Seton-Karr, who, by their judgment, dated the 10th of May, 1864, varied their decree of the 12th of June, 1863, and held, that the Widows took under the Deed of gift from their Husband, a mere trust estate, in the first instance for the Donor's Sons, and after them for his general heirs and reversioners. The Judges further declared, that they were of opinion, that the Respondent was shown to have exercised that degree of reasonable, proper, and just circumspection, which would satisfy the rule laid down by the Privy Council in the case of *Hunoomanpersaud Panday v. Mussamat Babooee Munraj Koonverree* (6 Moore's Ind. App. Cases, pp. 393, 412), and that the reasoning [217] of the Judicial Committee in *The Collector of Masulipatam v. Cavalry Vencata Narainapah* (8 Moore's Ind. App. Cases, p. 551), was quite consistent with this view of the power of alienation by a Widow of her Husband's estate, and referred to *Doedem Raichunder Paramanick v. Bulloram Biswas* (Fulton's Rep., p. 135). The Court on the facts of the case held, that the consent of Juggut Ram, unquestionably given at the time of the sale, and against his own obvious interests, was a very strong piece of evidence in favour of the Purchaser, as Juggut Ram was then the sole heir and reversioner, and who, at the date of the sale, was the person most likely to know the real state of the case and the urgent necessities of the Widows: and they would not allow his subsequent denial, and the admissions of the Widow, to be set against, or to counterbalance, his consent to the alienation given at a time when it was wholly out of question that any undue or extraneous influence should have been exerted on him: and the Court decreed that the Respondent was entitled to an absolute and indefeasible right in his purchase, and not merely entitled to hold for the surviving Widow's lifetime.

Mookundo Chunder, the adopted Son, died a Minor and without issue. The Appellant, claiming to be the heir of Mookundo Chunder, petitioned for leave to appeal, in her own right, to Her Majesty in Council, from the decree of the 10th of May, 1864. She afterwards adopted Mohesh Chunder as a Son, and was appointed his Guardian, with liberty to prosecute the suit on his behalf. He died after the institution of the appeal, and the Appellant became, as his adoptive Mother, his heiress.

The present appeal was brought from the decree of the 10th of May, 1864.

[218] Sir R. Palmer, Q.C., and Mr. Doyne, for the Appellant. The *status* of the Appellant's minor Son, as heir to Gource Pershaud Surmah's Sons, is admitted, and he was entitled to sue the surviving Widow, under the Hibbahnamah, who was a mere trustee with the purchaser. The burthen of proof of the legal necessity for the sale lies on the purchaser, the Respondent, and, we submit, he has failed to establish, that the sale resorted to by the Widows was through such a legal necessity as to satisfy the requirements of the Hindoo Law. The Court below has misunderstood the effect of the case of *Hunoomanpersaud Panday v. Mussamat Baboore Munraj Koonweree* (6 Moore's Ind. App. Cases, pp. 393, 412), which is really in our favour, and shows that the maxim "*caveat emptor*" applies. The rule as to the nature of the estate of a Hindoo Widow in Bengal is laid down in *The Collector of Masulipatam v. Cavalry Vencata Narraiah* (8 Moore's Ind. App. Cases, p. 529), and *Chetty Colum Comara Vencatachalla Reddyer v. Rajah Rungasawmy Streemunth Jyengar, Bahadoor* (8 Moore's Ind. App. Cases, p. 319), to the effect, that the power of a Hindoo Widow, who has only a life estate, to charge or alienate her Husband's estate, is confined to special purposes: first, to the performance of the religious obsequies of her Husband, or charitable objects; secondly, if imperatively necessary to preserve the estate for the remainderman, to charge or alienate a part of the estate, to pay debts, and so to save the estate from sale; and that absolute necessity must be shown by the Purchaser. Under the Hibbahnamah, the Widows are only Trustees for management of the estate, and do not take absolutely. The Donor, in the deed of gift, expressly men-[219]-tions his two Sons, and he declares that the Widows are to have no power of alienation. Nothing is therein expressed to alter the course of succession by Hindoo Law. Juggut Sing was examined as a Witness, it is true that it appears that he agreed to the sale, but to make the conveyance good, he as a reversioner, ought to have been joined in the Conveyance. The sale, however, may have been a Benamce transaction, and it is open to suspicion on that ground, *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (11 Moore's Ind. App. Cases, 39). The Division Bench of the High Court was in error, both as to law and fact, in admitting the review and altering their original judgment. First, the Division Bench, under the Civil Procedure Code, ought not, upon appeal, to have permitted new documentary evidence to be produced and further witnesses to be called; but, secondly, supposing such admission were within their competence, or the exercise of sound judicial discretion at the first instance of hearing of the suit on appeal, no case was made for so doing on review, having regard to the Civil Procedure Code, Act, No. XXIII. of 1861, sec. 9. Even taking the evidence upon review to have been properly admitted, and all true, there was not, it is submitted, any evidence whatever offered as to the actual legal necessity of the sale to the Respondent, and the Court has overlooked the uncontradicted evidence to the contrary by Witnesses for the Appellant, and the inferences afforded by the apparently long period which elapsed from the death of Gooroo Pershaud Surmah to the time of the sale to the Respondent.

Mr. Field, Q.C., and Mr. Bowring, for the Respondent.

[220] According to the true construction of the Hibbahnamah, in the event which happened, both the Donor's sons having died Minors and without issue, the Donor's Widows were at the date of the sale to the Respondent the absolute Owners, as the provisions of the testamentary Deed created an absolute gift to the Widows in equal shares. By Hindoo Law, a Widow can, without any special directions by her Husband to that effect, lawfully sell any portion of his estate for necessary and religious purposes, such as payment of her Husband's personal debts and obligations, and the performance of ceremonial obsequies, termed his Shradh. This principle is fully recognized in *Hunoomanpersaud Panday v. Mussamat Baboore Munraj Koonweree* (6 Moore's Ind. App. Cases, 393). Here the sale to the Respondent was made for the purpose of paying the Donor's debts and liabilities and to perform his Shradh, which was directed by the Hibbahnamah. There is no dispute that the sum of Rs. 11,352 was the fair value of the land sold to the Respondent, or that it was actually paid by him to the Widows. He is not bound to see to the application of the purchase-money. A sale by a Hindoo Widow in Bengal, of part of her deceased Husband's lands, for either of the above objects, is valid by Hindoo Law. Juggut Ram, the Donor's then presumptive heir in

reversion, concurred in the sale. Such a sale, valid at its date, cannot be invalidated or affected by the subsequent adoptions by the Appellant. The Appellant's right to sue is, moreover, barred by lapse of time. The title of the Minor, Mohesh Chunder, through whom the Appellant claims, is as heir to the Donor, and not to Mookundo Chunder, and no pro [221]-ceedings were taken on his behalf till more than twelve years after the Respondent's purchase.

Their Lordships' judgment was delivered by

The Right Hon. Sir James W. Colville. —The question raised by this appeal is, whether the sale by two Hindoo widows of part of the estate of their late Husband, one Gooroo Pershaud Surmah, to the Respondent, can be upheld as valid.

The suit was brought to impeach this transaction by the Appellant as the adoptive Mother and Guardian of one Mookundo Chunder. The fact of that adoption is not now in dispute, nor is it disputed that Mookundo Chunder was by virtue of it, at the time of the institution of the suit, the next heir to Gooroo Pershaud Surmah, or to the Sons of Gooroo Pershaud Surmah, failing his Widows or the survivor of them. Mookundo Chunder was still living at the date of the final decree, which is the subject of the present appeal; but he afterwards died childless, and the appeal is brought by his adoptive Mother, who, as such Mother, is his heiress. There is a suggestion in the Appellant's case that she has, under the authority given to her by her Husband, made a second adoption, but inasmuch as the validity of that adoption is incapable of being discussed in this suit, their Lordships cannot take that into their consideration.

The validity of this transaction is sought to be upheld upon two grounds, first, upon the construction of the Hibbahnamah, or Deed of gift, which, it is contended, gave to the Widows an absolute interest, subject to be divested in the event of their Sons or either of their Sons coming of age. If that construc-[222]-tion were correct, there would, of course, be an end of the case, because the Deed of sale by the Widows would be good against all the world. Their Lordships will, therefore, first dispose of that question.

Upon the best consideration which their Lordships have been able to give to this Hibbahnamah, they are of opinion, that it provides, only a species of trust for management, and that it does not interfere with the devolution of the estate, according to the ordinary law of succession, under the Hindoo Law. The Deed was executed by Gooroo Pershaud Surmah in the year 1823, at a time when he states himself to have been not only suffering from corporeal illness, but to have a purpose of going to reside at Benares, and, therefore, from his then circumstances there is ground for the argument of Sir Roundell Palmer, that he meant to provide for the management of the estate, not only after his death, but during his life, and that seems to their Lordships to be the true construction of the instrument. The learned Counsel for the Respondent have laid some stress upon the direction, "you shall perform the ceremonies of Shradh, etc., according to my means," and have contended that that implies a charge to the person to perform the funeral ceremonies of the Donor, and, therefore, must be taken to imply a change in the course of succession to his estate.

Their Lordships, however, are of opinion, that the words "Shradh, etc.," are somewhat wide and ambiguous, and that if the Hibbahnamah be taken, as they think it ought to be taken, to be an arrangement providing for the management of everything from the date of it, during the life of the Donor himself, it may be taken to refer to, certainly to include, those family [223] religious ceremonies which Gouree Pershaud Surmah himself would, from time to time, if he remained in his home, and in possession of his strength and faculties, be bound to perform.

They, therefore, cannot give to those words the force which, it has been contended, ought to be given to them.

That being their Lordships' view of the construction of the Hibbahnamah, it may be convenient here to consider what has been the course of the succession to the property. If the succession was not altered by the Deed, then of course, upon the Donor's death, his two Sons became entitled to his estate. Those Sons are shown to have survived him. Each is also shown to have died in the lifetime of his Mother, and to have died childless and under age. The consequence of that is,

that on the death of each, his interest would have passed to his Mother, and that Mookundo Chunder, who was the adopted Son of the Testator's Nephew, became, on his adoption, the collateral heir of each Son, subject to the interest of his Mother. The result, of course, is, that upon the death of the Widow, Gouree Dabea, Mookundo Chunder became entitled to a present interest in the property, which is the subject of this contention, unless it can be shown that that property has been validly passed by the act of alienation, which is the subject of the suit.

Their Lordships have next to consider, whether treating the Deed of sale as one executed by women having only the limited interest of Hindoo females in property which they take either from their Husband or their Sons, the transaction can be supported upon any of the grounds on which such a transaction is recognized as valid by the Hindoo Law. The law upon the point is well ascertained, and has been established by many cases. Some question has been made at the Bar as to the right of a person who is a presumptive heir in reversion to question such a transaction; but their Lordships, if it were necessary to decide the point, would find it extremely difficult to overrule the many cases in which that right has been more or less recognized. But in the view which they have now taken of the Hibbalmamah and of the present right of Mookundo Chunder, upon the death of Gouree Dabea, to enter into possession of two annas of this property, it really is not necessary, in order to support the suit, to express any more decided opinion upon that question.

Then, upon what grounds are we to treat this transaction as valid? The statement upon the face of the Deed of sale is, that the property was sold in order to liquidate the Husband's debts. It recites, "Now, our Husband's debts not being paid, the liabilities are being gradually increased by loss in interest. The debts of the Creditors cannot be liquidated at once, by the profits of the above zemindaries, particularly the debts of the time of our Husband for which we had made an Instalment Bond in Court in our own names with the Creditors, Narain Chunder Doss and others. Now, that money not being paid, the above Creditors are about to have all our zemindaries sold by auction by putting in force the said Instalment Bond in Court." Therefore, there is a clear allegation that the transaction was entered into for the purpose of defraying the debts of the Husband, including a particular debt, secured by an Instalment Bond, and an agreement made in Court, and under the threat of an immediate execution against the [225] zemindaries; though the Deed goes on to say, that it was executed for the further purpose of performing the Shradh, etc., of their Husband at Gya.

It is not easy to see why, if the case so stated was true, there should have been any difficulty in giving far more satisfactory evidence of it than has been given in this suit. There is the reference to an agreement in Court, there is also the reference to a threat of execution and to the Instalment Bond which constituted the debt at least of Narain Chunder Doss. These things, if they had any real existence, were presumably capable of being proved.

But what has been the course of the litigation? The burden of proof was unquestionably on the party seeking to support the transaction, that is, the present Respondent. But it is an admitted fact, that in the Court of First Instance he gave no evidence in support of the transaction except the Deed of sale itself. In that state of things the Principal Sudder Ameen very properly decided the issue against him.

The case, then, went to the High Court by appeal. When the appeal was heard in the first instance, the High Court, with some variation in the form of the Order, confirmed the decision of the Principal Sudder Ameen. There was then an application for a review, and a suggestion made upon that application, that the Respondent had been shut out by the Principal Sudder Ameen from giving the evidence which he was ready to give in the suit. The judgment of the Principal Sudder Ameen contains a distinct statement that no such application was made. He says, "It was indispensable, however, that he should prove that the sale was made to pay the Husband's debts, and the debts contracted for his funeral obsequies, but he [226] has filed no decree of Court, nor any other voucher proving these points. He

has not applied for a summons in the name of any Witness whatever. He has not even named a single Witness, nor adduced any description of evidence whatever." Certainly it appears somewhat singular that, if the learned Judges of the High Court had no other contradiction of that solemn and direct statement upon the face of the judgment of the Lower Court that no evidence had been tendered, they should have acted upon the very wild story told by the Witness, Gooroochurn Odheekary, and the copy of a petition said to have been made from an original petition lost in the extraordinary manner in which that Witness states it to have been lost. It may be that the learned Judges did ascertain by reference to the Principal Sudder Ameen or to the proceedings, that evidence had been offered and had not been taken, but certainly there is no *constat* of anything of the kind upon this record: they seem to have acted solely upon the singular evidence to which I have just adverted.

Their Lordships, however, think that, whether it were right or wrong in the appellate Court, in those circumstances, to admit the additional evidence taken before it, it would not be right for their Lordships to exclude that evidence from their consideration; and they will, therefore, consider it as if there were no objection whatever to its admission.

The material portion of the evidence taken on review is the deposition of Khadem Ally, who describes himself as the Jemmadar of Gokool Chunder Chowdhry, the Respondent. He gives a very detailed account of the execution of the Deed of sale and of the payment of the money, which he professed to have seen [227] made at the time of the execution of the Deed,—he states in particular, that he was a witness to the payment of Rs. 9500, part of the consideration-money, to Sree Narain Doss, Mahajun, upon account of the Instalment Bond. Although he had not mentioned Sree Narain Doss, in the first instance, as among the parties present, yet he does distinctly state that he was present. "Sree Narain Doss, who had taken Rs. 9500, was present there. Seetul Talookdar, had given him the said Rs. 9500. On the said Sree Narain Doss returning the Instalment Bond, Seetul gave it to the Thakooranies. On my Employer asking for it they did not give it."

Here, then, is very specific evidence of a transaction which took place many years ago; but the singular thing is, that when it is contrasted with the statements of the Respondent himself, it does not tally in any degree with his recollection of what passed on the occasion. His statement is, that the price of the property was paid in order to pay off the debts of Mahajuns, but he does not recollect the debts of what Mahajuns were paid, and he says, "I gave Gouree Dabea and Surbo Mungola Dabea the money myself." The learned Judges of the High Court seem to have thought that in that conflict of evidence, it was impossible to give the credit to Khadem Ally which they otherwise would be disposed to give. Their Lordships think, that when in a case in which the party himself having an imperfect recollection of the transaction, and having stated that he paid the money to the Vendors personally, a Servant—a Jemmadar—comes forward, after the decision of the case by the Court of First Instance and the Court of appeal, to make out this elaborate proof of payment of debts to Sree Narain Doss—the least that can be said of evidence [228] so given, is that it is wholly untrustworthy. Nor does the deposition of the other Witness, also a Servant, deserve more credit. The learned Judges, however, finally decided the case, partly upon the mere fact that Juggut Ram was an attesting Witness, and must, therefore, be taken to have been a concurring party to the transaction, and partly upon the corroboration which they seem to think that fact afforded to the evidence of Khadem Ally. Their Lordships cannot see how the one can be any corroboration of the other. The fact that Juggut Ram attested the Deed is perfectly consistent with the fact that Khadem Ally is a tutored Witness brought forward at the last moment to depose to having seen what he never saw. Again, with respect to the effect of the attestation of the Deed by Juggut Ram, it seems to their Lordships that the learned Judges have attached to that circumstance a weight which it really does not possess. Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the Husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one,

and one justified by Hindoo Law. That it can be, as Mr. Field seemed to put it, a presumption of law in the sense of "*praesumptio juris et de jure*," their Lordships do not think. It is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction. And one of the difficulties of allowing the present decree [229] to stand is, that this point, which was raised at the last moment, was decided upon the mere proof, by the production of the Deed of sale, that Juggut Ram was an attesting Witness to it. The point had never been raised before. The opposite party has had no opportunity of examining Juggut Ram as to the circumstances under which he became an attesting Witness, or what his understanding of the transaction really was. The utmost that the Judges ought to have done in that state of things, was to remand the case to be re-tried, for the full consideration of that question.

Their Lordships cannot affirm the proposition, that the mere attestation of such an instrument by a relative necessarily imports concurrence. It might, no doubt, be shown by other evidence that when he became an attesting Witness, he fully understood what the transaction was, and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise. But considering who Juggut Ram was, and what the circumstances of this family were, their Lordships are further of opinion, that his concurrence would not, in this case, be sufficient to set up the Deed. In the first place, it is not proved, though on the other hand it certainly is not disproved, that at the date of the execution of this Deed, which was executed before the adoption took place, Juggut Ram was the next heir in reversion. He was unquestionably a very distant relation, and although he appears to have taken a considerable part in the management of this family, and even in the adoption of the Plaintiff, he is not proved to have been the next heir. On the other hand, the very fact of his connection with the [230] family leads to the presumption that he knew that the present Appellant had the power given to her by her Husband to adopt a child, and that, therefore, his interest, even if it existed, as next reversioner, was, in all probability, likely to be defeated. Therefore, if his concurrence were proved, it would not amount to such a concurrence by the Husband's kindred as, in the opinion of their Lordships, would have defeated the Plaintiff's claim. Their Lordships have already said, that if anything could have been made of that point, it would have been rather a reason for a remand of the cause, to be tried upon such an issue, than for the immediate decision of the case against the Plaintiff; but in their Lordships' opinion, there was no ground, in the circumstances, for such a remand, because such an issue had never been raised upon the pleadings, or in the earlier stages of the cause. The case of the party who sought to support the validity of this transaction was, that the sale had been made for particular purposes. He gave no evidence of that. He did not, by any suggestion in his written statement or otherwise, put forward the concurrence of Juggut Ram either as supplying the want of proof of the existence of the debts and the necessity of the sale, or as a consent equivalent to such proof.

Their Lordships are, therefore, of opinion, that the decree which is under appeal must be reversed; and the only question is, what should be the form of the Order to be made? They have been furnished by Sir Roundell Palmer with the minutes of the Order which he thought he was entitled to claim; and to some extent their Lordships adopt those minutes. They think that the minutes should [231] stand thus:— "Declare that the Deed of the 16th of November, 1845, was and is invalid as against Mohesh Chunder and the Appellant as his heir, and declare that Mohesh Chunder became, on the death of the Widow, Gouree Debia, and that the Appellant, as such heir, is now entitled in possession to one moiety of the four annas, and order that the Respondent do deliver up to the Appellant such moiety, and do pay to her the profits thereof received since the death of Gouree Debia."

Their Lordships will, therefore, humbly advise Her Majesty to allow the present appeal, to reverse the decree of the High Court, and to direct that, in lieu thereof, a decree be made to the effect above stated, and further directing that the Respondent do pay to the Appellant the costs incurred by the Plaintiff in both the Courts below. The Appellant must also have the costs of this appeal.

[232] MOULVIE SAYYUD UZHUR ALI.—*Appellant*; MUSSUMAT BEBEE ULTAF FATIMA, and Others.—*Respondents* * [Nov. 30, 1869].

On appeal from the High Court at Fort William, in Bengal.

The principle with respect to Benamee purchases between Hindoos, laid down in *Gopekrish Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53) is equally applicable to similar transactions between Mahomedans [13 Moo. Ind. App. 246, 247].

Lands purchased in the name of a Son, held, on the evidence, Furzee or Benamee, in trust for his Father, who paid the consideration-money for the purchase, and was in possession.

Seemle: there is no presumption of an advancement, by the name of the Son being used as Purchaser, other than in the case of a Stranger being used [13 Moo. Ind. App. 247].

Although the Judicial Committee adhere to the rule not to disturb the findings of two concurrent Courts in India upon a question of fact, yet such rule does not prevail, where the Courts in India have never dealt with the real question raised by the issues, and have drawn wrong inferences from the evidence. In such a case the Court of ultimate appeal will disregard those concurrent judgments, and decide the case upon the evidence contained in the record [13 Moo. P.C. 243, 244].

In this appeal the suit was brought by the Respondents, the Widow and Daughters of Waez Ali, the Son of the Appellant, the Defendant in the suit, to oust him from the possession of certain shares in different mouzahs, or villages, together with mesne profits, which mouzahs were alleged to have been the absolute property of Waez Ali. The object of the suit was, first, to obtain a declaration of the title of Waez Ali to [233] the villages; and secondly, to establish, in their representative character, as Waez Ali's heirs, the Respondents' claim to the mouzahs, to the exclusion of the Appellant, both as the Purchaser, and as one of his Son's, Waez Ali's, heirs.

The principal question raised was, whether Waez Ali (as contended for by the Plaintiffs, the Respondents) was the actual Purchaser, and as such took an absolute beneficial interest in the mouzahs. Some of the conveyances being made in his name, and others in the names of members of the Appellant's family: namely, of his Wife and his Son-in-law; or whether, Waez Ali's, as well as the Appellant's Wife and Son-in-Law's names, were not used in the conveyances, Furzee or Benamee, (*i.e.* in trust) for the Appellant, according to the custom or usage of the Country, as was insisted by the Appellant.

The case of the Respondents rested upon the fact, that Waez Ali's name was used jointly, with the names of the Appellant's Wife and Son-in-Law, in the Conveyances, and that they were so entered in the Collector's Books. There was no evidence adduced by the Respondents to prove that Waez Ali had any means of his own to make the purchases in question, or that he had obtained from any other source such means, or that he was, in fact, the person who had made the purchases.

On the other hand, the Appellant contended that the mouzahs were purchased by him with his own moneys, for himself and for his own exclusive use and benefit, and that the Conveyances were taken by him in the Furzee or Benamee names of his Son and of his Wife and Son-in-Law; and, further, that he had been in exclusive possession and enjoy-[234]-ment of the mouzahs during his Son's lifetime, the rents having been collected by him, and entered in his own Books of account.

It appeared from the evidence, that, on the 24th of September, 1839, the Appellant purchased certain shares in the mouzah Chunderpore Khoord, which he paid for out of his own moneys, and took the Bill of Sale, or Conveyance thereof, not in his own name, but in the Furzee or Benamee names of his Wife (since deceased), and his Son, Waez Ali, also since deceased; and the nominal Purchasers' names were

* Present:—Members of the Judicial Committee.—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Joseph Napier, Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

recorded in the Collector's Books. On the 18th of April, 1848, the Appellant also purchased certain other shares in mouzah Mukdoompore Bheka, and Chuck Komalodeen in Pergunnah Nowbutpore Bulleah, being other portions of the property in suit, including the right of the rents of certain Malikana lands, the consideration-money being the sum of Rs. 3675. Of the above a 4-annas undivided share was declared in the Bill of sale to be sold to Sayyud Fidah Ali, the Son-in-Law of the Appellant, and the remaining 4-annas undivided share to be sold to his wife and Son, which Bill of sale was made by the directions of the Appellant to them, their names being used Furzee or Benamee for him, the actual Purchaser, who paid out of his own moneys the consideration-money aforesaid to the Vendors.

It appeared also, that a suit was instituted, some time afterwards, in the Civil Court of Patna, by one Sheikh Willayut Hossein, who died pending such suit, and Sheikh Dilawur Ali, his Father and heir, was substituted as Plaintiff, against the last-mentioned Vendors, and the three nominal pur-[235]-chasers of the last-mentioned property. The Plaintiff in that suit claimed a right of pre-emption in respect of that property, and sought on that ground to set aside and cancel the Bill of Sale, and that he might be allowed instead to become the Purchaser. The Defendants, the Vendors, by their answer, stated that the Appellant was the real Purchaser of the property in question, although the Deed of conveyance was in the names of his Wife, Son, and Son-in-law. The other Defendants, the Wife, Son, and Son-in-Law, by their answer, admitted that they had nothing to do with the property, as they had not paid for it, or were ever in possession. The suit was afterwards compromised.

On the 28th of December, 1848, the Appellant purchased shares of mouzah Khord, Uslee, mouzah Kurrura, mouzah Puchlea Chuck, mouzah Muckhdoom Chuck, and mouzah Moorad Chuck Dakhlee, in Pergunnah Mussonda, Zillah Patna, and took the Conveyance or Bill of sale thereof in the Furzee or Benamee names of Waez Ali, and his Wife and Son respectively.

After his Son's death, the Appellant, being desirous to have a formal declaration in writing from the Daughters of his Son, Waez Ali, with respect to the several Bills of sale and purchases aforesaid, made by the Appellant in the Furzee or Benamee names aforesaid; and, also, a formal renunciation on their parts of all right, as two of the heirs of their deceased Father, under the Furzee Conveyances, applied to them and their Mother, to execute an Ikrarnamah. Accordingly, on the 7th October, 1852, an Ikrarnamah was executed by one Lalla Juggo Lall, under a Mookhtarnamah (power of attorney), duly attested [236] and granted and signed by the two Daughters, previously with the consent of, and attested by, their Mother.

Eight years afterwards the present suit was brought by the Respondents, the Widow and Daughters of Waez Ali, in the Court of the Principal Sudder Ameen of Zillah Patna, against the Appellant, in which they claimed the estates conveyed to Waez Ali, as the heirs of Waez Ali. There was no allegation in the plaint that the shares, or any of them, were purchased with the moneys of Waez Ali, or even that the purchases aforesaid, or any of them, were made by him. By the plaint it was submitted, that the acknowledgment and admission of Furzee in the suit of Sheikh Dilawur Ali, was of no avail; and that the statement therein of the lands being Furzee was altogether unfounded. The plaint also alleged, that the Ikrarnamah was fraudulently prepared by the Appellant, without the knowledge of the first Respondent, Ulfat Fatima, and while the other two Respondents, Amantool Fatima and Bintool Fatima, were Minors. The plaint charged the Appellant with having forged and affixed the seals of the Respondents, Ulfat Fatima, and her two Daughters, to the Ikrarnamah, and with having retained the profits arising from the estates and shares since the date of the instrument, and prayed for possession and mesne profits.

The answer of the Appellant stated, that the mouzahs were never purchased by Waez Ali, and that he had no connection or concern in the possession of the property; that he was afflicted with leprosy, and had to be maintained by the Appellant, and that the Appellant was the real Purchaser and the payer of [237] the consideration-money, and possessor of the property. The answer then went on to state the several purchases made by him; and that he caused the Conveyances to be written out in the fictitious names of his Son-in-law, Wife, and Son. The answer

also pleaded the acknowledgment of the fact of the Furzee or Benamee transaction of the last-mentioned three persons, in the joint answer filed by them in the suit of Sheikh Dilawur Ali aforesaid; and the answer, also, pleaded that the above consideration-money for the purchases of the property was paid by the Appellant, and that, as proof of his being the real Purchaser, he stated that he had kept the title-deeds relating to the estate in his possession. The answer also stated, that the Ikrarnamah was written by the Respondents, when Amantool Fatima was aged eighteen years, and Bintool Fatima was aged twelve years, with the consent of the other Respondent, their Mother, and submitted that minority of females extended to the ninth year only; and denied that he had ever got any seal engraved, as alleged in the plaint, or that he had done any fraudulent act, in respect of the Ikrarnamah. He also stated that he was himself one of the heirs of his deceased Son.

The issues settled by the Court were as follows:—First, was Waez Ali, the ancestor of the Plaintiffs, the real Purchaser and in possession of the property in dispute, or Moulvie Sayyud Uzhur Ali, the Defendant? and secondly, was the Ikrarnamah set up by the Defendant genuine or not? Among the proofs of the Appellant were the answer of Syud Fedah Hossein and others in the suit of Sheikh Willayut Hossein, and also the other answer in the same suit of the Son-in-law, Son, and Wife of the Appellant, [238] in which it was admitted that the Appellant was the real Purchaser of the Property, and had paid for the same out of his own moneys, and had taken the Bill of Sale in their names, they disclaiming all beneficial interest therein, being only Furzee; in the Ikrarnamah sought to be set aside; and the two Kabooleats. The evidence of the Appellant consisted of the attesting Witnesses to the Ikrarnamah, and the other attesting Witnesses to the other instruments and Bills of Sale; there were also other Witnesses who were examined, and proved the fact of the Appellant being the real Purchaser and possessor of the lands, and of his having purchased the same with, or by means of his own moneys, and having caused the Conveyances to be taken in the names aforesaid Furzee or Benamee merely; that the late Waez Ali had no means of his own, and was, as well as his Wife and Daughters, entirely dependent on the Appellant for support, with whom they resided.

The hearing took place before the Principal Sudder Ameen (Mahomed Huneef Khan, Bahadoor) on 17th of April, 1861, and, by his judgment, he decided that the Plaintiffs were entitled, on the inference he drew from the Ikrarnamah, and that the Appellant was not the real Purchaser.

The Appellant appealed to the Civil Court of Patna.

The hearing of the appeal took place before Mr. Edgar Frederick Lutour, the officiating Judge of that Court, who by his judgment, ordered that the decree of the Principal Sudder Ameen should be affirmed with costs, without going into the evidence and admission in the suit of Sheikh Willayut Hossein, ignored by the Court below. The grounds for this Order in [239] affirmation of the decree, as stated in the judgment, were:—First, in relation to the first issue that the proceedings before the Court proved that the Appellant, during his Son's lifetime, purchased property in his Son's name, and had always acted as if his Son was the real proprietor of the estate. That the conveyances were drawn in the Son's name, and as long as the Son lived he was considered and treated as the real Purchaser. And further, that it was urged by the Appellant that all the property purchased by him was purchased in his Son's name, but with his own funds, which was probably the case; and that if the Appellant had imagined his Son would have died during his lifetime, the probabilities were he would have purchased in his own name. That, as it was, he had purchased property in the name of his Wife and in the name of his Son. Secondly, in relation to the second issue, involving the execution of the Ikrarnamah, the judgment stated, that as the Appellant would not state when his Son was married, the assertion that the Daughters left by Waez Ali were minors when the documents in question were prepared, must be considered as proved—and that as the Principal Sudder Ameen had cancelled those documents, and had declared the Appellant entitled only to his share in his Son's property as heir-at-law, the Civil Court held that his decision was quite correct, and confirmed the Orders of the Principal Sudder Ameen with costs.

The Appellant entered a special appeal against this decree to the High Court

at Calcutta, and in his petition stated three grounds of appeal.—First, that, under the circumstance, the Plaintiffs' predecessor himself had admitted and acknowledged the reality of the purchase by Appellant, in the suit of Sheikh Willayat Hossein; and that, contrary to that admission, the allegation of the Plaintiffs regarding the reality of their predecessor's purchase could not be admitted by the Court, either under the Mohammedan or the Regulation Laws. Second, that in cases of dispute about the real or ostensible nature of a purchase it was necessary to inquire and investigate into the payment of the purchase-money and the possession and seisin of the subject of sale, and that the Lower Courts were not right in decreeing in favour of the Plaintiffs without any regard or attention thereto; and third, that from the decision of the Judge himself, it was established, that the disputed property was purchased from the private funds of the Appellant, in the name of Waez Ali, and therefore, that the passing of a decree in favour of the Plaintiff was opposed to law and justice.

The hearing of the appeal took place on the 6th of February, 1863, before Sir Barnes Peacock, Chief Justice, and Mr. Justice Kemp, two of the Judges of the High Court.

By their judgment they stated as follows:—"The question in this case arising between the Son's Widow and the Father, is, whether the property was the Father's or the Son's? After the Son's death, when the Son cannot come forward as a Witness, the Father says that the property which was conveyed to the Son, and apparently paid for by him, was paid for with the father's money, and that the conveyance was to the Son, and in his name, Benamee for the Father. The Judge has found that the property was the Son's [241] and not the Father's, and consequently that the Father is entitled by inheritance to a share only. We cannot say that the Judge was wrong. The question was purely one of fact, which cannot be disputed in a special appeal. If persons will conceal in their Conveyances the real state of facts, and have their own property conveyed Benamee, it matters not for what reason, whether for the purpose of defrauding their Creditors, or for any other purpose, they have only themselves to blame if the Courts, acting upon the Conveyances as they find them, commit a mistake in awarding the property according to the Conveyance, though it may be contrary to a secret understanding between the parties themselves. The appeal must, therefore, be dismissed with costs and interest."

The appeal was from this decree of affirmance.

As the Respondents did not appear, the appeal was heard *ex parte*.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—In truth there are but two judgments against the Appellant, as the special appeal to the High Court was founded on a mere question of fact, and not of law. That Court was, therefore, by the Civil Code of Procedure Act, No. VIII. of 1859, sec. 372, incompetent to entertain such an appeal. The Courts below have proceeded upon inferences, and disregarded the evidence produced by the Appellant, which conclusively showed that the transaction was Furzee, or trust, the lands having been purchased by the Appellant, with his own moneys, and that he had been in exclusive possession and enjoyment thereof. Such a transaction is the common practice in [242] India. *Gopeekrist Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53), where the authorities regarding Benamee transactions are collected (*ibid.*, p. 69-71). The fact that the name of the Purchaser recorded was that of the Appellant's Son, or that the money in the Bill of sale was mentioned as paid by him is not conclusive of ownership. *Chowdry Deby Persad v. Chowdry Dowlut Sing* (3 Moore's Ind. App. Cases, 347). The *onus* of proving that the purchase was made by the Appellant in the name of his Son, Waez Ali, and other members of his family not as Furzee or Benamee, but for the absolute use and benefit of his Son, lay upon the Respondents, who failed to prove the same. Indeed, Waez Ali, in a suit by Sheikh Willayat Hossein, acknowledged that the purchase of a portion of the property claimed was made in his name, and in the name of others, merely Furzee or Benamee for the Appellant, his Father, for he disclaimed all right to, and interest in, the property so purchased, and as the Respondents claim title as Waez Ali's heirs, they are estopped from denying or disputing the title of the Appellant in respect thereof. The decrees of the Court below cannot be maintained. The Principal Sudder Ameen, in his decree, instead of adjudicating upon the evidence, rested his decision in

favour of the Respondents' claim entirely upon a weak and unsound inference, or presumption, that the Appellant was not the real Purchaser of the property, which he assumed from the fact that, after the death of the Appellant's Son, he had, as he supposed, fraudulently taken from the two Respondents the Ikrarnamah; but that inference was rebutted by the evidence. The decree of the officiating Judge of Patna wrongly [243] affirmed the decree of the Sudder Ameen, though not on the same grounds; the Officiating Judge held rightly, from the evidence, that it had been proved in the suit that the Appellant was the real Purchaser, but neutralized such finding by holding that the Appellant had always acted as if his Son was the real proprietor, and that he was treated as such, which conclusion was contrary to the evidence and admissions. The decree of the High Court is wrong in stating that the Officiating Judge had found, that the property was the Son's and not his Father's, the Appellant's, which was not the fact. Again, the decree not only gave undue weight to, and drew an erroneous legal inference or presumption from, the fact that the Conveyances were taken in the name of the Son, and entirely ignored the well-known custom of the Country in respect to Furzee or Benamee purchases in the name of a Son, or other member of the Purchaser's family. It is now an admitted principle of Indian Law, that no presumption of advancement arises from the use of the name of a son, any more than the use of the name of an entire stranger, but on the contrary, that the presumption arises that the transaction is Furzee or Benamee, a trust for the person paying the consideration-money, until the contrary is proved.

Their Lordships' judgment was pronounced by

The Right Hon. Sir James W. Colvile.—In coming to the conclusion which their Lordships have come to in this case, they feel that they are not departing from the wholesome rule—that, unless they are clearly satisfied that the finding of two concurrent Courts in India upon a question of fact was wrong, such finding will not be disturbed here. For if the [244] judgments in the Respondents' favour are carefully examined, it will appear, either that there has been no finding at all of the facts which it was necessary to find, or that those facts have been found in favour of the Appellant. Their Lordships may dismiss the judgment of the High Court with the respect due to that Tribunal, by saying that the learned Judges who then sat, appear to have conceived, rightly or wrongly, that the question in dispute between the parties was one of fact, and that they, under the rules which regulate the hearing of special appeals, had no jurisdiction to disturb the finding of the Court below.

Then, with respect to the first judgment—the judgment of the Court of First Instance—it appears to their Lordships, that the Judge never dealt with the real question at issue between the parties, namely, the question, whether this property was held Benamee by the Son and Wife of the Appellant, or whether it was held by those persons beneficially, and for their own interest, and in their respective shares.

There were two issues before the Court, one of which seems to be not very accurately framed. It is in terms, whether the Ikrarnamah was genuine or not? which apparently is meant to raise the question whether it was a forgery or not.

The real question between the parties and that which appears to have been decided by the Judge was, however, whether the parties who executed, or purported to have executed that document were, at the time when they so executed it, infants or of full age. The Principal Sudder Ameen has found that fact against the Appellant; and the learned Counsel at the Bar have not called upon us to inter-[245]-fere with that finding. But what was the inference which the Principal Sudder Ameen drew from the fact so found? It was that this document, which was a mere declaration of trust, and a document intended only to facilitate the mutation of names, *i.e.* the transfer of the property, into the name of the Appellant, being executed in a manner which was not binding on the parties who purported to have executed it, was a fact fatal to the Appellant's title; and that from the fact so found it necessarily followed that the whole of the Respondents' case was established against the Appellant, and that the property was really held by those who were the ostensible

Owners of it, in their own right, and not Benamee for the Appellant. That sweeping inference will not stand a moment's examination.

The case then goes by appeal to the Zillah Judge, who, so far as he finds any facts, appears to have found the material fact in favour of the Appellant; for he begins his judgment by stating, that the proceedings before the Court proved that the Appellant, during his Son's lifetime, had purchased property in his name, and always acted as if the Son were the real proprietor of the estate. He goes on to state the Appellant's case:—"It is urged by Uzhur Ali that all property purchased by him was purchased in his Son's name, but with his own funds, which is probably the case." And, therefore, he has either done what the Principal Sudder Ameen did, namely, omitted to come to any finding at all on the material issue in the case, or he has found that issue in favour of the Plaintiff.

That being the effect of the judgments, it appears to their Lordships that there has been really [246] no decision against the Appellant in the Courts below, which is capable of being supported on the grounds upon which it professes to rest. The result is, that it lies upon their Lordships to decide the case upon the evidence in the record, putting those decisions entirely out of consideration.

The case is simply this. The Respondents bring their suit in the nature of an ejectment suit, to recover, we will take it, that share of the property which would have belonged to their Father, supposing that the purchases originally taken in the joint names of their Father and the Wife of the Appellant, had been taken for them beneficially. The Defendant alleges that of that property, of which he seems to be the now ostensible Owner, he was all along the beneficial Owner; that it was purchased by him from his own funds, Benamee, in the names of his Wife and Son, and that every act of ostensible ownership which was done was consistent with that state of the title. It is not a novel thing in India that that state of things should exist. It has been repeatedly brought before this Committee; and the law relating to it was reviewed in the case of *Gopeekrist Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53). Of course we cannot apply to the decision of this case, which is one between Mahomedans, any of the reasons which in the judgment delivered at this Board in that case, are drawn exclusively from Hindoo law. It is, however, perfectly clear that in so far as the practice of holding lands and buying lands in the name of another exists, that practice exists in India as much among Mahomedans as among Hindoos, and the judgment in *Gopeekrist Gosain* [247] *v. Gungapersaud Gosain* [6 Moo. Ind. App. 53] and the cases therein referred to are, at all events, authority for the propositions that the criterion of these cases in India is to consider from what source the purchase-money comes; that the presumption is, that purchase made with the money of A, in the name of B, is for the benefit of A; and that, from the Purchase by a Father, whether Mahomedan or Hindoo, in the name of his Son, you are not at liberty to draw the presumption which the English law would draw, of an advancement in favour of that Son. Again, the mere fact that this property was purchased, not in the sole name of the Son, but in the name of the Wife as well as of the Son, affords a strong argument in favour of the hypothesis that it was a Benamee purchase, for there was no such community of interest between the Wife and the Son as would render it probable that they had been made joint Owners of the property; and the reason for putting two names rather than one into a trust applies almost as strongly in India as it would in this Country.

Again, when we come to the evidence which has been given in the suit, it appears to their Lordships to be all on one side. As we have said before, the evidence of acts of ostensible ownership prove nothing; but we have proof, so far as there is any proof in the suit, of the source from which the money proceeded, that the money was the Father's.

We have, moreover, the admission of the Son, which though it directly applies only to one portion of the property, throws a light upon, or at least tends to corroborate, the direct evidence which has been given as to the nature of the other transaction. So [248] that, without going through that evidence in detail, it is sufficient to say that, in their Lordships' opinion, there was but one conclusion to which, if the case were fairly tried out, the Judges of the two Courts which dealt with the question of fact, ought to have come.

On these grounds their Lordships will humbly advise Her Majesty that the decisions of all the three Courts below be reversed, and that the suit of the Plaintiffs be dismissed, with costs. They must also pay the costs of this appeal.

BAMASOONDERY DASSYAH and Others,—Appellants; RADHIKA CHOW-DHRAIN,—Respondent * [Dec. 1, 3, 1869].

On appeal from the High Court at Fort William, Bengal.

- A suit by a Zemindar against a Tenant to enhance rent, proceeds on the presumption that the Zemindar, holding under the Perpetual Settlement, has a right, from time to time, to raise the rent of all the rent-paying lands within his zemindary, according to the current rate, and that presumption prevails unless, first, the Zemindar is precluded from the exercise of that right by a contract binding on him; or, secondly, if the lands for which the rent is sought to be enhanced can be brought within one of the exceptions recognized by Ben. Reg. VIII. of 1793. It is also to be presumed, that the Defendant has some valid tenure or right of occupancy of the lands [13 Moo. Ind. App. 262]. Lands held at a fixed uniform rent anterior to the Decennial Settlement, on failure of evidence of payment of a fluctuating rent by the Zemindar on whom the *onus probandi* lies, held to be a dependent Talook, within the meaning of the 51st section of Ben. Reg. VIII. of 1793 [13 Moo. Ind. App. 268]. It is unnecessary, in order to bring a Talook within the scope of the 51st section of that Regulation, that it should be registered at the time of the Decennial Settlement. It is sufficient to show that the tenure existed, and was capable of being registered at the time of that Settlement [13 Moo. Ind. App. 267, 268].

The suit out of which this appeal arose was instituted by the Respondent to enhance the rent of a Talook within the zemindary of Kismut Pergunnah [249] Hogla, the Respondent, the Zemindar, alleging that a six annas share of the zemindary was hers by purchase. The principal question in the suit was, whether the Talook had been held at a fixed rent from before the Decennial Settlement so as to bar the claim of the Respondent for enhancement of rent.

The facts were these:—

Roopram Ghose and Joykissen Ghose, ancestors of the Appellants, purchased the Talook from a former Zemindar named Ramchunder Bose, as far back as the years 1152, B.S. and 1157, B.S., by two separate deeds of sale, at a jumma of Rs. 59. 13. 2. 2, which was afterwards converted by a settlement-paper of date 1158, B.S., into the sicca jumma of Rs. 158. 4. 15. 1, which rent was then fixed, and had been uniformly paid up to the time of these proceedings. Subsequently, Kissen Sing and Gungarain, two Brothers, obtained the proprietary right to the zemindary from Ramchunder Bose before the Decennial and Permanent Settlement was made with them.

In the year 1203, B.S. four of the Talookdars presented a petition for Kharij dakhil to the Collector of Jessore praying, that after inspection of the documents filed by them in 1203, Kharij dakhil might be made and [250] they might pay the amount of revenue direct to the Collector, instead of through the Zemindar. The Defendant, in these proceedings, was Gungarain Roy, the then Zemindar, who was summoned but did not file any answer.

The documents filed by these Talookdars were described in the decision of the Collector, dated the 2nd of September, 1800. They consisted, among others, of the deed of sale of 1151, B.S., from Ramchunder Bose, and a document confirming the jumma in such deed of sale, and a Bundobust signed by Kissen Sing, a former Zemindar and elder Brother of the Defendant, Gungarain Roy, in the names of Roopram Ghose and Joykissen, stating the annual rent to be Rs. 158. 4. 15. 1, together with

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. Sir Joseph Napier, Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

zemindary expenses written in the year 1199, B.S. The Collector made an Order for the filing of a jumma-wasil-bakee and other papers to show the amount of rent and the quantity of land on perusal of which the Order was to be made. A further Order was made on the 7th of July, 1801, directing the Petitioners to institute a suit in the Civil Court, on the ground that they had not proved that they were the only Talookdars entitled to have the Talook entered in their names. No further steps appeared to have been taken in these proceedings by the Talookdars.

On the 9th of July, 1810, a jumma-wasil-bakee of the Bengalee year 1211 was filed in the collectorate, in which the rent paid by Roopram Ghose and Joykristo Ghose, for the Talook in question, was stated to be Rs. 158. 4. 15. 1. This jumma-wasil-bakee was filed by a predecessor of the Respondent, and a copy was filed by a ten annas Shareholder in a suit, exactly similar to the present, instituted by him in [251] the name of his Wife, Daymaoi Chowdrain and others in which his claims were totally disallowed.

About the year 1849, one Radhamadhub Ghose, appeared as Claimant, seeking to release property which had been attached for a judgment debt, and which was described in the Order of the Moonsiff of Noyabad allowing the claim as "the two annas eight gundahs share of the dependent Talook, etc., appertaining to the zemindary of Doorgapersaud and Tarapersaud Roy Chowdry, the Zemindars of Pergunnah Hogla, and standing in the names of Roopram and Joykristo Ghose, at an annual rent of S. Rs. 158."

The former Zemindars, Kissen Sing and Gungarain, had each one Son, Door-gapersaud Roy Chowdry and Tarapersaud Roy Chowdry, who divided their properties among themselves in ten and six annas shares respectively. The Respondent was the Wife of Tarapersaud Roy Chowdry, the six annas Shareholder.

Up to the year 1859, until the institution of the suit, out of which this appeal arose, no steps were taken by any of the proprietors of the zemindary to enhance the rent of the Talook, while the receipts from the year 1245, B.S., to the year 1264, filed by the Defendants, showed payment in respect of the six annas share belonging to Tarapersaud Roy Chowdry of C. Rs. 63. 3. 4 per annum, corresponding to S. Rs. 158 4. 15, 1 for the whole Talook.

On the 30th of June, 1859, the Respondent brought this suit against the Appellants and others in the Court of the Principal Sudder Ameen of the Zillah of Jessore, pursuant to a notice served on the Defendants, in accordance with sections 9 and 10 [252] of Ben. Reg. V. of 1812, in which she prayed to have the rents for their holdings declared and assessed according to the rates current in the Pergunnah, at Rs. 2280. 5a. 12g. 2c., and the rent, according to such assessment, paid from the date of the suit.

Radhamadhub Ghose, one of the Defendants, filed his answer to the following effect: first, he denied the receipt of the notice; secondly, he alleged that the holding in question was at a fixed assessment of Rs. 158 a year as a Talook; that he held a 12 gundas share in the holding; that his Father, Gungapersaud Ghose, purchased this share of one Fuckerchand, and paid for the same, and that from such time he paid his *quota* of this assessment, and that no new assessment could be made; and thirdly, that the rates stated by the Respondent were too high, and that the land did not measure so much as alleged.

To this answer the Respondent, by her replication, stated, that the notice had been served; that the holding was not a Talook, as alleged; or that it was subject to a permanent or fixed rent; third, that the rates claimed were the current rates of the Pergunnah; and, further, that she had already obtained decrees for rent against other Ryots of the estate, at such rates.

The Appellants, by their answer, stated, first, that the Respondent was merely the ostensible Proprietor, and that her Husband, Tarapersaud Roy Chowdry, was the actual possessor; second, that Radhamadhub Ghose and Bromonoi Dossee, the other Defendants, had no interest in the property; and that no notice had been given; fourth, that the Appellants were not common Ryots, as they paid the Government revenue, through any person who might be the Zemindar; [253] that long before the Decennial Settlement, the late Runchunder Bose Chowdry, the former Zemindar of Pergunnah Hogla, sold the disputed Mehals at different times, and by different Deeds of sale, to their ancestors the late Roopram Ghose and Joykissen Ghose, with

the power of having the same entered in the Record Offices in their own names; and their ancestors got into possession, and paid a fixed assessment to the Zemindar: that in 1207, B.S. (1799 and 1800, A.D.) they applied to be admitted on the State Record, and a summons was served on Gangunarain Roy Chowdry, the ancestor of the Respondent; his deposition was taken, and the documents were filed; and on the 2nd of September, 1800, an Order was made for filing the collection papers; that on the 7th of July, 1801, an Order was made, requiring the Appellants' ancestors to prove their claim; that no further proceedings being taken, the holdings were comprised in the zemindary, and the rents paid accordingly; and that, therefore, the suit could not be allowed: fifth, that even if they were to be considered common Ryots, yet, as the rents had been paid at a uniform rate, from a period long anterior to twelve years before the Decennial Settlement, the assessment was protected from enhancement of rent by Ben. Reg. VIII. of 1793, and other Regulations; and lastly, that the rates sought to be assessed were too high.

The Respondent, by her replication to this answer, alleged that her Husband had sold the share to her, and that she was in possession in her own name, in the Sudder and Mofussil, as regards Government, and those under her, and that the objection on that score was irrelevant; that as Radhamadhub Ghose and [254] Bromomoi Dossee were in possession, and by their answer claimed possession, they had been properly made parties; that the notice was duly served; that the allegation as to purchases by the Appellant's ancestors, with the privilege of having their names entered in Records of the State, was wholly false, and the alleged Deeds of sale and Settlement paper fabricated; that the Appellants had petitioned the Collector to have their names recorded on a false statement, but that the petition had been rejected on the 7th of July, 1801; that if the statement had been true, the claim would not have been allowed to remain dormant, and without measures being taken; that the Appellants had filed two fabricated Kawalas and a Settlement paper; and, as the assessments stated, did not agree, and were inconsistent, they rather proved that the rates were variable; that the statement that the rent had been paid at a uniform rate from twelve years before the Decennial Settlement was untrue; and lastly, that the rates claimed were the rates current in the Pergunnah, and that she had obtained decrees against several Tenants of the estate for assessment at those rates.

The Principal Sudder Ameen filed the following issues for decision: whether the notice had been served or not? and whether the Mehal in dispute was liable to enhancement or not? and, if liable, then, what was the amount of rent? at what rate? and upon what quantity of land?

The evidence of the Plaintiff consisted of a copy of the notice, and of depositions of Witnesses referring to the current rates for lands held on Ryotee tenure.

The Defendants examined nine Witnesses, who [255] deposed that the Defendants were holders of the shares of the Talook at a fixed rent, not liable to increase or decrease. The documentary evidences adduced on their behalf consisted of the Kabalahs and Chuckbunders granted by Ranchunder Bose to Roopram and Joykissen Ghose, the Chuckbunder (or Settlement paper) fixing the jumma at Rs. 158. 4. 15. 1. They also filed a copy of a copy of a jumma-wasil-hakee, or statement of collections from, and balances due by Tenants, from 1211, said to have been prepared by Doorgapersaud Roy Chowdry, and to have been filed in another suit, to which the Respondent was not a party.

The case came on for hearing on the 30th of March, 1861, before the then Principal Sudder Ameen, who decided, that the Appellants were not dependent Talookdars "paying the Government Revenue through the Zemindar, like co-sharers. That they had not been able to produce any document granted by the proprietor containing mention of the quantity of land, and the amount of rent, to prove their assertion that the rents of the lands had been paid at a uniform rate, without increase or decrease, for a long time, and that accordingly there existed no reason to prevent the enhancement of rent. That as the Appellants had contended that the quantity of land, and the rates of rent, were less than what had been stated by the Respondent, it was necessary to have the lands measured, and the rates of rent investigated by an Ameen, or Commissioner." No appeal was preferred from this interlocutory decision.

On the 30th of March, 1861, the Principal Sudder Ameen issued his warrant to an Ameen, directing him to measure the lands, and make a local investigation [256] as to the rates. The Commissioner made his investigation and report thereon.

The case came on for hearing on the 21st of May, 1862, when Baboo Ohloya Coomar Dutt, the Principal Sudder Ameen, recorded his judgment. He stated, that he did not consider the Kabalahs of 1152 and 1158, and the bundobust, etc. (which the Respondent charged as fabricated) had been proved; that they did not bear the signature of the Collector of the District, though it had been urged they had been filed in his Court: that the course alluded to ended in a dismissal, and the Petitioners had been directed to seek redress by a regular suit, but that no such suit was ever brought. That from the Kabalahs, it appeared, that the jummas were for various amounts "for different portions, and that they had been subsequently augmented by abwab charges." He further stated that the Appellants did not mention in their defence the amount of the jumma or assessment paid by them; and have totally failed to prove that their Talook ever had its name in the Collectorate papers of the Permanent Settlement, or that its jumma, whatever it might be, had been paid at a fixed rate from twelve years prior to that Settlement. That the tenure, therefore, ought to be held assessable according to the current rates. He found that the prescribed notice had been served. He disallowed any assessment on the uncultivated lands, and found the Respondent's share of the assessment for the remainder ought to be Rs. 1503. 3. 2, less 10 per cent. for collection expenses, making a net annual assessment payable to the Respondent of Rs. 1352. 14. 2, which amount he accordingly decreed to be paid to her from the date of suit, with the costs in proportion; and decreed that [257] the Appellants were to recover from the Respondents their costs, to the extent of the claim disallowed.

Against this decree the Appellants appealed to the Court of Dacca. The Respondent being also dissatisfied with the decree, filed a cross appeal, against so much of the decree as deducted 10 per cent. for collection charges, and disallowed any assessment upon the uncultivated lands.

The appeal was heard on the 26th of February, 1864, by the Judge of Dacca (Mr. F. B. Simson). The material portions of whose judgment were as follows:— "The Vakeel for the Appellants brought a copy of a petition, said to have been presented by an ancestor of the Plaintiff to the Soondurbans Commissioner, in which the existence of the Talook was admitted; this petition was not proved; a copy was not presented to the Court below; and as there were difficulties connected with names and signatures, the Court refused to receive it. In the first place, the Kabalahs were entirely disallowed, and put aside as totally useless. The Lower Court disallowed them, though nearly a hundred in number; they are written on thin Bengally paper, with black fresh ink, and the Appellants elected not to establish them. The Dakhilahs were also similarly disallowed. It is true, that the Plaintiff comes into Court suspiciously late, and this casts distrust on the claim; but nothing to compare to the distrust cast on the Defendant's plea, when it is supported by such evidently false documents as the Kabalahs. Besides, the introduction of Act, No. X. of 1859, at first considered so averse to Zemindars, would naturally rouse them to examine their old titles and their possession, with reference to such Tenants whose position the new law would benefit. [258] The case decided in the Sudder Court, on the 31st of May, 1859, is in point. In it similar claims of Tenants in the same estate were completely disallowed; and it is evident that proceedings, such as these, were commenced in the estate a considerable time before the introduction of the Act, No. X. of 1859. The Talookdars entirely failed to prove the existence of their Talook; the Bundobust fixed was ignored, and the Dakhilahs considered insufficient, and the full claim of the Plaintiff to enhanced rates decreed. The Deeds of sale are entirely disallowed; there are no intermediate proceedings, which establish either the existence of the tenure, or its jumma, or the payment of a uniform rent; there is nothing binding brought against the Plaintiff; the collectorate proceedings terminated in nothing; they merely prove the attempt to separate the Defendant's Talook from the present estate; but the attempt was unsuccessful; and the papers do not establish the existence of the asserted Talook, at the asserted jumma, twelve years antecedent to the Decennial Settlement. The copies of these old Deeds, too, are unsatisfactory; the jumma is not clearly and

definitely mentioned from the beginning; there is no reply on the part of the Zemindar; and the proceedings are as nearly *et parte* as possible, and, as no decision was arrived at, merely show an attempt at a claim, and in no way establish the validity of that claim. The jumma-wasil-bakee certainly showed a jumma, as the Defendants assert; but it was filed in the year 1859, in a case in which the Plaintiff was not a party; and it merely showed the jumma for 1211. It did not show the nature of the Talook; and though the jumma of the Talook in question in that case was correct, it does not suffi- [259]-ciently prove that the Defendants in this case held a valid tenure antecedent to the Decennial Settlement. The want of intermediate proof on the part of the Plaintiff, as urged by the Appellants, does not affect the case; the Plaintiff avowedly keeps back her proof; and demands that the Defendants prove their title, before her proofs can be called for. She is correct, therefore, in requiring proof of the existence of the asserted tenure, twelve years antecedent to the Decennial Settlement, before she can agree to offer her proofs. The Defendants should have fortified themselves by securing their old title long ago, by any of the legal means for security of such titles, which the law allowed. On the whole, I consider, that the Appellants have failed to show that they hold any particular Talookdary tenure at all, at any certain jumma, or from any particular date, or from twelve years antecedent to the Decennial Settlement, as is necessary to prevent enhancement after notice under the law in force, before the Act, No. X. of 1859. The notice is proved to have been served. The rates were fixed fairly by the Principal Sudder Ameen, after local inquiry; but the deduction of 10 per cent. for collections is not customary in the case of Ryots, and the Defendants have not established that they are in any higher position. The ruling as to non-assessment of uncultivated land need not be interfered with; it is not permanently binding, and may alter with the conditions of the land. The slight modification on this point ought not to make any difference in the matter of costs."

The Appellants appealed to the High Court against this decision.

On the 17th of December, 1861, the appeal came on for hearing, before the Justices Loch and Seton- [260]-Karr, when the Court, by its judgment, considered the tenure not to be protected by the provisions of section 51, Reg. VIII., of 1793; but as the Defendants could not be considered as common Ryots, the Court considered that they were entitled to have a deduction for expenses of collection, as decided by the first Court. They, therefore, modified the judgment of the Lower appellate Court to that extent, and gave costs in proportion.

Against this decree the Appellants brought the present appeal.

Sir R. Baggallay, Q.C., and Mr. Cochrane, for the Appellants.—First, the Appellants' estate constitutes a Talook, and has been held from a date long prior to the Decennial Settlement, at a fixed and uniform rent, as appears by the Jumma-wasil-bakee, and is not liable to enhancement of rent under Ben. Reg. VIII. of 1793, sec. 51, *Rajkishen Roy v. Bydonath Nundee* (Dec. Sud. Dew. 1858, p. 902); Act, No. X. of 1859.

Secondly, the *onus* of proving that the Talook is held at a fluctuating rent is on the Respondent, the Zemindar, who has adduced no evidence to that effect, *Doyamoyee Chowdrain v. Nundocomer Dey* (Hayes' High Court Dec. 1863, Vol. 2, p. 220); *Mussamut Mohamoya Dossee v. Mussamut Doya Moya Chowdrain* (7 Sutherland's W.R. 63); *Rudhika Chowdrain v. Bholanath Ghose* (15 Dec. Sud. Dew. 1859, p. 677); and not the Talookdar Ben. Reg. VIII. of 1793, sec. 51.

Third, the right of the Respondent to bring the suit is barred by the Ben. Regs. of Limitation, III. of 1793, sec. 14, and II. of 1805, cl. 3, sec. 3; Macpher- [261]-son's New Civil Code of Procedure, p. 68 [Ed. 1860], as no cause of action has arisen twelve years before the suit was commenced, *Mussamut Chundrabullee Debia v. Luckhea Debia Chowdrain* (10 Moore's Ind. App. Cases, 214).

Mr. Doyne, and Mr. Cave, for the Respondent.

The Court below was right in holding that the Appellant's lands, being Ryotty were liable to be assessed, under sec. 49 of Ben. Reg. VIII. of 1793, at the current rates of the Pergunnah, in respect of the lands held by them in the zemindary, as the Appellants failed to prove that they were exempt from such assessment, *Doorgapershad v. Clements* (6 Ben. Sud. Dew. Rep. 179). If the lands were a Talook, as contended by the Appellants, within the meaning of the 51st section of Ben. Reg.

VIII., to be effective, it ought under the 48th section of that Regulation to have been registered at the time of the Decennial Settlement, otherwise it is void for non-registry. It has been found by the Court of first instance as a fact, that the notice of assessment, under sections 9 and 10 of Ben. Reg. V. of 1812, has been regularly served on the Appellants; and that Court has also determined the quantity and description of the lands held by the Appellants. These facts were binding on the High Court, and it is not now competent for the Appellants to call such finding in question. The Appellants cannot take advantage of the Regulations of Limitation cited by them, as it has not been pleaded or raised as a distant issue, but if available those Regulations do not apply, *Doorgapersaud Roy Chowdry v. Tarapersaud Roy Chowdry* (8 Moore's Ind. App. Cases, 308); *Gunga* [262] *Gobind Mundul v. The Collector of the Twenty-four Pergunnahs* (11 Moore's Ind. App. Cases, 345). Act, No. X. of 1859, does not apply to this case, as the suit was brought before it came into operation.

Their Lordships' judgment was reserved, and pronounced by

The Right Hon. Sir James W. Colville (Dec. 13, 1869).—The only question upon this appeal is, whether the Respondent is entitled to enhance the rents of certain lands held by the Appellants within the zemindary of which the Respondent is the Owner of a six-anna share. In the Courts below some questions were raised touching the Respondent's title to her share; the sufficiency of the notice, which is the statutory commencement of such a suit, and the justice of the particular assessment, supposing that the rents were liable to enhancement at all; but these are no longer in dispute.

A suit to enhance rents proceeds on the presumption that a Zemindar holding under the Perpetual Settlement has a right, from time to time, to raise the rents of all the rent-paying lands within his zemindary, according to the Pergunnah or current rates, unless either he is precluded from the exercise of that right by a contract binding on him, or the lands in question can be brought within one of the exemptions recognized by Ben. Reg. VIII. of 1793; and it also assumes, that the Defendant has some valid tenure or right of occupancy in the lands which are the subject of the suit. Before the recent modification of the law (which, as Act, No. X. of 1859 had not [263] come into operation when this suit was commenced, does not affect the case), the effect of this presumption in favour of the Zemindar was undoubtedly to relieve the Plaintiff in a suit for enhancement from much of the burden of proof, which would have laid upon him in an ordinary suit, and to shift it upon the Defendant. Regulation VIII. of 1793, however, does not apply an uniform rule to all tenures and rights of occupancy. It may be broadly said, that it divides them into two great classes, viz., Talooks within the meaning of its 51st section; and Ryotty and other under-tenures for which provision is made by the 49th section. If it be conceded that the law casts upon those who claim the benefit of the latter section the whole burden of proving that their land has been held at a fixed rent for a period commencing at least twelve years before the date of the Decennial Settlement, it is clear that the 51st section is more favourable to the holders of Talooks within its meaning, by imposing upon the Zemindar the burden of showing that he is entitled to raise the rent either by special custom, or by contract, or by reason of certain specified conduct on the part of the Talookdar. It follows, that in every suit for enhancement of rent, the nature of the tenure is a material question, irrespective of the question, whether the rent is fixed or variable, since upon the former question depends the extent and nature of the proof which the Plaintiff is bound to give.

In the present suit the Respondent has come into Court treating the Defendants to the suit as Ryots, having a right of occupancy in certain lands at a variable rent. The case set up by the Appellants was that they were Slikmy Talookdars; that they [264] and their ancestors had become so many years before the Decennial Settlement; and that they held the Talook at a fixed rent. In this state of things, it is obvious that the issue settled by the Principal Sudder Ameen, viz. "whether the Mehal in dispute is liable to enhancement or not," is not sufficiently pointed, because in order to determine not only that issue, but also the mode of trying it, it is necessary to determine the preliminary question, whether the tenure of the

Appellants was or was not a Talook within the meaning of the 51st section of Ben. Reg. VIII. of 1793.

To the consideration of this question their Lordships will first address themselves, and they will assume that as the law stood before Act, No. X. of 1859, came into operation, the burden of establishing the affirmative of it lay upon the Appellants.

The Appellants produced in the Courts below two Kabalas and a Settlement paper, all dated long before the Decennial Settlement, in order to prove and explain the creation of their tenure; and a number of Dakhilas, or receipts for rent, to show the payment of rent at a uniform and fixed rate. The Courts in India have rejected these documents as spurious, or at least untrustworthy; and their Lordships accept that finding, and propose to act upon it, by leaving them out of consideration.

The fact, however, remains, that the Appellants derive title from Roopram Ghose and Joykristo Ghose, who are admitted in the replication to have held the lands in question under one Ramchunder Bose, from whom the zemindary passed to Kisshen Singh and Gunganarain (through whom the Respondent derives her title), some time before the Decennial Settlement. The fact is, therefore, admitted, that the tenure of the Appellants, [265] whatever it be, existed before and at the time of the Decennial Settlement. The proceedings before the Collector at least prove, that as early as the year 1797 the then holders of that tenure asserted that it was a Talook, capable of being separated under Ben. Reg. VIII. of 1793, from the zemindary, and entered in the Collector's Books as a Talook, paying revenue directly to Government.

It appears from these proceedings that the Zemindar, although he did not at first appear, ultimately came in and resisted the demand, but that no final decision was come to. It does not appear what were the grounds of his defence, and it is quite consistent with the evidence, that he admitted the existence of a Talook, but contended either that it was held at a variable rent, or that, by reason of some beneficial interest reserved to the Zemindar, it ought not to be separated from the zemindary, but to continue a dependent Talook. Again, by comparatively modern Dakhilas, produced and proved in the suit, it appears not only that rent at the uniform rate of C. R. 168. 4. being the equivalent of S. R. 158. 4. 15. 1. has been paid and received for this holding from 1245 to 1264 B.S., or from 1838 to 1857; but that in those Dakhilas, the holding was described as "Talook, Roopram Ghose and Joykristo Ghose." The notice, which was the commencement of this litigation, was served in the year 1264 B.S. The Jumma-wassil-bakee is, so far as it goes, corroborative evidence of the Appellant's case; inasmuch as it shows that by a document which, from its nature would seem to have proceeded from the Cutcherry of the Zemindar, and was filed in the Collectorate in the year 1810, the lands in question are described as "Talook, Roopram Ghose [266] and Joykristo Ghose," and as held in 1804 at a rent of S. R. 158. 4. 15. 1. Their Lordships, however, do not lay much stress on this document, inasmuch as the Respondent disputes its binding force on her, and the evidence concerning it is scanty, and not very satisfactory.

The evidence, however, above stated, seems to their Lordships sufficient to establish at least a *prima facie* case, that the holding of Roopram Ghose and Joykristo Ghose, which existed before and at the date of the Decennial Settlement, was a Talook, and is identical with the present holding of the Appellants. Such a case called for an answer from the Respondent, and no answer, in the way of evidence, has been given by her to it.

It may be added, that the judgment of the High Court seems to treat the tenure as being in terms a Talook, and even a Talook in existence at the time of the Decennial Settlement, though afterwards it speaks of it as a Talook created at some unknown period, but having a fluctuating rent. The judgment, too, of the Principal Sudder Ameen, which also allows the deduction of 10 per cent. for the expenses of collection, seems to treat the tenure as an intermediate tenure, *i.e.*, something higher than a mere Ryot's hereditary right of occupancy.

It is said, however, that the tenure, if a Talook, is not a Talook within the meaning of the 51st section of Reg. VIII. of 1793, unless it is shown to have been registered under the 48th section of that Regulation.

This proposition is undoubtedly supported by the cases, *Maharaja Kishen Kish-wur Manik v. Ram Guttee Burdun* and *Kali Das Neogee*, decided on the 30th [267] of June and 10th of August, 1847, reported at pp. 292 and 413 of the Bengal Sudder Dewanny Adawlut Decisions for that year; by *Ramkoomer Moostojee v. Roopmarain Purdham*, decided on the 29th of August, 1850, and reported at p. 451 of the Decisions for that year; and by *Nubokishen Mookerjee v. Kalepersad Roy*, decided on the 31st of May, 1859, and reported at p. 607 of the Decisions for that year. But it is not consistent with the case of *Rajkishen Roy v. Bydonath Vandee*, decided on the 30th of April, 1858, and reported at p. 902 of the volume of Reports for 1858, in which two of the Judges, who afterwards decided the case of 1859, extended the benefit of the 51st section to the tenure of a Kudeemee Ryot—a tenure which their Lordships apprehend was not subject to be registered under the 48th section, and was certainly not shown to have been so registered in fact. And this doctrine of the necessity of registration has been questioned and overruled by the cases decided in the High Court on the 28th of February, 1863, *Doyamoyee Chowdrain v. Vundaroomer Dey*, and the 23rd of January, 1867, of which the first is reported at Vol. 2, p. 220 of Hayes' Reports of the decisions of the High Court for 1863, and the other case, *Mussamat Mohamoya Dossee v. Mussamat Doya Chowdhraim*, is reported at p. 63 of the 7th volume of the "Weekly Reporter."

The effect of the authorities in India seems to their Lordships to be, that although for several years it was held by the late Sudder Dewanny Adawlut, that in order to bring a Talook within the scope of the 51st section, it must be shown to have been "registered," "recorded," or "recognized" (for all [268] three terms are used in the cases) at the time of the Decennial Settlement, that construction is no longer recognized as law by the High Court; and that it is, at all events, sufficient to show that the tenure existed, and was capable of being registered at the date of the Decennial Settlement. It follows, that their Lordships are not compelled by a long course of uniform decisions to put upon the clause in question a construction narrower than that which, in their judgment, its words warrant. And applying this view of law to the evidence, which, though scanty, is uncontradicted, they must find, as a fact, that the tenure of the Appellants is a dependent Talook, within the meaning of the 51st section of Reg. VIII. of 1793.

Whether such a finding ought not of itself to be an answer to the present suit, is a question which is certainly open to argument; for it may well be said, that a Plaintiff who brings a suit founded on her rights against a Ryot in occupation of land, ought not to be allowed to convert that suit into one founded on a different right, and governed by a different rule. Their Lordships, however, without pressing that point, think it sufficient to say, that the effect of such a finding is to cast upon the Respondent the burden of showing that the rent is variable, and that if there is no evidence of that fact in the suit, her suit must fail.

It may be said, however, and that seems to have been the opinion of the High Court, that the evidence given by the Appellants itself affords proof that the lands were held at a variable rent. But that opinion seems to their Lordships to be founded on a misconception of the effect of the proceedings before the Collector between the years 1797 and 1801. The [269] proceeding of the 2nd of September, 1800, shows that whatever inaccuracy there may have been in the petition (and the document appears on the face of it to be worm-eaten and imperfect), the case really put forward at that date by the Appellants' ancestors was, that they were the holders of a Talook at a rent of S. R. 158. 4. 15. 1. Their Lordships are, therefore, of opinion, that upon the evidence in the suit the Respondent must be taken to have failed to show that the Talook was held at a fluctuating rent; or that she is entitled to enhance the rent, which is proved to have been paid at a uniform rate for so many years.

Their Lordships have further to observe, that if the Respondent's case were a true one, she would have had little difficulty in proving it. She does not come into Court as a Purchaser at a sale for arrears of revenue, who rests upon a statutory title, with no documents to support it. She derives title from the Zemindar with whom the Decennial Settlement was effected; and she has presumably a right of access to all the records of the Zemindary. Her determination in such circumstances to rest upon the supposed defects in the Appellants' proof, and to abstain from giving

evidence of the truth of her own case, affords strong grounds for supposing that she had, in fact, no such evidence to give. If such evidence were forthcoming, and she has neglected to give it, she must take the consequences of her own miscarriage.

Their Lordships will humbly advise Her Majesty that the three decrees under appeal ought to be reversed, and that in lieu thereof a decree should be made, dismissing the Respondent's suit with costs; and the costs of this appeal must follow its result.

[270] MAHARANEE SHIBESSOUREE DEBIA, Trustee and Guardian of her minor Son, KOOMAR GOBINDNADH ROY.—*Appellant*; MOTHORA-NATH ACHARJO,—*Respondent* * [Dec. 15 and 16, 1869].

On appeal from the High Court at Fort William in Bengal.

Lands which were dedicated for the religious services of an Idol and managed by a Sebait of the endowment, cannot be alienated by the Sebait, but the Sebait can create derivative tenures and estates conformable to usage. Suit for possession of lands against the Sebait, as Talookdar, and certain holders of jummas or rents, arising out of lands part of a Talook, sold by them to the Plaintiff, without the consent of the Talookdar, as being held by his Vendors at a fixed invariable rent. In the absence of proof of the jummas being held at a fixed invariable rent, the suit was dismissed, without prejudice to the Plaintiff bringing a fresh suit to establish his Vendors' title, as holding by mouroosee or hereditary title, and of their power to transfer without the Talookdar's assent.

The Respondent brought the suit out of which this appeal arose, against Maharanee Kestomonee Debia, deceased, and now represented by the Appellant, as Sebait (Manager of a religious endowment) of the Talook, Dilhee Foolbarree, and other Defendants, the former proprietors of certain jummas, or rents, who, he alleged, held the same by mouroosee, or in hereditary tenure, and had sold such jummas to him, to recover possession of the lands, out of which the jummas [271] were derived. These jummas arose out of portions of lands which formed part of the Talook, of which the Maharanee Kestomonee Debia was Manager, and one of the principal questions raised in the suit was, whether they were held at an invariable fixed rent by the Respondent's Vendors.

The facts material to the issues are fully stated in their Lordships' judgment.

By the decree of Mr. Seton-Karr, the Judge of the Civil Court of Jessore, the fact of the sale by the Defendants, the Vendors, other than the first Defendant, was held to have been established, and that the jummas reserved to the Talookdar, and payable by the Vendors, and those from whom they derived title, was an invariable or fixed rent; and he further held, that the interest of the Vendors in the jummas which the Defendants sold could be transferred without the consent of the Talookdar, and decreed the Respondent possession, with mesne profits. On appeal to the High Court, Coram. Messrs. Bayley and Campbell, that decree was affirmed, and the appeal dismissed with costs. Hence this appeal.

As the Respondents did not appear, the appeal was heard *ex parte*.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant, argued, first, that the *onus* of proving the title set up by the Respondent to the jummas, or rents arising out of the lands and part of the Talook, held at a fixed and invariable rent, lay on him, *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 183), and that he had failed to prove that fact; secondly, [272] that, even if the sale was *bona fide* between the Vendors, the Tenants, and the Respondent, yet that the same

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

was invalid as against the Sebait, the Talookdar, as his consent to such sale and transfer was not obtained; and, thirdly, that the Respondent was not entitled to recover, as the *onus* was on him to establish that the jummas or rents, were a mouroossee tenure, as he alleged in his plaint, which he had not proved; while, on the contrary, the Appellant had established by evidence, that the Vendors held the jummas as tenants at will, after the expiration of the term mentioned in the lease of the jummas.

Their Lordships' judgment was reserved, and now pronounced by

The Right Hon. Lord Chelmsford (Dec. 18, 1869) — This appeal was heard before their Lordships *ex parte*.

The suit out of which it arose was brought in the Civil Court of Jessore, by Mothooranath Acharjo, the sole Plaintiff, against Maharanee Kestomonee Debia, described as Sebait of a Talook, dedicated to the service of the Deity, and against certain other persons named in the plaint. It was brought to establish a title to certain jummas and to recover possession of certain lands connected with them, which the Plaintiff claimed by purchase from four of the Defendants, Mahomedan Ladies, who descended from one Gouronohun Biswas, a Hindoo, on whom, as the Plaintiff avers, the right to the jummas transferred to him was originally conferred.

The present Appellant represents the interests as Guardian of her infant, which, at the commencement [273] of the litigation, were represented by the Maharanee Kestomonee Debia, since deceased, his Grandmother, appointed his Guardian under the direction of his deceased Father. The tenure, whatever its strict character, whether ryotwary or of a higher degree, is one held under the infant's title, as superior owner of the lands.

The jummas were claimed by the Plaintiff as mouroossee (hereditary), and also as held at a fixed invariable rent.

The Appellant, the Sebait, denies the hereditary character of the tenure, the invariable quality of the rent, and the purchase itself. She stated, that the tenants of the jummas, from whom the Plaintiff asserted that he had purchased, had not any hereditary tenure, and that they had surrendered such interest as they possessed to the Appellant, before the time of the alleged sale to the Plaintiff.

Of the four Defendants, the alleged Vendors, three denied the sale, and affirmed the surrender: whilst the fourth affirmed the sale and denied the surrender, agreeing, three of them with the Appellant, and one with the Plaintiff. They all, however, insisted on the hereditary character of their tenure.

The Talook itself, with which these jummas were connected by tenure, was dedicated to the religious services of the Idol. The rents constituted, therefore, in legal contemplation, its property. The Sebait had not the legal property, but only the title of Manager of a religious endowment.

In the exercise of that office, she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage.

The sale under which the Plaintiff claimed was [274] established by the decree of Mr. Seton Karr, the Judge of the Civil Court of Jessore, who tried the cause.

On appeal from his decision, it was affirmed by the High Court.

Two Courts, therefore, have established the sale to the Plaintiff, and have decided against the validity of the alleged surrender.

Into the sufficiency of the evidence to support those several findings, their Lordships do not propose to enquire; their judgment on this appeal will be confined to the question, whether a tenure held at a fixed invariable rent has been established by the evidence.

The Appellant insisted on the authority of Baboo Prosonoo Koomar Tagore's case (11th January, 1855), which she quoted in her answer, and which was relied on in the argument at the Bar, that a transfer of such a tenure as that set up in his case, which she termed a Ryotwary tenure, could not be effected without the consent of the Zemindar, or Talookdar, as the case might be, the immediate successor in estate. The Judges in both Courts decided that this tenure was one at a fixed rent; and that the case in question did not apply. On the question of its vendible character without the condition of the superior's consent, they pronounced no opinion. A question of this latter character is likely to be one so much affected by modern

and local usage, that it would be unsafe for an ultimate Court of appeal to express an opinion upon it as a mere dry, legal question turning on the incidents of hereditary tenure. Their Lordships would be most reluctant to decide on an *ex parte* appeal any ques-[275]-tion of general consequence, not absolutely necessary to the decision of the particular case.

If the decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings, and especially on the judgments, be viewed as *res judicata* binding on the parties and those claiming under them.

Their Lordships think that there is no satisfactory proof in the cause that these jummas were ever held at a fixed invariable rent. One important element in this inquiry has been wholly lost sight of, viz., the nature of the Sebait title, and its legal inability to be the source of such a derivative title. To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent, from time to time, would be a breach of duty in a Sebait, and is not, therefore, presumable. Where variable-ness of jumma is the normal condition, the mere naming a sum certain in connexion with the grant of a descendible tenure does not in part of itself fixity to that sum, in the absence of positive words, or of other evidence to show that such was the original design. In this case we start with a double presumption against the rent having been fixed, viz., that founded on the ordinary character of rents, and that derivable from the special character of the tenure. Another presumption arises in this case, that the rent was variable, from the circumstance that the only instrument which asserts positively that the jummas were to be at a fixed rent, is one of the three documents on which the signature of Mr. Skinner, the Magistrate, was fabricated. This fraud, in tampering with evidence, throws additional doubt upon this part of the case.

[276] The terms of the surrender relied on by the High Court do not state that the rent is fixed and invariable; that document, on which the High Court laid great stress, appears to their Lordships to afford but a slight presumption that the Sebait adopted and admitted that description of the tenure on which the Surrenderor relied, though by accepting the surrender she acquiesced in the use of that description by them; and as the instrument does not say that the rent was fixed as well as the tenure hereditary, the implied recognition of the right can be raised no higher than the actual language warrants. The tenure, therefore, at a fixed rent is, in the opinion of their Lordships, not proved. The acts of the Plaintiff cannot be ascribed to a valid title to possession under the circumstances of this dispute, since the only title insisted on, in the contest between him and the superior, viz., the right to hold at a fixed rent, is not established, and the general right of the Zemindar or Talookdar to receive the collections, subject to account, till a valid claim to an intermediate tenure be established, must prevail, *ad interim*, at least, until the Plaintiff, if he think it for his interest to rely on the mouroosee title at a variable rent, and to establish it by a suit founded on that title, in which suit the true nature of the tenure, and its freedom from the conditions of the superior's assent to the transfer of the tenure, may be ascertained. Their Lordships will, therefore, humbly advise Her Majesty that this appeal be allowed, and the decision appealed against reversed, and in lieu thereof the Respondent's suit be dismissed with costs, and their Lordships think that the Appellant should have the costs of the appeal.

[See *Juggut Mohini Dossee v. Mussumat Sokheemoney Dossee*, 1871, 14 Moo. Ind. App. 289; *Prosunno Kumari Debha v. Golab Chand Baboo*, 1875, L.R. 2 Ind. App. 151.]

[277] MUSSUMAT FANNY BARLOW,—Appellant: SOPHIA EVELINE ORDE and Others.—Respondents * [Jan. 28, 29, 1870].

On appeal from the Court of the Judicial Commissioner of the Punjab, Lahore.

S., a Military Officer in the East India Company's service, died in 1841, domiciled in Delhi, in the North-Western Provinces of India. At the time of his death there was no *lex loci* in those Provinces, and the law applicable to the succession depended on the personal *status*, which was regulated by the religion of the individual; and in the event of such rule not being applicable, the Courts were, as provided by the Regulations, to determine according to the rules of justice, equity, and good conscience. There was no evidence that S. professed any particular religion. S. had five illegitimate Sons acknowledged by him in his lifetime, and several Grandchildren, all of whom were, with one exception, illegitimate. By his Will, made in the English form, after giving life estates to his five Sons, he bequeathed as follows:—"I will and declare, that it is my intention and meaning, that in the event of all or any of my afore-mentioned Sons (naming them) dying leaving issue or children, that the share of the Fathers shall devolve on the issue or children, to be by them divided in equal shares." J., an illegitimate Son of one of the Testator's five Sons, born some years after the Testator's death, claimed, under the above devise to "children," to share with his legitimate Sister a moiety of his Father's one-fifth share:—

Held (reversing the decree of the Courts in India), first, that the technical rule of English law, that under a testamentary gift to children as a class, illegitimate children, although recognized by the Testator in his lifetime, cannot share with natural lawful children, was not applicable, and that, under the circumstances, it was impossible to apply any particular law of construction to S.'s Will, or to regulate his succession, and that, therefore, the case fell to be decided, as directed by the Regulations, by the principles of natural justice, equity, and good conscience [13 Moo. Ind. App. 309]; and,

Secondly, that the limited signification which the English law puts upon the word "children" when used as the designation of a class, and not as *descriptio personae*, was not to be followed in construing S.'s Will, as the word "children" in such Will denoted and included as well illegitimate as legitimate children, and such illegitimate children having been recognized and treated by S. as his children; effect was to be given to the devise, according to the actual manner in which the Testator used the word "children," whereby he intended to include illegitimate children of his Sons' whenever acknowledged by their putative Father, and that the illegitimate child of J. took equally with his legitimate Sister under S.'s Will [13 Moo. Ind. App. 313].

The question raised in this appeal was upon the construction of the Will of the late Colonel Skin-[278]-ner, C.B., in the Military service of the East India Company, who died, in the year 1841, domiciled in the Delhi territory, which then formed part of the North-Western Provinces of India.

The suit was brought by the Appellant on behalf of herself, as guardian of her infant Son, against the Respondents, to establish the Will of Major James Skinner, deceased, the putative Father of the infant Plaintiff, and to recover possession of a moiety of a fifth part or share of the estate and property devised by the Will of his Father, Colonel Skinner, to his five illegitimate Sons equally, and to their issue or children; and also to recover possession of a fifth part or share of Major James Skinner in certain other estate and property which was purchased and acquired by Colonel Skinner's Sons subsequent to his death, by means of the income derived by them from the estate and property; which last-mentioned fifth share of the

* Present:—Lord Westbury, Sir James William Colville, and Sir Joseph Napier, Bart. Assessor,—Sir Lawrence Peel.

accretions was devised and bequeathed by the Will of Major James Skinner to the Appellant, and his Son, the infant, James Skinner.

The principal questions raised by the suit and adjudicated on in the Courts below were:—First, whether it was the intention of Colonel Skinner to include in the devise to the Sons' issue or children, [279] their illegitimate children, and in particular, whether the above-named infant, James Skinner, was entitled to the moiety of the fifth part or share of his Father's interest in the estate and property, upon his death, under the devise; and secondly, whether the fifth part or share of his Father in the subsequently purchased and acquired estate and property passed by the devise thereof in his Will to the Appellant and his infant Son, or whether, as was contended by the Respondent, Orde, the same was to be considered as an increment to the original estate, because purchased by means of the income arising therefrom, and as such was to be considered subject to the limitations and condition affecting the estate contained in the Will of Colonel Skinner.

By the decree of the Officiating Deputy Commissioner of the Hissar Division in the Punjaub, both these questions were decided in favour of the Appellant and her infant Son; but on appeal therefrom the same was reversed by the Officiating Commissioner and Superintending Civil Judge, and on appeal brought from such decree of reversal was rejected by the Judicial Commissioner of the Punjaub. The effect of these decrees, now appealed from, decided against their claims *in toto*, holding that illegitimate children were excluded by the Will of Colonel Skinner, and that the estate and property purchased and acquired after his death was to be considered as an increment to, and, therefore, as part and parcel of his original estate, and so subject to the limitations and conditions therein contained.

The facts of the case were as follows:—

Colonel James Skinner, C.B., was an Indian soldier of fortune, and had, for military services performed to the East India Company, obtained from [280] Government, in the beginning of the present century, an Altumgah grant of a large zemindary situate in the Boolundshuhur District in the North-Western Provinces. He had also, by purchases made in his lifetime, acquired considerable other landed and house property; and he possessed at his death many villages, on leases, some granted to him by the Government, and others by other proprietors. A portion of the property was situate in the Delhi territory, which, at the time of the commencement of the suit in which the present appeal has arisen, was under the administration of British Officers forming the Punjaub Government.

It appeared that the management of the estate was carried on at Hausee, in the Hissar District. It further appeared that a renewed grant of the zemindary and the villages therein contained was made by the Marquis of Hastings, the then Governor-General in Council, to take effect from the commencement of the year 1226 Fusly era, corresponding with the 15th of September, 1818, in Altumgah, in the following terms:—"To Colonel Skinner, and his heirs after him, or to such persons as he may devise by his last Will and Testament, or by any other valid instrument, with their heirs, in the proportions in which he may devise the same to them respectively, so that each holding and enjoying his own share shall conform himself to the dispositions of the said Will."

Colonel Skinner died in December, 1841, domiciled in the North-Western Provinces, in possession of the Altumgah zemindary, and other lauded property, including the leased villages, as well as of considerable personal property, leaving him surviving no [281] legitimate children, but leaving five illegitimate and acknowledged Sons, namely, Joseph and James, and the Respondents, Hercules, Alexander, and Thomas, and two illegitimate Daughters named Louisa and Elizabeth, and one Granddaughter, the Respondent, Orde, the only legitimate Daughter of his Son, James Skinner.

It appeared that Colonel Skinner was himself illegitimate, born in India; and that all the children of his Sons (with the exception only of the Respondent, Orde) were likewise illegitimate.

Colonel Skinner made a Will, dated the 10th of May, 1841, disposing of the whole of his immoveable and moveable estate and property, which Will was proved, and a certificate of administration of his estate and property was obtained from the

proper Court by Joseph Skinner and James Skinner, two of the Executors and Managers.

The important clauses in the Will which the question raised by the suit affected, were as follows:—

"I will and bequeath the rest of my property, of whatever nature, I may die possessed of, or may be coming to me by gift, Will, or as heir-at-law, or in any other manner, to my Sons, Joseph, James, Hercules, Alexander, and Thomas Skinner, or the surviving heirs of them, in equal shares or dividends," and then, after giving certain specific legacies, proceeded in these terms:—"I leave and bequeath the income of my Altungah, zemindary, and Theka villages, gardens and houses, to my five Sons herein named, Joseph, James, Hercules, Alexander, and Thomas Skinner, to share alike, none of them to have the power or option (even if they all agree) to sell or divide any landed property of the Altungah or [282] zemindary. One of my Sons, whichever is most fit, or whoever I may name hereafter, is to manage the whole concern, for which trouble he is to get 10 per cent. from the whole income, and he is bound to show a faithful account current yearly to his Brothers.

"Should they like to live together, they may live at Belaspoor, and build Houses with mutual consent in the Altungah or zemindary.

"Should my personal property not pay off all my debts, they may sell my House at Delhi, and my garden at Trevelliam Gunge; but should the personal property pay the debts, the house to be rented, and the rent, after paying for the yearly repairs, to be divided amongst my five Sons.

"In the event of the death of any of my boys previously to attaining the age of twenty-one years, without issue, his or their portion or portions of the Altungah, zemindary, and Theka villages shall revert to the surviving Brothers for the benefit of the survivors and their heirs, and his or their portion or portions of other property willed by me shall be equally divided amongst all my surviving male children.

"I will and declare that it is my intention and meaning, that in the event of all or any of my aforementioned Sons, Joseph, James, Hercules, Alexander, and Thomas Skinner, dying and leaving issue, or children, that the share of the Fathers shall devolve on the issue, or children; to be by them divided in equal shares.

"I will and declare that in the event of the death of all my reputed children, Joseph, James, Hercules, Alexander, and Thomas Skinner, and without issue, that my Altungah rights, zemindary, Theka villages, [283] and all and every of the sums bequeathed, and eventually bequeathed to them, shall devolve to my Daughters, Louisa and Elizabeth, and to my Granddaughter Sophy, or their lawful issues, to my late Brother, Major Robert Skinner's children, and their issues, in equal shares and dividends."

Colonel Skinner died in December, 1841, leaving his five Sons mentioned in his Will surviving, who thereupon took possession of the estate left by their Father.

On the 25th of October, 1855, the eldest Son, Joseph Skinner, died, and George Skinner, claiming to be his Son, applied for a certificate to his Father's estate. This was assented to by his Uncles Thomas, Alexander (one of the Respondents) and James, but opposed by Hercules on the ground of George being illegitimate: this objection was overruled, and a certificate allowing him to collect the debts of the deceased Joseph was granted. It appeared that George remained in possession of his Father's share for several years, and was killed at Delhi in May, 1857, leaving a Wife and Daughter, the Respondents, Helen and Victoria Skinner.

The second Son, Major James Skinner, was during his Father's lifetime married to Sophia Barlow, by which marriage he had one Daughter only, the Respondent, Orde. He also cohabited with his Wife's eldest Sister, Charlotte, by whom he had a Son, Stewart, and also with the Appellant, his Wife's other Sister, by whom he had a Son, James, the infant in the suit.

On the 10th of November, 1859, Major Skinner made his Will, the only material parts whereof were as follows:—

[284] "I give, devise, and bequeath my share of the landed interests devised to me by the last Will and Testament of my late Father, Colonel James Skinner, dated Hausie, 10th May, 1841, consisting of Altungah, zemindary, Theka villages,

Indigo Factories, Houses, and other lands specified therein, also all and every sum and sums of money which may be due to me at the time of my decease, and also all other debts, or money, or Bonds, or other securities, to be equally divided between my Daughter, Mrs. Sophia Eveline Orde and my Son James, and to their descendants in perpetuity, and a salary of Rs. 100 per month to their respective Mothers, Mrs. Sophia Elizabeth Skinner and Fanny Barlow, alias Villattee Begum, which on their demise is to revert respectively to their children above named, viz., Mrs. Skinner's, to my Daughter, Mrs. Orde, and Fanny Barlow's (alias Villattee Begum), to my Son James, and likewise, in case of the decease of the children without issue or descendants, their share is to revert respectively to their Mothers, as above mentioned. And I request my Executors will adopt measures to carry these my last wishes into effect, as also to pay for my Son James's schooling and maintenance as long as he is a minor, and to invest the surplus of his share in the best Government loan that may then be open, and to be made over to him on his attaining the age of maturity, or twenty-one years. As my Son, James, is not educated, or otherwise provided for, I leave and bequeath to him and to his Mother, Fanny Barlow, alias Villattee Begum, the whole of the villages, landed property, etc., etc., etc., which have been purchased for the estate since the late Colonel Skinner's demise, and in which I have a fifth share, [285] as also my House, out-offices, and other lands at Hausie, and on their demise the share of one to devolve on the other, if my Son, James, may die without issue or descendants. Should I happen to die in debt, I ardently hope and beseech my Executors to effect such arrangement and compromise with my Creditors as will not prevent the above legacies from being carried into effect, otherwise to make a proportionate deduction from the share or income of each legatee."

Major Skinner died in 1861 without having revoked his Will, leaving him surviving, his Wife, Sophia, his legitimate Daughter, Orde, his Wife's Sister (the Appellant), and his illegitimate Son, James. Various proceedings took place in the Revenue Courts as to the substitution in the Government Books of the name of his Son, James, in the place of that of Major Skinner. On the 8th of October, 1861, an application was made in the Judge's Court by Major Skinner's Wife, Sophia, and his Daughter, the Respondent, Orde, for a certificate to be granted to them under the Act, No. XXVII., of 1860, to administer to the estate of Major Skinner. This application was opposed by the Appellant on behalf of herself and her minor Son, James. The Will was relied upon by her, and the question of its validity discussed before the Judge, who, on the 20th of December, 1861, decided in favour of granting the certificate to the Respondent, Orde. Against that decision the Appellant appealed to the Sudder Dewanny Adawlut, which Court, in July, 1862, confirmed the decision of the Judge.

On the 4th of June, 1863, the Appellant commenced the suit out of which the present appeal [286] arose by filing on behalf of herself and her Son, James, a plaint in the Deputy-Commissioner's Court against the Respondents. The object of the plaint was to have Major Skinner's Will declared valid, and to have a decree for possession of one-tenth of the whole estate left by Colonel Skinner, and one-fifth of subsequently acquired property.

At the hearing it was contended, that Major Skinner had no power to make a Will affecting the property acquired from Colonel Skinner, and while he admitted the right of the children of Major Skinner to succeed to the property, both original and conjointly acquired, of the estate by virtue of Colonel Skinner's Will, denied the claim made by the Appellant, Fanny Barlow, to any portion of the property or interest therein whatsoever.

The following issues were recorded: "The meaning of the parties having now been satisfactorily ascertained by careful examination, the issues may be determined. On law there was none. On fact, the following:—First, did the original Testator contemplate the exclusion of illegitimate offspring or issue, in favour of legitimate? Second, is there any recognizable difference between the original estate or inheritance, and that subsequently acquired? Third, had Major Skinner the power of devising any portion of his interest in the Skinner estate; and if so, what portion? Fourth, had Major Skinner the mental capacity requisite for the preparation and execution of a Will? As regards the first issue, it is to be determined by the Will

itself, as each party construes it suitably to his own views, and the construction is open to argument; both parties have filed their proofs, which are altogether documentary. [287] On the second issue, the proof rests on the Plaintiffs: they will file their documentary proofs, and produce certain documents named in the Hissar record Office and Skinner estate Office. The third issue is to be decided by the Court on discovering the tenor of the Will. The fourth issue, the Attorney of Sophia Orde will prove."

From the evidence given in the suit the capacity of Major James Skinner to make and execute his Will was distinctly proved.

The hearing took place on the 13th of October, 1863, before J. Horne, Esq., the Officiating Deputy Commissioner of Hissar, when he gave judgment, finding for the Plaintiffs on all the four issues, and decreeing the property claimed in full; and as to costs, ordered each party to pay their costs, except the Defendant, Khially Ram. On the first issue the judgment was in these terms:—

"The all-important point to be determined in this case is, what was the intention of the original Testator, as ascertained by the terms of his Will? I have given the subject careful consideration, and it is with much diffidence that I felt myself forced to a conclusion other than that expressed by a very high legal authority. It is, however, satisfactory to know that this is, as it were, but a preliminary inquiry, since the decision will certainly be appealed. The Devisor's words, I would observe, *in limine*, must be their own exponent; if the context of the Will should, as I believe, disclose the Testator's intention, no quantity of parole evidence can be allowed to contradict their import. It is obvious that one of the Testator's leading motives was to perpetuate his name: for he not only prohibits the division of the [288] estate under all circumstances, but he bequeaths merely the 'income' thereof to his Sons, and after them to their surviving male children; and this provision is repeated and qualified by the succeeding paragraphs, wherein it is provided that the share of the Father shall devolve on the children—to be by them divided in equal shares.' He provides for the continual management of the undivided property, and directs the preservation of his war trophies and presents in the paternal Hall at Belaspore, as a lasting memorial of him. The same sentiment pervades his disposition of his Brother Robert's estate, 'My will and intention being that the said Jageer shall continue to the nearest of blood in perpetuity. Now, the perpetuation of the Testator's name could be only through male children; hence his specification—'all my surviving male children.' We see that after providing for the distribution of the property amongst his direct male issue, he goes on to bestow it on his Daughters and Granddaughter Sophia (Mrs. Orde) by name, and the collateral heirs—the issue of his Brother Robert. Now, the wording of this clause certainly does convey, as conclusively as it can be ascertained, the intention of the Testator; among them Sophia Orde is the only child born in wedlock; she is near to him in the ties of consanguinity, and yet he gives her no preference over the children of Robert Skinner, who are all illegitimate, but bequeaths the property to them in 'equal shares and dividends.' Here, then, Colonel Skinner gave no precedence to the law of legitimacy; indeed, if the word 'lawful,' as used in conjunction with the word 'issues,' of the female conditional Devises, is not accidental, it would appear as if the [289] Testator disregarded the illegitimacy of his Son's offspring, but scrupulously barred the succession of other than his Daughter's legitimate offspring. The Plaintiffs lay stress upon this phrase—'lawful issue;' and I admit, that without giving it any undue weight, it is a qualification perfectly consistent with man's instincts and conventional laws, which condone the adultery of a man, while punishing ruthlessly the unchastity of a woman. It is deposed by Major H. Skinner, and by Thomas Skinner and George Everett, that at the time of the execution of Colonel Skinner's Will, George and Joseph, illegitimate children of Joseph Skinner, the eldest Son of the Testator, were living, and yet it is seen that Colonel Skinner did not exclude them from his Will; and from this fact, coupled with the fact of his open recognition of George, the illegitimate Son, deposed to by the foregoing, the inference is, that the Testator did not consider illegitimacy a sufficient reason for their exclusion from social and hereditary rights." The judgment then further proceeded under this issue as follows:—"We see that on the death of Joseph, George, his illegitimate Son, inherited, three of the Brothers

supporting his claim, and Hercules alone dissenting; but Hercules is married and has lawful issue, and this may, insensibly to him, have biassed his judgment in this matter. In reference to the plea, that even if illegitimate children are entitled to inherit by the Will of Colonel Skinner, he could never have designed that the fruit of an incestuous intercourse should debar the legitimate offspring from their rights, I must confess I do not see its force. I observe, however, that the Judge of Meerut took this view. I consider that we are not to determine the [290] issue on ethical grounds, but on the terms of the Will and by the analogies it contains. There we find that illegitimacy is recognized, and no expression or allusion is used subversive to the claim of the Plaintiff; the right of this Minor, therefore, may be admitted by implication. This deduction, however hostile to morality, is, I believe, conformable to the terms of the Will, to which implicit deference, as long as the Will in its entirety is upheld, is due. If the circumstance pleaded by Defendants, of the Boy James, the child of an incestuous intercourse, acting as a bar to the succession of the legitimate heir, is an aggravation of the evil of recognizing illegitimacy never contemplated by the original Testator, it is no part of the Judge to amend it." On the second issue the judgment proceeded:—"As regards the increase in landed property, the Defendants do not dispute it; their only plea is, that such increase has become by simple accretion an integral part of the estate. Alexander Skinner admits, that the proceeds of the estate are divisible by the co-sharers: but he appears to argue, that because some of these proceeds were spent by the Manager in the acquisition of additional lands without consulting the co-sharers, this fortuitous circumstance places the lands purchased with this money, rightly within the co-sharers' control, beyond their control or disposal. This doctrine is as untenable as novel. That the acquired property is a reality and no fiction is clearly ascertained by the long list filed by the Plaintiffs, consisting of some ninety villages, worth, according to Khialy Ram's valuation, and not challenged by the other Defendants, two and a half lakhs. It is deposed by him, and he was intimately associated [291] with the transactions of the estate during the life-time of Major James Skinner, and he is still a confidential Agent of the co-parceners in the estate, that whereas the original estate was involved to the extent of eleven lakhs at the time of the decease of Colonel Skinner, all this debt was, by 1860, cleared off, with the exception of a little more than a lakh, in addition to which all these lands were acquired. Subsequent to Major James Skinner's decease four lakhs of money were borrowed from Luchmee Chund, the Muthro, Banker, but the main portion of this was employed in the liquidation of the debts of the co-sharers. How far the acquired property may be liable for this debt is not now a question raised, and, therefore, not considered, but it appears that the Bond has primary reference to the original estate. The ascertainment of what is and what is not property accruing to the co-sharers after the demise of the original Testator can be a matter of no difficulty. A list already exists, drawn out by orders of Major Hercules Skinner, of which Alexander Skinner, Defendant, the officiating Manager, admits a copy, and it is presumed correct, since it is not challenged, is filed with the plaint. If there is any error in this list it can form the subject of objection on the execution of the decree which will issue in this case: at the present time the principle is the important point." On the third issue he held, that "As regards the third issue, or the authority of Major James Skinner to make a Will disposing of this property, I conceive that he had no right, under the provisions of his Father's Will, to dispose of any portion of the original estate. The issue found in favour of the Boy James is by the Will of the original Testator, [292] and quite independent of the Will of Major James Skinner. But that he had power over the acquired property there can be no doubt, for, as pertinently observed by the Judge of Meerut, 'A man may do as he likes with his own.' The matter is susceptible of further elucidation, but the opinions of the Civil Courts of Delhi and Meerut, *vide* Robucarree of the 11th of August, 1860, and judgment of December, 1861, concur, and the question is itself obvious." On the fourth issue, as to the mental capacity of Major James Skinner at the time of the execution of his Will, the Court held, that he was of full testamentary capacity, and the judgment then concluded:—"I consider that Colonel Skinner by his Will gave no preference to legitimate heirs over illegitimate: that there is a difference between the sub-

sequently acquired property and the original estate; that Major James Skinner had the power to will away this acquired property, but no other portion; and that he was possessed of mental capacity to make a Will; I, therefore, find for the Plaintiff on all the issues, and the property claimed is decreed in full."

The Respondent, Orde, appealed to the Civil Court of Hissar.

The appeal was heard before J. Nasmyth, Esq., Officiating Commissioner, Superintendent, and Civil Judge of Hissar, who, on the 26th of January, 1864, reversed the decree of the Lower Court on the three following points:—First, the legal inability of the late Major James Skinner to bequeath property already entailed; second, the objection to the construction of the Lower Court in regard to the intention of the late Colonel Skinner as regards the term 'issue or children'; and third, the objection to the ruling of [293] the Lower Court to the effect, that landed property purchased for the estate, from the estate proceeds (before dividend of net profits), subsequent to the demise of the late Colonel Skinner, was unfettered by the limitation placed on the succession in the Will of Colonel Skinner, and was at the absolute disposal, according to his share, of each co-sharer.

With respect to the first point, the judgment stated:—"It seems clear to the Court, that the late Major James Skinner was not empowered to devise his share in the Skinner estate otherwise than had been provided for by the Will of his Father, the late Colonel Skinner. His power to bequeath was confined to the personalty, and to any real property which he may personally have acquired. A distinction has been drawn by the Lower Court in regard to the estate, between property strictly ancestral, and that subsequently purchased for the estate from the estate proceeds, which question will more appropriately come under notice when considering the third plea of appeal." As to the second point, the judgment proceeded:—"The ambiguity and obscurity of the late Colonel Skinner's Will in this respect are remarkable. For reasons explained at some length, the Lower Court has recorded an opinion and judgment in favour of the construction, that legitimate and illegitimate issue should share equally in the succession. This decision is based on what the Lower Court conceived to be the intention of the Testator, as gathered from the context of the Will and the usage of the family. To the appellate Court, however, it appears that this inference is by no means evident, or even probable, from the context; the occurrence of the term 'lawful,' as applied to the [294] female issue in the succeeding clause of the Will does not seem sufficient to warrant the conclusion, that the omission of that term elsewhere implies a recognition of illegitimate issue as regards the male branch of the family. The strict and primary meaning of the term 'issue or children,' when used in a document such as this, and with no distinct declaration of, or obvious allusion to, contrary intention, can, it seems to the appellate Court, only be legitimate issue or children—i.e., born in wedlock. It appears also in the highest degree improbable, that the late Colonel Skinner (whatever may have been his own domestic relations) could have desired, to the manifest detriment of his Sons and their legitimate heirs, his own daughters and their lawful issue, and the legitimate female child of his Son James, who is specially mentioned in the Will, that the inheritance (which he was so anxious should be maintained in its integrity, and of which he so strictly forbids even the partition) should be frittered away in innumerable shares on the illegitimate offspring of his Sons. The whole tenor of the Will appears to the appellate Court to be opposed to such a construction, and the dubious passages do not seem to point, with any reasonable probability, to any such intention. The appellate Court is consequently of opinion, that 'issue or children,' as used in the Will, must be held to signify legitimate issue only." Upon the third point, the judgment proceeded:—"There is no doubt of the fact, that property has been added to the estate subsequently to Colonel Skinner's death, partly by purchase and partly by gift of Government. The question is, can such property be regarded as absolutely at the disposal of the co-sharers, according to [295] the share of each, or is it subject to some restriction that limits the succession to the property which formed the estate at the time of Colonel Skinner's demise? With one exception, any such distinction is strongly objected to by the existing co-sharers. The 'Theka villages' are undoubtedly covered by the meaning of the Will, and as regards these, there would seem to be no room for doubt that they are in all respects subject to the pro-

visions of the entail. The property was purchased, prior to any division of profits, from the proceeds of the estate, with the joint consent of the co-sharers, expressed or understood, the Agent being the Manager; and without the consent of all the co-sharers, it does not appear to the appellate Court, that this subsequently acquired property can be regarded as circumstanced otherwise than as the rest of the entailed joint estate. The interest of each sharer is a life interest only. Even were all consenting it is by no means clear that any difference would be legally admissible. Under all the circumstances of the case, the appellate Court thinks it would not. The case of entailed estates in England, as observed by the Lower Court, does not seem analogous, or to apply in the case of a joint concern, such as the Skinner estate. Of course, landed property purchased by any sharer personally with his own means is 'his own'; but this is quite distinct from the joint estate acquisitions under notice. The appellate Court, therefore, considers that the distinction which has been allowed by the Lower Courts is not in this case admissible. It is not within the province of this Court in recording a judgment in this appeal case, to pass any opinion as to the particular claims of Mrs. Orde to succeed to the vacant share, which it has [296] been herein ruled is not inheritable by illegitimate issue or children, and is not divisible in the manner admitted by the District Court. The obscurity of the Will has already been referred to, and a question, as to whether 'issue or children' was intended, as to immediate succession (as distinguished from reversionary), to be limited to male heirs, when considering in conjunction clauses 10 and 11 of the Will, might possibly be raised. This decree, therefore, is to be understood only as applying to the three issues as above described; and as leaving the matter as to who is or who are the immediate legitimate heirs in tail under the Will for settlement by the family or otherwise, as they may deem fit."

The Appellant appealed from this decree to the Court of the Judicial Commissioner of the Punjaub.

The hearing took place on the 21st of January, 1865, before A. A. Roberts, Esq. The points urged on the appeal were:—First, that the decision of the officiating Commissioner was opposed to the true construction of the Will of Colonel Skinner, and to the usage of the family. Secondly, that there was a difference between the estate left by Colonel Skinner and the after-acquired property, and thirdly, against the Order for payment of Costs, as the Commissioner had declared that the Respondent, Orde, was not entitled to any share in the estate; and it appeared that the Counsel for the latter had moved the Court for a declaratory Order in favour of her title.

The material part of the judgment of the Judicial Commissioner (A. A. Roberts, Esq.) was in these terms: "Colonel Skinner unquestionably had power to entail his estate, and he did so in a special manner. I concur with the Court below, that it was not [297] competent to Major James Skinner to interfere by devise with the succession to the Skinner estate (or to any share of that estate), which had already been settled by the Will of the founder of the family and of the estate. Secondly, the construction of the Lower Court, that the words 'issue or children' must be held to signify legitimate children, is quite correct, as also does the word 'heirs' mean legitimate heirs. Thirdly, I also agree with the Lower Court that the property purchased prior to any division of profits from the proceeds of the estate by the Manager or Managers, became a portion of the entailed joint estate, and falls under the provisions of Colonel Skinner's Will. As regards the Respondent's (Defendant's) request for a declaratory Order in her favour, the Court does not understand on what ground she seeks such an Order, but she is of course entitled to all the benefits resulting from the decision of the three issues raised between her and the Plaintiff, and which are all against the latter. This Court, at the same time, considers the remarks of the Lower Court, immediately after the decision on the last issue, and previous to affirming the appeal, altogether superfluous. I reject the appeal with all costs, whether in this Court or the Courts below."

From this decree of affirmance the present appeal was brought.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—Two questions arise, first, upon the construction of Colonel Skinner's Will, whether James Skinner's children, one of the Testator's five illegitimate Sons, took under the Colonel's Will their Father's share as [298] tenants in common, and, secondly, whether a fifth part

of the accretions acquired by the Devises from the surplus of the Testator's estate after his death did or did not pass by James Skinner's Will.

With respect to the first question, it is clear, that it was the intention of the Testator, Colonel Skinner, by the devise in his Will to his five Sons and the "issue or children" of his five Sons, to include their illegitimate children, and the Appellant is, therefore, entitled to a moiety of the fifth share of the estate of Colonel Skinner under that devise. We submit, that from the peculiar circumstances in this case, Colonel Skinner's Will is not to be construed according to the technical rules of English law as applied to Wills made in this Country, and that the construction as to children, as a class, cannot be imported into such a Will as this. The fact of the Will being made in the English form is not a sufficient ground for treating the rights of the parties as being governed by the English law. The ruling authority is *Abraham v. Abraham* (9 Moore's Ind. App. Cases, 199), a case decided in this Court, where the *status* of native Christians, known as "East Indians," in the Mofussil, and their rights, were fully considered. That case was from Madras, and it was held, that Mad. Reg. II. of 1802, sec. 17, which enacts, that in cases where no specific rule exists, the Judge is to act according to "justice, equity, and good conscience," was applicable in a case of succession to the estate of a deceased of pure Hindoo blood who had married a European Wife, professing with his family the Christian religion; and the case was decided, not according to Hindoo law, but according to the usages of the class and family, to which the deceased at-[299]-tached himself, and to which he belonged. This rule first occurs in Ben. Reg. III. of 1793, sec. 21, which enacts "that in cases coming within the jurisdiction of Zillah and Civil Courts for which no specific rule may exist, the Judges are to act according to justice, equity, and good conscience"; Act, No. XXVI. of 1854. [Lord Westbury.—The *status* of the Testator, Colonel Skinner, will determine the law of construction to be applied to his Will.] His domicile was the North-Western Provinces of India, and there is no particular law of that domicile applicable to this case. The Indian Succession Act, No. X. of 1865, shows the state of society in India, and the effect of having acquired the reputation of being legitimate; sec. 87 enacts, that in the absence of any intimation to the contrary, the term "child," "Son," or "Daughter," where there is no legitimate relative, is to be understood as legitimate relative, or the person who has acquired, at the date of the Will, the reputation of being such relative. The principle of English law excluding illegitimate children as a class, under a gift to children, cannot be applied as a rule of "justice, equity, and good conscience," to which the Courts of Colonel Skinner's domicile, in the absence of any particular law, are to have recourse. In order to arrive at the true construction to be put on this Will we must look to the habits, condition, and *status* of the Testator. He was himself illegitimate. [Lord Westbury.—That fact is assumed; it is not pleaded.] The effect of Colonel Skinner's Will is to give his five Sons an estate for life, with remainder to their issue as tenants in common. The intention which the Testator had in view in using the words "issue or children" is manifest. In directing that [300] in the event of any of his Sons dying, and leaving "issue or children," the share of the Fathers should devolve on the "issue or children," he meant children in the wider natural sense, and not strictly legitimate children. [Lord Westbury.—The words are "all my surviving children." Is there anything in the Will that will justify us in construing that as including illegitimate children?] After providing for the division of his estate among his male issue, he bequeaths it to his Daughters and Granddaughter Sophia, the Respondent, Mrs. Orde, by name, and to the collateral issue of his Brother, Robert. It is to be observed, that the Respondent, Orde, is the only child born in wedlock, yet he gives her no preference over the children of Robert, who are all illegitimate, as he bequeaths the property to them in "equal shares." It would appear as if the Testator disregarded the illegitimacy of his Sons' offspring, but scrupulously barred the succession of other than his Daughters' legitimate offspring. The fact that on the death of Joseph Skinner, George, his illegitimate child, succeeded, is strongly in favour of our contention. The evil of recognizing illegitimacy was never contemplated by Colonel Skinner.

As to the second question, there exist no grounds to support the claim, that the property acquired after Colonel Skinner's death has become by accretion an

integral part of the original estate of Colonel Skinner: *Sreemutty Soorjemoney Dossee v. Denobundoo Mullick* (6 Moore's Ind. App. Cases, 526; and see 9 Moore's Ind. App. Cases, 123), which was recognized in *Sonatun Bysack v. Sreemutty Juggat-sundree Dossee* (8 Moore's Ind. App. Cases, 66), and *Bissonauth [301] Chunder v. Sreemutty Bamasoondery Dossee* (12 Moore's Ind. App. Cases, 41). The Court below rightly distinguished between the estates and the property purchased, or otherwise acquired, by the five Sons subsequent to Colonel Skinner's death and the original property and estate devised by his Will; and it was competent to each of his Sons to alienate, and consequently it was competent to Major Skinner to devise, his undivided one-fifth share of such purchased property, which, we submit, passed by his Will to the Appellant and her infant Son as the Devises therein named.

Mr. Pontifex and Mr. Nasmith (Mr. Prichard with them) for the Respondent, Orde.—According to the true construction of the Will of Colonel Skinner, illegitimate issue are excluded from inheritance, and the Judicial Commissioner correctly interpreted such Will to that effect. If the *status* of Colonel Skinner and his family be considered in its proper view, as representatives of a class of British subjects known as "East Indians," the case of *Abraham v. Abraham* (9 Moore's Ind. App. Cases, 199, 245) is in our favour. In that case the parties were pure Hindoos, who had adopted Christianity, and this Court held, that the Hindoo law did not apply: *a fortiori* in this case the English law applies. If the English law is not to govern the rule of construction, what law is? Colonel Skinner's Sons were not Hindoos. The custom of a family is not to be taken into consideration in violation of law. We submit, that the principles upon which English Courts exclude illegitimate children, although recog-[302]-nized by the Testator, when the devise is to children as a class, apply. The English rule is not a technical one, but reasonable, and it is clear that designation is necessary. *Godfrey v. Davis* (6 Ves. 43) is an authority to show, that an illegitimate child is not entitled under the description of a "child" in a Will, though the Testator knew the state of the family,—that there were several illegitimate and no legitimate children. So in *In re Stanley's Estate* (Law Rep. 5 Eq. 303), illegitimate children were held not sufficiently designated by the words "next of kin" of another illegitimate child. The Vice-Chancellor Giffard, in *In re Wells' Estate* (Law Rep. 6 Eq. 599), followed the last case. There a Testator, by his Will, after a gift to his Son T. (who was illegitimate), directed the division of his estate into seven parts, one of which was given to his Widow, and after her death to "such of his children to whom the other six shares were given." As to those six shares, the direction was to pay them, "among all my children living at my decease, except my Son T." The Testator left seven children, of whom five were legitimate, two (T. and A.) illegitimate, and it was held, that A. was not entitled to a share as one of Testator's children (a). The contention of the Appellant, that the technicalities of construction applied to English Wills ought [303] not to be imported into Indian Wills, as it is based on the assumption that the rule excluding illegitimate children as a class when described as "children," is a mere arbitrary rule of construction, is unfounded, as the rule is founded on public policy, and not confined to England. [Sir James Colville.—In the case of *Her Majesty's Procureur v. Bruneau* (4 Moore's P.C. [N.S.] Cases, 1) from the Mauritius, their Lordships held, that the word "descendants" in Art. 766 of the Code Civil of France was not limited alone to legitimate descendants, but included illegitimate issue.] Here the devise by the Will of Colonel Skinner is not to illegitimate children, but to the legitimate children of his five Sons, as tenants in common for life. Major Skinner left a legitimate child and an illegitimate child, and made a Will giving to them what share he had in his Father's estate and subsequently acquired property, which he had no power to do. *Cooper v. Cooper* (2 K. and J. 658) was a case upon the construction of a Will. There the Testator bequeathed his residuary personalty

(a) See also *Howarth v. Mills* (Law Rep. 3 Eq. 389). In that case, there was a bequest by a single woman, who had gone through the ceremony of marriage with her deceased Sister's Husband, in favour of her children, "legitimate or otherwise." At the date of the Will she had one child living, and several were born afterwards; and the Vice-Chancellor Wood held, that the after-born children were excluded, and that the gift enured to the benefit only of the child living at the date of the Will.

between his four children, whom he named, to be equally divided between them, share and share alike; and in case of the death of either of them leaving issue the issue of such child was to take the parent's share; but in the event of their dying without leaving issue, then the share or shares of one so dying to form part of the residue; and the Vice-Chancellor Wood held, that the Testator's children took for their respective lives only. This case is referred to, as well as the case of *Gosling v. Townshend* (17 Beav. 245), in Hawkins' Treatise on the Construction of Wills, p. 259. It cannot be denied, that existing illegitimate children [304] may take as *personae designatae*, but it is equally clear, that illegitimate children born after the death of a Testator cannot be recognized by him and specially designated. In *Blodwell v. Edwards* (Cro. Eliz. 509) it was held, that a remainder to a Bastard not *in esse* was void, and that case was acted upon in *Lomax v. Wright* (2 My. and K. 775). There, by deed, an estate was limited to an after-born illegitimate Son in fee; and if he should die before he attained twenty-one, then in fee to a living illegitimate child, who died an infant; and an after-born illegitimate Son attained the age of twenty-one, and it was declared, that the last limitation failed, and that the devised estate resulted to the heir of the Grantor. [Lord Westbury. — But for the rule of religion, the term "children" would be flexible, and would extend to unlawful as well as lawful children.] No case can be found in which even existing illegitimate children have been admitted to take with legitimate children. Irrespective of the rule of public policy recognized by the English law, we submit, that according to the actual intention of the Testator, illegitimate issue are not included. The use of the term "lawful" as applied to the female issue is not sufficient to warrant the conclusion that the omission of that term in other parts of the Will implies a recognition of illegitimate issue as regards the male branch of the family. The general tenor of the Will is opposed to a construction of the word "issue" as including illegitimate issue, and the passage containing the word "lawful" does not furnish any ground for presuming the Testator's intention of including them.

[305] The next point taken by the Appellant is, whether property subsequently acquired is to be considered as an accretion to the joint estate, and at the disposal of the co-sharers; we submit, that it is to be considered as an accretion. The estate was a joint concern. The leases granted to Colonel Skinner by Government of certain villages and lands expired at the death of the Colonel, and although they were renewed to the Devises, yet such renewed leases were obtained by virtue of the original ownership of the devised estates, and in equity are subject to the gifts made by the Will of the devised estates.

Mr. J. D. Bell, for the Respondent, Alexander Skinner.—With respect to this Respondent the plaint was improperly framed, and he ought not to have been made a party. His rights cannot be concluded by the decree made in the suit. Upon the merits, I submit, first, that Major Skinner had no power by Will to alienate, affect, or incumber any of the property derived by him from his Father, Colonel Skinner, or, secondly, by Major Skinner, with respect to property acquired subsequently to his Father's death, conjointly with the other members of the family. Whatever may be the rights of the infant, James Skinner, and the Respondent, Orde, to share between them the estate of Major Skinner, such rights accrued to them under the Will of Colonel Skinner, independently of the Will of Major Skinner, and the Appellant has no right to any portion thereof. As to costs, it is clear that the Court below was wrong in [306] ordering costs to be paid by this Respondent; on the contrary, being improperly made a party, he was entitled to costs.

Mr. Leith, in reply.—The domicile of Colonel Skinner himself an illegitimate child, was the North-Western Provinces of India, which, at the time of his decease, were part of the territory of the East India Company, since annexed to the Punjaub. All the Devises of the original Testator and their children, with the exception of Mrs. Orde, were illegitimate; and it is clear, in a question of construction of Colonel Skinner's Will, that when he used the words "my children," he meant his "illegitimate children." The general principles of construction, in respect to the meaning of the words "issue" and "children," in the authorities cited, so far as relates to illegitimate children not taking as a class, do not apply to this case. The Will itself was never proved, in the sense in which an English Will would be proved in England. The *status* of Colonel Skinner was not one to which the

technical rules of English law applied: on the contrary, the Regulation and Act of the Indian Legislature provides for such a case as the present, when it declares that the Court is to determine "according to justice, equity, and good conscience." *Rajah Burrodicaunt Roy v. Bisnosoondery Dabee* (Morton's Dec. Sup. Court, Calcutta, 91-3) was a case of a mortgage by Hindoos of lands in the Mofussil, and the Supreme Court at Calcutta held, that the mortgage deed was to be governed by the Hindoo law, although the conveyance was in the English form.

[307] At the conclusion of the arguments the case stood over for consideration; their Lordships' judgment was pronounced by

Lord Westbury (March 9, 1870).—The question in this appeal depends on the construction and legal effect of the Will of Colonel James Skinner, who was an Officer in the service of the East India Company.

Colonel Skinner died in the month of December, 1841, and at the time of his death he was resident and domiciled in the Delhi territory, which then formed part of the North-Western Provinces of India, but which, after the mutiny, was placed under the administration of the Punjaub Government.

The construction and effect of the Will, therefore, must depend on the law of the domicil, if that can be ascertained. At the time of the Colonel's death there was no *lex loci* of the Province in which he was domiciled, and the law applicable to the succession of any individual depended on his personal *status*, which again mainly depended on his religion.

Thus the succession of an Hindoo would, as a general rule, fall to be regulated by Hindoo law, and of a Mahomedan by Mahomedan law, and of an East Indian Christian by English law; but in every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual, and to the usages of the class or family to which he belonged.

If no specific rule could be ascertained to be applicable to the case, then the Judges administering justice in the Province were to act "according to justice, equity, and good conscience."

[308] Such is the substance of the Regulations, as explained in the case of *Abraham v. Abraham* (9 Moore's Ind. App. Cases, 199), which were made by the East India Company for defining the jurisdiction of the Courts of the Province in which Colonel Skinner was domiciled, and which were in force at the time of his decease.

There is little evidence from which the personal status of Colonel Skinner may be ascertained, beyond that which is afforded by the Will.

It is stated, and there is proof, that he was illegitimate, being probably the child of a native woman by an European Father. As a Commander of a corps of irregular light Horse he acquired great distinction in the Military service of the East India Company, and, in consideration of his services, he obtained grants of large landed estates, situate partly in the North-Western Provinces, and partly in the Territory of Delhi.

The form of a renewed grant of some of these estates made to Colonel Skinner by the Marquis of Hastings when Governor-General, may be material to be noticed. The grant was made to the Colonel in "Altumgah" to take effect from the beginning of the year 1226, Fusly era, and contained this special form of limitation, viz.:—"To Colonel Skinner and his heirs after him, or to such persons as he may devise by his last Will and testament, or by any other valid instrument, with their heirs, in the proportions in which he may devise the same to them respectively, so that each holding and enjoying his own share shall conform himself to the dispositions of the said Will." Had the grant been simply to the [309] Colonel and his heirs in "Altumgah," the grant would have come to an end on the death of the Colonel without leaving lawful issue, and the super-added special power of testamentary disposition, therefore, is regarded as an indication that the Grantee was conscious that he was not likely to leave lawful issue, and, therefore, obtained the grant of a power of disposition. This argument, however, is not of much weight. Colonel Skinner does not appear to have been ever married, but he seems to have kept several native women as part of his family, with whom he cohabited and by whom he had several children.

There is nothing to indicate the religious belief or profession of the Colonel or of his family, or what were their habits or usages.

His origin is unknown: being illegitimate, he belonged to no family, and all that can be collected is, that he was probably a Soldier of fortune, who rose by his courage and military skill to a certain rank and distinction in the service of the East India Company.

It is impossible, under these circumstances, to affirm that any particular law is applicable to the construction of the Colonel's Will or the regulation of his succession. Any questions that may arise respecting them must, therefore, be determined by the principles of natural justice.

In English law there is a technical rule of construction, that under a testamentary gift, to children as a class, illegitimate children, although recognized by a Testator in his lifetime, cannot be permitted to share jointly with natural lawful children; and the Respondents contend, that this rule is applicable to [310] the construction of the Will of Colonel Skinner; but, for the reasons we have already given, we are of opinion, that Colonel Skinner's succession is not to be administered according to English law, and that there is no room, therefore, for the application of this English rule of construction. The word "children" where it occurs in Colonel Skinner's Will, must be taken in that sense, and receive that signification, in which it is plain from the language of the Will, and the dispositions it contains, that it was used by the Testator, that is to say, its extent of meaning in the vocabulary and mind of the Testator must be determined in the Will itself.

The Testator had at the times of making his Will and of his death, five Sons and two Daughters, all of whom were illegitimate, for it seems to be certain that no rite or ceremony of marriage had ever taken place between the Colonel, and any one of the Mothers of these children.

All of these Sons and Daughters, however, appear to have been acknowledged by the Testator during his life as his children, and they are expressly called by him in his Will his "Sons and Daughters."

Thus the Will begins with a general gift "to my Sons, Joseph, James, Hercules, Alexander, and Thomas," and, after giving various pensions to servants and others for life, the Testator directs that they shall revert to my "Sons."

The Sons are again in a subsequent part of the Will referred to under the term "male children," and afterwards they are called "my reputed children."

It appears that the Testator had a Brother, Major Robert Skinner, who, like himself, had never been [311] married, but at the date of the Colonel's Will was dead, leaving several illegitimate children, who had been treated and acknowledged by their Father during his lifetime as his children.

It appears also from the Will of the Colonel, that he had been appointed Trustee or Guardian of these children, and must be taken to have been well acquainted with their real *status*, or condition of illegitimacy. It is important, therefore, that we find in the Will a devise in certain events "to my late Brother Major Robert Skinner's children and their issue in equal shares."

Here the illegitimate offspring of Major Robert are called his children, and are associated as tenants in common with the Testator's Daughters and Grand-daughter and their lawful issues.

The correctness of the interpretation which we put on the word "children" in this will, as denoting the offspring of Sons, is much confirmed by the fact that there is a marked change of expression in the Will, when the Colonel speaks of the issue of his Daughters.

It is natural to suppose that he would shrink from the thought of his Daughters forming any other connections than those of lawful marriage, or of their having any but lawful issue. Accordingly, when he provides for the event of the death of all his reputed children (meaning his five Sons) without issue or children, and directs that the property given to them shall devolve to his Daughters, Louisa and Elizabeth, and his Grand-daughter, Sophy (who was born in wedlock), or their lawful issues, we find a remarkable change of expression which is not to be [312] found in any of the gifts to the children or issue of his Sons.

It appears also from the evidence, that the Colonel's eldest Son, Joseph (who died in the year 1855), had no lawful issue, but had one illegitimate Son, named George,

who was born some years before the death of the Colonel, and was always recognized and treated by the Testator as his Grandson; and it is also proved that on the death of his Father, Joseph, George—this reputed Son—was permitted to succeed his Father, and has, in fact, taken the share devised to Joseph by the Will.

The limited signification which in our law is put upon the word "children," when used as the designation of a class, and not as *descriptio personarum*, is probably the result of the Christian law of marriage.

According to natural law, the children of a man mean the issue begotten by him, and the *criteria* of this condition are, the being born of a wedded Wife or Wives, or, if born of other women, the being recognized and acknowledged as children by the Father.

With regard to his Sons, the Colonel probably felt the same indifference as to their being married or not, which he had shown in his own case.

The conclusion, therefore, at which their Lordships have arrived is, that the word "children" in the Will of Colonel Skinner denotes and includes as well illegitimate as legitimate children, whenever such illegitimate children are acknowledged or treated as his children by their putative Father.

We proceed to apply this conclusion to the case [313] which is before us, and which arises on the following clause in the Testator's Will: "I will and declare that it is my intention and meaning, that in the event of all or any of my aforementioned Sons, Joseph, James, Hercules, Alexander, and Thomas Skinner, dying and leaving issue or children, that the share of the Fathers shall devolve on the issue or children, to be by them divided in equal shares." As has been already stated, the first Son, Joseph, died intestate in the year 1855, without lawful issue, but leaving an illegitimate Son, George, who, with the assent of the majority of his Uncles, succeeded to his Father's share under the devise.

James, the second Son, died in the year 1861, leaving one legitimate Daughter, Sophia Orde, and an illegitimate Son, James Skinner; and the question is, whether the share of James, the Father, in the property devised to his five Sons by the Will of Colonel Skinner vests, as to the share of James, in his Daughter Sophia exclusively, or in the said Daughter and the Son James, as tenants in common. For the reasons we have already given, we are of opinion, that the share of the Son James belongs to Sophia Orde and James the son equally as tenants in common. James is named and described as his Son in the Will of his Father James, and, therefore, there is a natural equality of *status* between him and his Sister, Mrs. Orde, and both take equally under the aforesaid gift made by the Will of their natural Grandfather.

The next and subordinate question in this appeal relates to the Will and succession of James, the second Son of the Testator.

By his Will, dated the 10th of November, 1859, [314] after devising all his share of the landed interests devised to him by the Will of his late Father, and which he particularly mentions, and after also bequeathing all sums of money due to himself at the time of his decease, and also all other debts, money Bonds, or other securities, unto his Daughter, Mrs. Sophia Evelina Orde, and his Son, James, to be equally divided, the Will contains the following passage:—"As my Son James is not educated or otherwise provided for, I leave and bequeath to him and to his Mother, Fanny Barlow, *alias* Villaetee Begum, the whole of the villages, landed property etc. etc. etc., which have been purchased for the estate since the late Colonel Skinner's demise, and in which I have a fifth share, as also my House, out-offices, and other lands at Hausee."

The question between the Appellant and Respondents is, what property passed under this last devise?

The facts, although they are not very clearly stated, appear to be, that whilst the estates devised by the Colonel to his Sons were under the management of the Executors or Managers appointed by the Colonel's Will, considerable sums, being surplus rents of the devised estates, but not drawn by the Devises, the Sons, were laid out in the purchase of additional landed property; and it is contended by the Respondents, that these new acquisitions must be regarded in law as accretions to the original devised estates, and as passing with them under the gifts made by the Will.

If this were so, the share of James, the Son, in the purchased estates would be

divisible, like his share in the original estates, between his Daughter, Mrs. Orde, and his Son, James, under the Colonel's Will, and [315] would not pass under the devise contained in his own Will.

But their Lordships find no ground for this conclusion, and they are of opinion, that the purchased estates follow the ownership of the purchase-money, which was the absolute property of the five Sons in equal shares; and they are of opinion, therefore, that the Testator James's fifth share in these purchased estates passed under the aforesaid devise in his Will.

But another question was raised at the Bar by the Respondents' Counsel, who stated that some leases granted to Colonel Skinner by the Government of certain villages and lands expired at the death of the Colonel, and that renewals were made by the Government to the Colonel's Devises, which renewed leases were, it was contended, obtained by virtue of the original ownership of the devised estates, and must, therefore, in equity, be subject to the gifts made by the Will of the devised estates.

It was incumbent on the Respondents to have stated and proved the facts on which this claim is founded, so as to have enabled their Lordships to decide the question; but this has not been done, and it does not appear to have been considered and determined by the Courts below.

If, however, Mrs. Sophia Orde requests, and is content to take at her own risk, an inquiry on this subject, their Lordships will recommend that such inquiry shall form part of the Order to be made. Their Lordships will humbly recommend Her Majesty to reverse the decree appealed from, and to declare that Mrs. Sophia Orde and James, the Son and Daughter of Major James Skinner, are entitled in [316] equal shares, by virtue of the Will of Colonel Skinner, to one equal fifth part of all the estates and property thereby devised and bequeathed to the Testator's five Sons in equal shares, and also to declare that one equal fifth part of all the estates and property purchased or acquired after the death of the Colonel by means of the rents, profits, or income arising from the estates and property devised and bequeathed to the said five Sons of the Testator, belonged absolutely to his second Son James Skinner, and passed, under the Will of the last-named James, to Mrs. Fanny Barlow and his Son James absolutely in equal shares; and at the request and risk of Mrs. Sophia Orde, let an inquiry be made, by or under the direction of the Court from whose decree this appeal is brought, whether any renewals or leases of lands that had been held by the Colonel during his lifetime were made or granted by the Government or any other persons to the Executors or Managers of the Colonel's Will, and under what circumstances, and for what consideration, the same were made.

There remains the subject of costs.

On the first hearing of the cause no costs were given to either party. From the decision of this first Court on the matters in question Mrs. Orde appealed, and obtained a judgment with costs, from which the present appeal is brought. In the opinion of their Lordships, Mrs. Orde was wrong on both points; and further in contending that the fifth share of her Father belongs to herself exclusively, she is claiming inconsistently with what was done by the family in the case of George, the illegitimate Son of Joseph. Their Lordships see no reason, therefore, why the ordinary rule should not prevail. The difficulty has [317] arisen, not from any uncertainty in the language of the Colonel's Will, but from the contention of Mrs. Orde that it ought to be interpreted by English law, which has no application. Their Lordships, therefore, condemn Mrs. Orde to pay the Appellant's costs in the Court below, the judgment of which is hereby reversed, and also to pay the Appellant's costs of this appeal. No Order is made as to the costs of the Respondent, Alexander Skinner.

[S.C. 6 Moo. P.C. (N.S.) 437.]

KHAJAH ASSANOULLAH. — *Appellant*: OBHOY CHUNDER ROY and Others, —
Respondents * [Jan. 25, 26, 27, 28, 1870].

On appeal from the High Court at Fort William, in Bengal.

Review of the policy of the Revenue sale Laws passed since the Decennial Settlement [13 Moo. Ind. App. 323].

An hereditary transferable Putnee Talook, created subsequent to the Perpetual Settlement, held at a fixed rent, was sold by the Government in the year 1835, for arrears of revenue, and the Government itself became the Purchaser at such sale. No steps were taken by the Government under Ben. Reg. XI. of 1822, to cancel or destroy the Talook dary tenure, but on the contrary, the Government, after reducing the tenure from a Talook at a fixed to a variable rent, made various settlements with the Talookdars as late as 1862, agreeing to preserve their rights. The Government afterwards sold the Talook subject to the rights of the Talookdars. Held:—

First, that as the Government had not effectually annulled the tenure before the year 1842, it had lost its statutory right to do so; as Ben. Reg. XI. of 1822, under which that right depended, was repealed by Act, No. XII. of 1841 [13 Moo. Ind. App. 331].

Secondly, that the Purchaser from the Government had no higher rights than were possessed by his Vendor, at the date of the sale, and consequently as the Government had waived its right, under Ben. Reg. XI. of 1822, to cancel the tenure, and left the Talookdars in the position they would have a right to under the old Law, the Purchaser's title was subject to the Vendor's agreement to preserve the Talookdars' rights [13 Moo. Ind. App. 332].

Where Tenants are dispossessed of their Lands by a Zemindar who disputes their title, the proper remedy to recover possession is to sue under Act, No. X. of 1859, sec. 23, cl. 6 [13 Moo. Ind. App. 332].

This suit was instituted under cl. 6, sec. 23 of Act, No. X. of 1859, by the Respondents, against the Appellant to recover possession of their ancestral hereditary transferable Putnee Talook, Poorba Auttee, appertaining to the 2as. 13gs. 1c. 1kr. share, part of a 10as. 13gs. 1c. 1k. share of Pergunnah Buldakhal, of which the Respondents were dispossessed by the Appellant as Purchaser in the year 1863 of the zemindary rights in the Pergunnah from the Government, who had up to that time held the same as Zemindars, as a khas mehal, having in the year 1835 become the Purchaser thereof at a Collector's sale for arrears of Government revenue, under Ben. Reg. XI. of 1822, and had, subsequently to such purchase, and under the powers contained in that Regulation, enhanced the rents reserved and paid by the Respondents in respect of their Putnee Talook.

By the decree of the Deputy Collector, Baboo Govind Chunder Bose, dated the 7th of June, 1864, he dismissed the suit on the ground, that the Government, being the original Purchaser, had as a matter of grace and expediency only settled for rent of the Talook, with the Talookdars, and that the Appellant as Purchaser of the Government's Zemindary rights [319] was not bound by that concession, and had, as Zemindar, a right to oust the Respondents, and take possession of their Putnee Talook.

On appeal the High Court, consisting of Messrs. Loch and Seton-Karr, on the 23rd March, 1865, reversed the decree of the Deputy Collector, on the ground that the Government, as such auction Purchaser, not only waived any right which they might have had to cancel the tenure of the Talookdars, but, actually, admitted the latter to a settlement in respect of the enhanced rent, and held out to them a promise of renewal; and that at the time when the Government disposed of their zemindary rights to the Appellant they had recorded a resolution, on a petition presented on behalf of the Talookdars, that nothing was sold to the Appellant but the zemindary rights, and

* Present.—Members of the Judicial Committee—The Right Hon. Lord Westbury, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart. Assessor.—The Right Hon. Sir Lawrence Peel.

that, therefore, the Talookdars' rights (whatever they might be) would be respected; and further they held, that the intention of the Government was sufficiently clear from the revenue Letters and proceedings, and that the Appellant, the Purchaser, was bound to respect the acts and intentions of the Government, and could not put in force any right which the Government had actually waived, and must, therefore, respect the tenure of the Respondents.

The appeal was from this decree and an Order of the High Court refusing an application for review of judgment.

The facts of the case, as presented on the pleadings and the points argued and discussed on the hearing of the appeal, are fully stated in their Lordships' judgment.

The case was argued by Mr. Doyne, and Mr. Cave, for the Appellant, and [320] Sir R. Palmer, Q.C. and Mr. Leith, for the Respondents.

The following Regulations and Act were cited and commented on: Regs. I. of 1793, sec. 10, cl. 9; VIII. of 1793, sec. 5; XLIV. of 1793, secs. 5, 6, 32; I. of 1801, sec. 14; XI. of 1822, sec. 31; Act, No. X. of 1859, sec. 23, cl. 6. *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy, Bahadoor* (10 Moore's Ind. App. Cases, 123) was referred to.

Their Lordships reserved judgment, which was now delivered by

The Right Hon. Sir James W. Colvile (Feb. 22, 1870).—The Appellant is the present Owner of the zemindary right in that portion of an extensive estate situate in Zillah Tipperah, and called Buldakhal, which includes the lands and villages that form, or once formed, a Talook known as Talook, Poorba Auttee. This Talook was created subsequently to the Perpetual Settlement, and in the year 1830, by Mirza Hosein Ali, the then Zemindar of that portion of the estate, in favour of Bishonath Roy, the Father or ancestor of the Respondents.

It was an hereditary transferable Talook, to be held at a fixed perpetual rent of Rs. 1550. 4½a. The estate of Buldakhal, at the date of the revenue sales, afterwards mentioned, seems to have comprehended many other Talooks, of which some had existed at the date of the Decennial Settlement; but the greater part had been created subsequently to the Permanent Settlement of the Mehals in which they were situated.

[321] In January, 1835, an 8-unna share, and in May, 1836, a 2-anna share, of the Buldakhal estate (the latter being the portion which included the Talook in question), were sold for arrears of Government revenue; and in both instances the Government itself became the Purchaser, and thus acquired all those rights which the sale Law then in force gave to a Purchaser of a zemindary sold for arrears of revenue.

In the exercise of those rights it proceeded to make a re-settlement of the estate, and proceedings, extending over a considerable period of time, were had against the Talookdars, including Bishonath Roy or his representatives. These will, hereafter, be more particularly considered. At present it is sufficient to state, that several settlements were ultimately made with the Respondent, Obhoy Chunder Roy, on behalf of himself and the other Respondents, in respect of the lands comprised in Talook, Poorba Auttee, viz., a settlement for one year in August, 1841; a settlement for twenty years in August, 1842; and a second settlement for one year in April, 1862. On the expiration of this third settlement the Government Collector gave notice to the Ryots and cultivators of the lands comprised in the Talook not to pay their rents to any person except the Government; and on the 23rd of November, 1863, the zemindary rights of the Government in the lands were put up for sale, subject to the rights (if any) of the Talookdars, and were purchased by the Appellant.

In March, 1864, the Respondents commenced the suit, out of which this appeal arises, against the Appellant. It was founded on their alleged dispossession from their Talookdary rights in the lands, and was brought under the 6th clause of the 23rd [322] section of the Act, No. X. of 1859, before the Collector. That Officer, by his decree, dated the 7th of June, 1864, dismissed the suit; but his decision was reversed by the High Court on the 23rd of March, 1865, and the appeal is against the latter decree, and a subsequent Order rejecting an application for a review of judgment.

The contention between the parties is shortly this. The Respondents assert, that their Talook is still a subsisting tenure, and that, although it is now, as they admit, subject to enhancement of rent by means of proceedings properly taken by the

Zemindar for that purpose, it gives them a right of possession or occupancy which he is not entitled to disturb. The Appellant, on the other hand, insists that the Government, after the sale for arrears of revenue, and in the exercise of its powers as Purchaser, effectually cancelled and destroyed the tenure created in favour of Bishonath Roy; that the Settlements which it afterwards made with Obhoy Chunder were in the nature of mere temporary Ijarahs, or farming leases; and that the last of these having expired, it was open to the Government, and is now open to him, the Appellant, to resume the possession of the lands, and either to make the collections from the Ryots and actual cultivators himself, or to make a new lease or settlement with the highest bidder. He further contends, that if the proceedings of Government have given to the Respondents any equity for a re-settlement, that equity is one which cannot be enforced in a suit brought under the special statutory jurisdiction given by Act, No. X. of 1859, to Collectors in cases of dispossession. It is admitted that the Appellant, as Purchaser, can claim no higher rights than those [323] possessed by the Government at the date of the sale to him; and that, if Government had then waived or lost the right which it may have had originally to cancel the tenure, he cannot now assert such a right.

The questions argued at their Lordships' bar were:—

First, whether the Government, upon the true construction of Regulation XI. of 1822 (the sale Law under which it purchased), ever had the right to cancel or destroy this tenure.

Secondly, whether, assuming that right to have existed, it was ever in fact exercised, whilst it was capable of being exercised; and,

Lastly, whether the suit, whatever be the rights of the Respondents, has been properly brought under the 6th clause of the 23rd section of the Act, No. X. of 1859.

Their Lordships will consider these questions in the order in which they have just been stated.

The general policy of the Revenue sale Laws that have been passed since the Perpetual Settlement, has been to protect the public revenue by placing the Purchaser of an estate sold for arrears of revenue in the position of the person who, at the time of the Decennial Settlement, engaged to pay the revenue then fixed. They, therefore, gave, or sought to give, to the Purchaser, the power abrogating all engagements made by the defaulting Zemindar or his predecessors since the settlement, whereby the zemindary rents and profits, which were the security to Government for the due payment of its revenue, were diminished. The Indian Legislature, however, has not uniformly tried to effect this general object by precisely the [324] same means. The various Regulations and Acts which it has from time to time passed for the purpose differ in the language of their provisions, and in the stringency of the powers conferred by them. Those enactments, at least those that were passed before 1840, are reviewed in the very able paper signed by Mr. Colvin. It was called forth by a difference of opinion between the Board of Revenue, of which he was then the Secretary, and Mr. Dampier, the Commissioner of the division in which this estate was situate; Mr. Dampier taking the view now contended for by the Respondents, viz., that the Talookdars, whether their tenures were created before or after the Decennial Settlement, were entitled to retain possession of their lands, subject, save in certain exceptional cases, to the liability of enhancement of rent according to the Pergunnah rates. And this was the view of the Law expressed by the Board of Revenue itself in May, 1833. Mr. Colvin's Letter was written in 1836 on behalf of the Board of Revenue to combat and overrule this construction of the Law.

To some of Mr. Colvin's conclusions their Lordships give an unqualified assent. They concur with him in holding that, under the sale Law, as it existed before 1822, a Talookdar could not be dispossessed of his lands at the will of the Purchaser at the sale; that he was at most, liable to pay the full Pergunnah or district rate for them; and could only be ejected from them if he finally declined to hold them at the enhanced rent. They are also of opinion that Mr. Colvin is right in holding that, under Regulation XI. of 1822, the Law respecting dependent Talooks created subsequently to the Settlement was, "that such Talooks were liable to be wholly avoided and annulled at the option of the [325] Purchaser at a sale for arrears of revenue," unless they fell within the class contemplated by the 32nd section of that Regulation. The language of the 31st section is very distinguishable from that used in the earlier

Regulations. It provides that "all tenures which may have originated with the defaulter or his predecessors, shall be liable to be avoided and annulled." On the other hand, the 5th section of Regulation XLIV. of 1793, provides only that the engagements which the defaulting proprietor may have contracted with dependent Talookdars, as also all leases to under-farmers, shall stand cancelled; and that the Purchaser shall collect from the Talookdars rent according to the full Pergunnah rates. The effect, therefore, of the earlier Regulation was to cancel a farming lease, but to keep alive the Talookdar's tenure, though at a rent liable to enhancement.

Hence the question between the Commissioners and the Board of Revenue in 1836 was, as the question between the parties on this part of the case now is, whether Talookdars of the class of Bishonath Roy were within the protection of the 32nd section. Mr. Colvin contends that "the Mofussil Talookdars" spoken of in that section, being described as persons having an hereditary transferable property in the lands or in the rents thereof, must be taken to be such Talookdars as are described by section 5 of Regulation VIII. of 1793, who, at the time of the Decennial Settlement, might have engaged directly with Government for the payment of the public revenue assessed on their lands; and even after the Settlement, and until that right was taken away by Regulation I. of 1801, might have claimed to be separated from the estate of the Zemindar. He [326] argues that the term does not include dependent Talookdars whose tenures have been created since the Settlement, they being Talookdars, who, under the 7th section of Regulation VIII. of 1793, are declared not to have the property in the soil, but to be mere leaseholders.

Their Lordships are of opinion, that there is considerable weight in the reasoning of Mr. Colvin, which receives some corroboration from that portion of the 14th section of Regulation I. of 1801, which declares that the rules regarding separable Talooks, contained in Regulation VIII. of 1793, were never meant to apply to any new Talooks constituted since the Decennial Settlement. Considering, however, that they have been referred to no case in which the clause now under consideration has received a judicial construction; that the question was not raised or considered in the Courts below; and that its determination is not absolutely essential to the disposal of this appeal, they abstain from expressing any further or more decided opinion concerning it.

They will assume that an auction Purchaser under Regulation XI. of 1822, had the option of cancelling and avoiding such a Talookdary tenure as that of Bishonath Roy which Mr. Colvin claims for him. But granting this, they are of opinion, that the power was one which he might or might not exercise; and that, in conformity with the principle of the decision in the case of *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy* (10 Moore's Ind. App. Cases, 123), it was incumbent on the Government in this particular case to take some clear step for the purpose of declaring the avoidance or cancellation of the tenure.

Their Lordships will, therefore, proceed to consider [327] the second question raised on this appeal; viz., whether the Government has, in fact, exercised its power of cancellation whilst it was capable of so doing.

Mr. Colvin's Letter being the expression of the views of the Board of Revenue, is not merely an able exposition of the law; it is also the best evidence we can have of what the Government, in February, 1836, intended to do in respect of the dependent Talooks forming part of this estate. Nor is it possible to read the last paragraphs of that letter, beginning with the 52nd, without coming to the conclusion that it was then the intention of Government, whatever might be their extreme rights, to make settlements with the Talookdars of all classes, putting them, or at least all who were not specially protected against enhancement of rent, in the position which they would have held of right before 1822, viz., that of under-tenants entitled to retain possession of their lands during the subsistence of their tenure, subject to the condition of having their rents enhanced, according to the Pergunnah rates. The Letter, no doubt, contemplated the exercise of the extreme rights of Government if the Talookdars should not, within a certain time, enter into the new settlement. But the primary object of Government was to settle with the Talookdars; and if the settlement were made, the tenures would continue to exist, though as Talooks held at variable instead of fixed rents. Nor is it improbable that, considering the power and influence which the hereditary possession of land

seldom fails to give in India, especially in a remote District like that in which this estate is situate, the revenue Officers felt that such an arrangement would [328] be beneficial to Government, as well as to the Talookdars.

Do, then, the subsequent proceedings show that Government departed from this its original intention?

In considering these proceedings, it should be borne in mind that the position of Government, in one respect, differed from that of an ordinary Purchaser at a sale for arrears of Government Revenue; inasmuch as the 36th section of Regulation XI. of 1822 expressly declares, that an estate purchased by Government shall be subject to the rules applicable to the management of ordinary Malguzary Mehals held Khas. By virtue of this enactment the revenue Officers had over this estate in 1833 all the powers conferred upon them by Regulation IX. of 1825, and by the provisions of Regulation VII. of 1822, which by the second section of the former Regulation are extended to and made applicable to estates held Khas, and the other lands there mentioned. It follows that Government, though its rights either in respect of cancelling the under-tenures or of enhancing the rent, were not higher than those of an ordinary auction Purchaser, may have been at liberty to assert those rights by a procedure not open to a private individual.

Their first proceeding was, however, one which every Zemindar is bound to make, the foundation of a suit for enhancement of rent. It was the issue on the 7th of June, 1836, of a notice under the 9th section of Regulation V. of 1812, claiming a rent raised at discretion to the sum of Rs. 5000. This led to the proceeding of Mr. Allen, the Deputy Collector of the Zillah Tipperah, of the 19th of June, 1837.

[329] Great stress has in the argument for the Appellant been laid upon this proceeding. Their Lordships, however, feel that in considering its effect they should look to its nature, and not to expressions loosely used in it, such as "it be ordered that the Talook be set aside," or the like. And, if this be done, it will be found that it is nothing but an ordinary proceeding for the enhancement of rent, against a person admitted to be in occupation of the lands. On such a proceeding it is open to the Defendant to contest either the right to enhance at all, or the reasonableness of the rent claimed, or both; without, however, admitting the reasonableness of the rent claimed if he expressly contests only the right to enhance. The Talookdar in this case adopted the former course by asserting that his Talook was one at a fixed rent, incapable of enhancement even by an auction Purchaser. And the proceeding determined this point against him. It is in fact such a proceeding as Mr. Colvin in the 56th paragraph of his Letter assumes to have been already taken.

Again, it appears that in July, 1836, and, therefore, between the date of the notice and that of Mr. Allen's proceeding, the Government had given orders for the measurement and survey of the lands. This shows that the rent of Rs. 5000 was a mere arbitrary claim made in order to try the right to enhance; and that the proceeding of 1837 determined neither the rent to be fixed, nor the person with whom the settlement was to be made.

The measurement and survey were not completed until the Bengal year 1245; and on the 3rd of September, 1839, the Commissioner wrote to the Collector that notice was to be issued to the Talook-[330]-dars to appear within fifteen days, and make settlements for twenty years at the Pergunnah rates, and that if they did not appear Ijarah settlements would be made after annulling their rights. These directions clearly imply that up to that time the intention of Government was still not to destroy the Talookdars' tenures, unless the Talookdars should finally refuse to engage at the Pergunnah rate.

Accordingly, notice was issued to the heirs of Bishonath on the 5th of December, 1839. It invited them to come in and make a Talookdary settlement within fifteen days, in default of which they were to be held not to have any rights as Putnee Talookdars of the late Zemindar, or of possession.

From Mr. Money's proceeding it appears that the Respondent, Obhoy Chunder, did not come in under this notice to accept the settlement; that he still struggled either for a settlement at the old rate, or for delay; and that Mr. Money accordingly, as Collector, granted an Ijarah for twenty years to a Stranger, Sheikh Aeenodeen. This arrangement, however, was subject to confirmation by higher authority, and we learn that on the 24th of November, 1840, the Commissioner refused to confirm

it *in integro*, and reduced the lease for twenty years to one for a single year. And we have a further notice to the heirs of Bishonath, dated the 23rd of February, 1841, calling upon them once more, in anticipation of the expiration of the one year's lease to Aeenooddeen, to enter into a Talookdary settlement at the Pergunnah rate, under pain, in case of default, of losing all right to the Talook.

The Appellant relies much on the interruption, or assumed interruption, of the Respondent's possession [331] by the grant of this lease to Aeenooddeen. And if the original lease for twenty years had been confirmed, and possession had followed thereon, the inference that the old Talookdary tenure had been cancelled would have been strong.

The Commissioner's Letter of the 24th of November, 1840, was not, however, produced *in extenso*; and it is to be presumed that the Appellant, who derives title from the Government, would have found means to produce it, had it supported his case. Its effect, as stated on the record, coupled with the fact of the subsequent notice to the heirs of Bishonath, which treats their Talookdary tenure as still subsisting, leads their Lordships to the conclusion that the lease for a year to Aeenooddeen was nothing but one of those temporary arrangements pending negotiations for a final settlement of the Revenue which the Revenue authorities were, under Regulation IX. of 1825, competent to make. Certain it is, that the result of this second notice was that, in 1841, the Respondent, Obhoy Chunder, entered into the first engagement for one year; and in 1842 made the engagement for twenty years; and the Kaboolyats and other documents executed on both occasions support the conclusion that those settlements were Talookdary, and were made with him as representing the persons entitled to hereditary possession of the lands under the old Talook granted to Bishonath, although their continuing tenure may not be described with strict accuracy as a Putnee Talook.

It is further to be observed that, if the Government had not effectually annulled the tenure before 1842, it had then lost its statutory right to do so; since Regulation XI. of 1822, upon which that right [332] depended, was repealed by Act, No. XII. of 1841; and that it is, therefore, unnecessary to consider the subsequent proceedings. The conclusion, then, to which their Lordships have come upon this part of the case, is that the Government, whatever may have been its powers, did not, in fact, cancel or destroy the tenure, but left the Talookdars in the position in which they would have been, as of right, under the old law: reducing their tenure from a Talook at a fixed to one at a variable rent. And it follows from this that the Appellant, though he has the right to bring a suit properly framed for the further enhancement of the rent, is not entitled to disturb the possession of the Talookdars, or to let the land over their heads to the highest bidder.

Upon the last question their Lordships think it sufficient to say, that the suit being one between under-tenants claiming a right to the possession of lands of which they have been dispossessed, and their Zemindar who disputes their right of possession, has, in their Lordships' judgment, been properly brought under the 6th clause of the 23rd section of Act, X. of 1859.

Their Lordships, therefore, being of opinion, that no ground for disturbing the decree under appeal has been established, will humbly advise Her Majesty to dismiss the appeal with costs.

[333] STREE RAJAH YANUMULA VENKAYAMAH,—*Appellant*: STREE RAJAH YANUMULA BOOCHIA VANKONDORA,—*Respondent* * [Feb. 2, 1870].

On appeal from the High Court at Madras.

A *Mansubdary* Talook was held by a joint Hindoo family under a grant from the Zemindar. By the custom of the family, the Talook was impartible and descendible to a single heir. One of the members of the family took forcible possession of the Talook, and refused to pay the Zemindar's revenue. He was ousted out of possession by the Zemindar by the aid of A., another member of the family, whom the Zemindar recognized and put in possession, and afterwards entered into an agreement with him to pay the revenue. There was no division of the family. Held, that no forfeiture took place, or new title accrued, so as to constitute a separate acquired estate in A.

The case of *Katama Natchier v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 543) observed upon and distinguished [13 Moo. Ind. App. 336].

The *onus probandi* lies on a Plaintiff, a member of the Hindoo family, claiming an estate, as self-acquired, as the presumption of Hindoo Law is in favour of the family remaining joint.

In this case the question raised by the pleadings and at issue, both in the Court below and on appeal, was one of fact, whether the family of which the parties to the appeal were members, constituted a joint or divided Hindoo family. By the decree of the High Court of Madras, which affirmed the decree of the Civil Court of Rajahmundry, it was held that the *onus* of proving the family to be a divided family and the estate self-acquired, lay on the Plaintiff, the present Appellant, and that she failed to do so, consequently [334] that the estate in question was to be treated as joint family property, and not governed in its devolution by the incidents of, or rules applicable to self-acquired property.

The suit was brought by the Respondent against the Appellant, as Widow and heiress-at-law of Stree Rajah Uddandah Jagappa Dorah, who died childless, and another, the younger Widow of the same person, since deceased, to eject the Appellant from possession of the estate of Totapatti Talook, held as Mansubdary, *i.e.*, on the feudal condition of supplying a certain number of armed Peons to the paramount Government: and to have the Plaintiff's title to the estate decreed; and to recover certain personal estate. The Respondent alleged, that the real and personal estate was joint property belonging to a joint and undivided Hindoo family, of which the deceased and the Appellant were members, and that the Respondent, a distant relative of the late Owner (being a great-grandson of a common ancestor), was entitled to succeed as heir, according to the Hindoo Law in force in Southern India, to the estate and effects, to the exclusion of the Appellant.

The Appellant's case was, that the family was joint; and she submitted, that even if the family had been proved to be undivided, the Talook in question was self-acquired by the Grandfather of her Husband by force of arms, and under an agreement with the Maharajah and Zemindar of whom the Talook was held; that the Grandfather of her Husband had thus acquired a new title to the Talook, in virtue of which it became vested in him and his separate heirs as separate and self-acquired estate, and devolved on the separate heir of the last possessor in preference [335] to those who claimed to be joint heirs with him in the joint family property; and that the Appellant, as a childless Widow, was entitled to succeed to the estate as heir-at-law and legal personal representative of her Husband. The nature and effect of the original grant of the Talook and the agreement made by the Zemindar with the Appellant's Husband's Grandfather, are duly stated in the judgment of the Judicial Committee.

The appeal was from the High Court's decree of affirmance of the judgment of the Civil Court of Rajahmundry, holding the family to be joint.

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice Giffard. Assessor.—The Right Hon. Sir Lawrence Peel.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant, submitted, that the Respondent had failed to prove that the estate to which he claimed to succeed as a member of a joint family, was ever held as a joint family property, and that the Courts in India were wrong in throwing the burthen of proof on the Appellant of showing that the estate had been separately acquired. They insisted that the Mansubdary Talook came into the family originally as self-acquired estate by gift, and descended as such on the Owner's separate heirs in succession, to a single heir only at a time, and not to any co-heirs or joint heirs; and that it had never been held, as alleged, by such sole heir as a Hindoo Manager for the joint heirs. They further contended, that any original title or rights which might have accrued to the Grantor and his heirs or to other property acquired by them, were put an end to as regarded the Talook, by the fact that the Grandfather of the Appellant's Husband acquired the Talook by right of arms, and that he [336] was confirmed in possession thereof by an agreement with the Zemindar of whom the Talook was held; that a new title was thereby created, under which the Talook became vested in her Husband's Grandfather and his heirs as separate self-acquired estate, *Katama Natchier v. The Rajah of Shivagunga* (9 Moore's Ind. App. Cases, 543).

Mr. Mundell, Q.C., and Mr. F. H. Bowring, appeared for the Respondent, but were not called on.

Their Lordships' judgment was pronounced by

The Right Hon. Sir James W. Colville.—The question on which the parties in the suit out of which this appeal arises joined issue and went to trial, was, whether the family, of which the Plaintiff and the Appellant's Husband were members, was an undivided or a divided Hindoo family.

Both the Courts below, giving effect to the presumption of Hindoo Law which the evidence failed to rebut, have decided, and in their Lordships' judgment have properly decided, that issue in favour of the Plaintiff. The general *status*, therefore, of the family, as an undivided family, has been ascertained.

Accordingly, the strength of the argument of the learned Counsel for the Appellant has been directed to show that this case should be governed by *Katama Natchier v. The Rajah of Shivagunga*, in the 9th vol. of Moore's Indian Appeal Cases, p. 543, which is generally known as the "Shivagunga case." They have gone so far as to argue that the estate in question in this case, being impartible, must, from its very nature, [337] be taken to be separate estate, and consequently that, according to the decision in the "Shivagunga case," the succession to it is determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided.

The authority invoked, however, affords no ground for this argument. The decision in the "Shivagunga case" will be found to proceed solely and expressly on the finding of the Court, that the zemindary in question was proved to be the self-acquired and separate property of Gowary Vallabha Taver. It assumes that if this had not been so, the decision would have been the other way. At page 593: 9 Moore's Ind. App. Cases, their Lordships say:—

"Hence, if the Zemindar, at the time of his death, and his Nephews were members of an undivided Hindoo family, and the zemindary, though impartible, was part of the common family property, one of the Nephews was entitled to succeed to it on the death of his Uncle. If, on the other hand, the Zemindar, at the time of his death, was separate in estate from his Brother's family, the zemindary ought to have passed to one of its Widows, and, failing his Widows, to a Daughter, or descendant of a Daughter, preferably to Nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestible; but Gowery Vallabha Taver's Widows and Daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that, even if the late Zemindar continued to be generally undivided in estate with his Brother's family, this zemindary was his self-acquired and separate property, and as such was descendible, like separate [338] estate, to his Widows and Daughters and their issue preferably to his Nephews, though the latter, as coparceners, would be entitled to his share in the undivided property. Upon this view of the law the question whether the family were undivided or divided becomes immaterial. The material

question of fact, would be, whether the zemindary was to be treated as self-acquired separate property, or as part of the common family stock." Again, at page 609, it is said:—"The substantial contest between the Appellant and the Respondent is, as it was between Anga Mootoo and the Respondent's predecessors, whether the zemindary ought to have descended in the male and collateral line: and the determination of this issue depends on the answers to be given to one or more of the following questions:—First, were Gowery Vallabha Taver and his Brother undivided in estate, or had a partition taken place between them? Second, if they were undivided, was the zemindary the self-acquired and separate property of Gowery Vallabha Taver? And if so,—Third, what is the course of succession according to the Hindoo law of the South of India of such an acquisition, where the family is in other respects an undivided family?" And again at page 610, their Lordships, dealing with the second of these questions, say:—"The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the zemindary as the self-acquired property of Gowery Vallabha Taver. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the Grantee selected by Government was a remote [339] kinsman of the Zemindars of the former line, does not, their Lordships apprehend, bring this case within the rule cited from *Strange's Hindoo Law*."

It is, therefore, clear, that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate. And their Lordships apprehend, that if they were to hold that it did so, they would affect the titles to many estates held and enjoyed as impartible in different parts of India.

Has it then been shown that, though the family was undivided, this estate was in fact the separate property of the Appellant's Husband?

The evidence concerning the original grant of it, and the terms on which it was held, is extremely scanty. The most material document is the Exhibit A, in the record: which, as the statement of the then Zemindar, made on an official requisition at a time when he had no interest in giving, nor apparent motive for giving any but a true account of the history of the estate and of the custom of his family, seems to be in every way worthy of credit. Looking at that document, their Lordships are of opinion, that the estate was in its inception part of the common family property, though impartible, and, therefore, with certain qualifications enjoyable by only one member of the family at the time. It appears to have been substantially granted to the common ancestor of the family, Bapam Dhora; though with his consent and for some undisclosed reason, it was put into the name of his third Son, Joggappa Dhora. This grant states:—

"As the issues which the said Saraba Raghavaraz had, had failed, and as he had no near relatives and [340] heirs, he made up his mind to give up the said Totapatti Talook attached to Raghavaraz Sima to my said ancestor, Bapam Dhora, and the Joddangi Talook to Boggula Gannamreddi Dhora, and at the time of his death he executed Pottahs in the names of Joggappa Dhora, the third of the four Sons of Bapam Dhora, according to his consent, and of Boggula Gannamreddi Dhora transferring to them respectively the Talooks of Totapatti and Joddangi, and authorizing them and their posterity to enjoy them as Jaghires as he has done."

That the grant was to the family of Bapam Dhora is made more apparent by what follows:—"From that time Joggappa Dhora enjoyed the Talook (of Totapatti) for forty-nine years. In his time he had managed the affairs of the Talook and lived at Totapatti, and provided vasatis (landed gifts) to his three Brothers, caused Pudda Mallu Dhora to live in the village of Vajrocutani, Rajani Dhora in Kottange, and Chinna Mallu Dhora in Nellipudi, and thus maintained them."

These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a Raj, or impartible estate, in favour of the junior members of the family: who, but for the impartibility of the estate, would be coparceners with him.

It is argued, however, that whatever may have been the original nature of the property, the effect of what took place when Bapam Dhora supplanted and excluded

Mallappa Dhora was to make it a new and fresh acquisition of Bapam Dhora; just as in the "Shivagunga case," the new grant of the escheated zemindary to Gowary Vallabha Taver, was held to [341] constitute a new and separate acquisition by him, though a member of the family of the former Zemindar. Their Lordships are, however, of opinion, that there is a clear distinction between the two cases. In the "Shivagunga case" the zemindary had escheated to Government, which was free to deal with it as it chose. By a new Sunnud it granted it to the Taver, conferring a legal title which none could dispute. What was done in this case? The document A. states:—"On his death, Jaggappa Dhora's Son, Mallappa Dhora, after joining the people called 'Desastula,' fell out with Sri Maharaz, and enjoyed the Talook as Mokhasa without his interference, by causing much disturbances; consequently, my senior paternal Uncle, Bapam Dhora, went to Peddapuram, visited Sri Maharaz, represented to him, that in the event of your affording me assistance, I will turn out the said Mallappa Dhora, enjoy Totapatti Talook, paying the Jumma-bundi amount formerly fixed by Rajam Dhora, and thus obtained the assistance of Sibbandis (Warriors), came and drove out Mallappa Dhora, entered Totapatti, and took possession of it, and paid 2700 karuku pagodas for one year in full."

This account shows no legal forfeiture; no fresh grant by any person competent to grant a legal title. It only shows that on a dispute between Mallappa Dhora and the superior, another member of the family came in, and, with the strong hand, and in concert with the superior, succeeded in ousting Mallappa Dhora, and in assuming the position and rights of the Zemindar. And the document itself shows that the adopted Son and successor of Bapam Dhora himself considered this as no substantial change in the nature or tenure [342] of the property; that he still traced his title to Bapam Dhora by virtue of the original grant; and spoke of the Talook as having been enjoyed by six generations of his family during the period of one hundred and seventy-nine years.

Nor is it immaterial to observe what he states as regards the practice of succession observed in the family. He says:—"As regards the practice of succession observed in our family, I have to state, that if the holder of the Talook has two or three Sons, the eldest of them enjoys the estate, while the rest, being provided with *vaesatis*, conduct themselves according to his will, but it has never been the practice of dividing the Talook among Brothers. If the Owner of the land has no issue, a competent person out of his nearest Cousins is selected, and the Talook put in his possession.

Their Lordships are, therefore, of opinion that, even if the case made for the Appellant at their Bar had been made in the Courts below (which apparently it was not) it must have failed: and that no ground has been shown for disturbing the decrees under appeal. They must, therefore, humbly advise Her Majesty to dismiss this appeal, with the costs of the Respondent, on whose behalf an appearance has been entered here.

[See *Chowdry Chintamun Singh v. Mussamut Noutukho Konwari*, 1875, L.R. 2 Ind. App. 270.]

[343] IN THE MATTER OF SREE MOHUN GHUTUCK * [Feb. 21, 1870].

On petition from an Order of the High Court of Judicature at Calcutta.

An Order of the High Court at Calcutta, under sec. 26, cl. 2, of Ben. Reg. V. of 1831, dismissing a Moonsiff for corruption in the exercise of his functions as Judge, is final, and there is no jurisdiction in the Judicial Committee to admit a special appeal therefrom.

The Petitioner, in this case, applied *ex parte* for special leave to appeal from an Order made by the High Court at Calcutta, under Ben. Reg. V. of 1831, section 26, dismissing him from his office of Moonsiff, or Judge, of Chawkey Shahazadpore in Bengal, for corruption in the exercise of his judicial functions as Moonsiff.

The petition set forth, that the Petitioner was appointed a Moonsiff in the year 1859, and discharged the duties of that office from the year 1865 down to the period of his dismissal from that appointment in 1867; that he was dismissed from his office of Moonsiff by Orders of the High Court at Calcutta, dated respectively the 3rd of October, 1866, and the 12th of June, 1867; that such Orders were made upon separate reports made by the Judge and Commissioners of Rayohayr, dated the 21st of August, 1860, and the 25th of September, 1866, in relation to certain charges of corruption brought against him in the exercise of his judicial functions as Moonsiff, under the provisions of Ben. Reg. V. of 1831, [344] section 26, cl. 2. That although the provisions of Act, No. XXXVII. of 1850, which prescribe the course of procedure to be followed in investigating charges against Judicial Officers whose cases fall under cl. 1, of section 26 of Ben. Reg. V. of 1831, do not expressly refer to the investigations of charges against Moonsiffs by the Sudder Court, whose powers were now vested in the High Court, yet, the Petitioner submitted, that the principle was the same in both cases, and that there had been grave departures from principle and justice in disposing of the case. That the Judge on whose report, together with the evidence taken by him and upon which the High Court entirely proceeded, entered on the discharge of duties, which should have been conducted in a judicial spirit, with the strongest avowed prejudice against the Petitioner, and regarded himself as a private Prosecutor. That the Judge admitted hearsay evidence when it was in his power to have called for the original account-books, in which it was alleged, the entries of the moneys paid by Witnesses to the Petitioner as bribes were entered; that he allowed alleged copies to be put in, which, without proof, he held to be true copies; and submitted, that if such evidence were excluded, there would remain no proof of the charge against the Petitioner; that the Judge did not give him sufficient opportunity of putting in his defence or calling Witnesses. That one of the Judges of the High Court before whom the report of the Judge came, acting thereon, and without hearing the Petitioner, on the 3rd of October, 1866, made an Order for the dismissal of the Petitioner; that afterwards, in consequence of the Petitioner complaining of not being heard, the case came on again for hearing on the 12th of June, 1867, before another Judge of the High Court, [345] who after hearing the arguments for the Petitioner affirmed the Order of dismissal; and the petition further alleged, that if full opportunity had been given to the Petitioner of making his defence, he could have successfully rebutted the false and malicious charges brought against him, and have escaped the ruin and disgrace which his dismissal from the Bench, and exclusion from practice at the Native Bar, had brought upon him; and that as there was no right of appeal under the Letters Patent creating the High Court, he prayed that special leave might be granted him to appeal against the judgments of the High Court of the 3rd October, 1866, and the 12th of June, 1867, and that such decisions might be reversed, and the Petitioner reinstated in his Office, or that the High Court might be ordered to direct a fresh inquiry to be instituted, with regard to the charges brought against the Petitioner.

* Present: Members of the Judicial Committee.—The Right Hon Sir James William Colville, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Right Hon. the Lord Justice Giffard. Assessor,—The Right Hon. Sir Lawrence Peel.

Mr. Doyne, in support of the Petitioner.—As no right of appeal is given from Orders of dismissal of Moonsiffs by section 39, of the Letters Patent of the 14th of May, 1862, creating the High Court at Calcutta, which Court exercises the same power as the late Sudder Court did under cl. 2, sec. 26 of Ben. Reg. V. of 1831, in dismissing Moonsiffs, the only remedy the Petitioner has is under the Statute, 3rd and 4th Will. IV., c. 41, sec. 1, to seek for special leave to appeal. *In re Minckia* (4 Moore's Ind. App. Cases, 220), this Court allowed an appeal from an Order of the Supreme Court at Madras, dismissing the Master of that Court, which Order was not by the Madras charter an appealable grievance.

[346] Sir James W. Colville. The Office of Moonsiff is not a Patent Office within the meaning of the Statute, 22nd Geo. III., c. 75. *Exp. Robertson* (11 Moore's P.C. Cases, 288), is an express authority that we have no jurisdiction to entertain this application.

BHOWAN DOSS and PURSOTUN DOSS,—*Appellants*: SHEIKH MAHOMED HOSSEIN and MUSSUMAT BUNNOO BIBEE, Widow of Sheikh Mahomed Hussun, and MUSSUMAT HOSSEINEE BEGUM,—*Respondents* * [Feb. 22, 1871].

On Appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

In a mortgage Deed the Mortgagee was described as one "M. J. B., otherwise B. K. the Wife of M.," and it recited, that the consideration-money was advanced by her. M. J. B. was not the Wife of M., but his Concubine. In the absence of satisfactory proof that the money advanced was M. J. B.'s separate property, and upon evidence that the consideration-money was really advanced by M. Held (affirming the decrees of the Courts in India), that the preponderance of the evidence was in favour of M., being the person who advanced the money, and that the transaction was to be considered as Benamee; or in trust for M. as Mortgagee.

This was a suit brought in the Court of the Principal Sudder Ameen of Jounpore by the Appellants, as the Purchasers and Assignees of a mortgage security [347] contained in a Deed of conditional sale and Deed of acceptance of lease, from one Mussumat Jariutool-Butool, generally known by the name of Hossein Buksh, who had lived as the Wife, but was in fact the Concubine, of one Mirza Abdoollah Beg, deceased, a Mahomedan; to obtain possession from the Respondents of the lands consisting of half the Talooka Ronurpore proper, and Mouzahs, Becka Serai, Jugdespore, Horamunpare, and Korounda, its dependencies, situated in Pergunnah Ghuswa, in Zillah Jounpore; by setting aside the Lease for breach of conditions thereof and on expiration of term; and to recover the sum of Rs. 2840 for mesne profits, according to the deed of acceptance of lease, which Deed together with the Deed of conditional sale, was made by the Respondent, Sheikh Mahomed Hossein and Sheikh Mahomed Hussun, since deceased, in favour of Mussumat Jariutool-Butool and assigned by her to the Appellants.

The principal questions raised in the suit were, first, who was the Mortgagee designated and intended by the name and description of "Mussumat Jariutool-Butool, *alias* Bebee Hosseinee Kullan, Wife of Mirza Abdoollah Beg," which description appeared in each of the two Deeds; whether Mussumat Jariutool-Butool (it being admitted that she had been called by that name after she lived with Mirza Abdoollah Beg, and that she had been previously known as Hossein Buksh) was the Mortgagee designated and intended, or whether Zynub Bebee, who was the legal Wife of the Mirza, but as to which name it was not pretended that Hossein

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Buksh had ever been called; and secondly, whether the consideration-money mentioned in the Deed of conditional [348] sale, as having been paid and advanced by the Mortgagee therein named, was in fact, the money of Mirza Abdoolla Beg, and whether, therefore, he had reserved to himself the entire beneficial interest under the Deed and Deed of acceptance of Lease, so that the same passed to and vested in the Respondent, Mussumat Hossainee Begum, as his niece and heiress, according to Mahomedan Law, on his dying intestate.

By the decree of Mahomud Abdoolla Khan, the Principal Sudder Ameen, it was declared, that "it was quite superfluous to inquire who Jariutool-Butool, otherwise Hossainee Kullan, really was"; and that "even if it were granted that Jariutool-Butool, Hosseinee Kullan, and Bebee Hossein Buksh, were all names given to Hossein Buksh by Mirza Abdoollah Beg in the excess of his affection"—because as he held "she had admitted the latter's ownership of the property now in dispute"; and he further decided, that this admission was made by her through her setting up a certain document as the Will of the Mirza in another suit, in which she had failed to prove it, and in which, as the Principal Sudder Ameen declared, the fact of Mirza Abdoollah Beg being the Mortgagee of Konurpore, now in dispute, was admitted by "the estate being included in the property bequeathed." On this ground alone, the Principal Sudder Ameen ordered the suit to be dismissed, with costs.

On appeal, the Sudder Dewanny Adawlut at Agra, consisting of Messrs. C. R. Lindsay and R. Spankie, Officiating Judges, affirmed the decree of the Lower Court, but on different grounds, deciding that the Deed of conditional sale was made in favour of [349] the lawful Wife of the Mirza, and not in favour of his Concubine; because the term "Wife" had been used in the Deed. The decree declared "that the Deed of mortgage was in favour of a Lady styled Jariutool-Butool Hosseinee Begum, acknowledged in the Deed as the Wife of Mirza Abdoollah Beg; that it had been proved that Mussumat Hossein Buksh was not lawfully married to Mirza Abdoollah Beg, and no argument based on the ground that she was acknowledged by Mirza Abdoollah Beg as his Wife can be admitted."

The substance of the mortgage Deed, and the nature of the interest of the parties, are sufficiently stated in their Lordships' judgment.

The present appeal was from the above decree of the Sudder Court at Agra, and was fully argued by Mr. Leith, for the Appellants, and Mr. Field, Q.C., and Mr. J. D. Bell, for the Respondents.

The consideration of their Lordships' judgment was reserved. Judgment was now pronounced by

The Right Hon. Sir James W. Colville (March 25, 1870).—The only question on this appeal is, whether the interest of the Mortgagee under a Deed of conditional sale, dated the 7th of November, 1855, is now vested in the Appellants as the Assignees of a woman whom it will be convenient to designate by her original name, Hoosein Buksh, or in the Respondent, Mussumat Hossainee Begum, as the heiress and representative of Mirza Abdoollah Beg.

The suit in its inception was one brought by [350] the Appellants to enforce the security against the Mortgagors, who are represented by the two other Respondents. The Respondent, Mussumat Hossainee Begum, intervened by petition, alleging that Hossein Buksh had no right to assign the mortgage security, which was part of the estate of the Mirza, and as such now belonged to her, the Petitioner, as his representative. She was admitted to defend her title as a party to the suit, which thus embraced two distinct questions, viz., first, whether the Appellants, under the title derived from Hoosein Buksh, were entitled to stand in the shoes of the original Mortgagee, and, if so, secondly, whether they were entitled to the relief sought against the Mortgagors. The first only of these questions has been fully tried in the Courts below, or argued on the appeal here.

In a former suit touching the estate of Mirza Abdoollah Beg, between the Respondent, Mussumat Hossainee Begum, and Hoosein Buksh, it had been determined by the decree of two Indian Courts, confirmed on appeal by Her Majesty in Council (see *Mussumat Jariutool-Butool v. Mussumat Hosseinee Begum*, 11 Moore's Ind. App. Cases, 194), that the latter was not, as she alleged, a Wife, but a mere Concu-

bine of the Mirza : that a document which she had propounded as his Will in her favour was spurious ; and that the Respondent, Mussumat Hossainee Begum, as his heiress-at-law, was entitled to his estate.

The following is the history of the security in question. In November, 1855, the Mortgagors being the Owners of a half-share in Talook Komurpoor, which they had previously mortgaged to Bishnoo Doss, the Father or ancestor of the Appellants, bor-[351]-rowed Rs. 7000 in order to pay off that mortgage, and for other purposes. As a security for the repayment of the new loan with interest, they executed the Deed of conditional sale of their share in the Talook to enforce which this suit is brought. By instruments of the same date (the 7th of November, 1855) they took from the Mortgagee a lease of the mortgaged premises at a yearly jumma of Rs. 3996. 12a. and 6p. ; and accordingly remained in possession, under the obligation of paying out of that sum the Government and other charges on the property, and accounting for the balance, being Rs. 840 per annum, as profits to the Mortgagee on account of this usufructuary mortgage. The mortgage was taken, and the sum granted, in the name of " Mussumat Jariutool-Butool, otherwise Bebee Hooseinee Kullan, Wife of Mirza Abdoollah Beg." And the question, as already stated, now is, who was the real Mortgagee?

This question was, in the Courts below, treated as involving two issues, viz., first, who was the person designated by the above description, *i.e.*, whether it was Hoosein Buksh, or the admitted Wife of Mirza Abdoollah Beg, one Zenut Bebee ; and, secondly, whether the money was not advanced by the Mirza, and the security taken for his benefit, though Benamee in the name of the person, whoever she might be, to whom the description was intended to apply.

Their Lordships are of opinion, that if the money advanced can be shown to have been the money of the Mirza, it becomes immaterial to consider who was the nominal Mortgagee. For the case made by the Appellants, and sworn to by their Witnesses, is, that the money was advanced by Hoosein Buksh out of her [352] own moneys ; and the mortgage taken in her name for her own benefit. There is no suggestion on the record that, though the money came from the Mirza, the transaction was by way of gift, or provision for her ; and the Appellants cannot now be allowed to set up a title inconsistent with that asserted in the Courts below. This being so, it is to be regretted that the judgments of these Courts do not so much proceed on a clear finding on this material issue, to which the evidence taken was almost wholly directed, as upon inferences from the conduct of Hoosein Buksh, and other circumstances, which will be hereafter considered.

The case made by the Appellants was, as already stated, that the money was that of Hoosein Buksh. It is supported only by the testimony of Servants, of whom one at least has been discredited in the former suit. Some of them undertake to swear that when she came into the zenaneh of the Mirza she brought a large sum of money (Rs. 15,000 or more) with her--a circumstance far from probable. The Principal Sudder Ameen has expressed an opinion, that the Appellant's Witnesses are untrustworthy as compared with the Witnesses of the other party, and their Lordships feel that very little reliance can be placed upon them. Hoosein Buksh herself has not been examined ; nor is her story corroborated as it might have been, to some extent, by the production of the Collector's receipts for revenue, which, as appears from the instrument called the acceptance of the lease, the Mortgagors were bound to hand over to the Mortgagee.

The case of the Respondents as to the money is, that it was made up of a sum of Rs. 6900, which [353] was brought for the purpose from the Bank of one Narain Doss, under an order of the Mirza, and of a sum of Rs. 100 added to it from his cash in the House. The Witnesses who depose to this are, for the most part, also menial Servants. Nor can their Lordships, who have not the means of seeing them, judge how far the Principal Sudder Ameen was warranted in considering them more worthy of credit than those on the other side. The evidence of the Gomashtah called to prove the payment from the Bank of Narain Doss, if free from the objections taken to it, would unquestionably turn the scale in the Respondent's favour. Those objections have now to be considered.

The first is, that the date of the entry in the Banker's Books as given in the record, corresponds with the English date, the 22nd of November, 1855, and is,

therefore, inconsistent with the Respondent's case, inasmuch as it shows that the payment of the Rs. 6900 was posterior to the date of the mortgage transaction. Their Lordships, however, are not satisfied that the Hindee date is correctly printed in the record. It is Mitu Katuk Soodee, 13th. The Hindee date of the Conditional sale is Katuk Boodee, 13th. The name of the month and the number of the day are the same. The difference is between Soodee and Boodee, or "the light" and "the dark side of the moon." An error, therefore, in one letter would account for the discrepancy. Their Lordships cannot but think that if there had really been this gross inconsistency between the Respondent's evidence and her case, the fact could not have escaped the notice of the native Judge who tried the suit in the first instance, or of the Appellants. Yet the former admitted the entry [354] without comment, and apparently gave credit to it; and neither in their reasons of appeal, nor, so far as appears, in the argument before the appellate Court, was this objection taken by the Appellants.

A more formidable objection to the entry is its particularity. It is asked, why should it state that the money was paid "through Thakoor Hurren Singh for a mortgage in presence of Sheikh Mahomed Hossein and Sheikh Mahomed Hussun to Bishnoo Doss and Gopal Doss." The statement seems to point rather to a payment at the Bank than to one at the House of the Mirza. Nor do the other Witnesses speak to the payment to Bishnoo Doss and Gopal Doss; though such a payment at some time and in some place must have formed part of the transaction.

It is also argued that, if the Respondent's case were true, she might have proved it by calling Sheikh Mahomed Hossein, the surviving Mortgagor, and other respectable persons named by the Witnesses or in the entry. That there is considerable force in these arguments cannot be denied. But it is to be remarked, that there was no cross-examination of the Gomashitah upon the entry or otherwise. The evidence seems to have been given without objection or comment in the Court below. If, therefore, the Indian Courts had distinctly found upon this evidence that the money was advanced by Mirza Abdoollah Beg, as alleged by the Respondent, and their Judgments had expressly proceeded on that finding, their Lordships, notwithstanding the difficulties about the entry, and the character of the Respondent's Witnesses, would not have seen grounds sufficient to justify them in disturbing these concurrent judgments.

[355] Unfortunately, there has been no distinct finding on this issue of fact. And their Lordships must consider, whether the grounds which the Judges of the two Courts do assign for their conclusions, are sufficient to justify them.

The judgment of the Principal Sudder Ameen proceeds chiefly on the ground that Hoosein Buksh, having included the mortgaged property under the description of "Komurpore," in the enumeration of the Mirza's properties at the foot of the spurious Will, must be taken to have admitted that it was part of his estate. The judgment of the appellate Court in India adopted this ground, but proceeded also on the conclusion that the nominal Mortgagee was not Hoosein Buksh, but Zenut Bebee. Its reasons for that conclusion are not, in their Lordships' opinion, satisfactory. It may be admitted that "Jariutool-Butool" is a term as applicable to the one person as to the other. But the *alias* Hossainee Kallan is at least nearer to the name of Hoosein Buksh than it is to that of Zenut Bebee. Hoosein Buksh, if her story is true, might well give to herself in the Deed a more noble title than properly belonged to her, and yet be careful in the Will to call herself by her original name in order to avoid any dispute touching the description of the Legatee. It is also perfectly consistent with her case that she should describe herself as the Wife of the Mirza. Nor, though improbable, is it absolutely impossible that he, if the transaction were with him, would allow her to be so described? Their Lordships, therefore, are not prepared to affirm that Hoosein Buksh was not the benamee Mortgagee, though they do not say that she has been satisfactorily proved to have been so.

[356] The other grounds of the judgment seem to them to be stronger. It is met by the suggestion that the "Komurpore" mentioned at the foot of the Will is not the property comprised in the mortgage. The Principal Sudder Ameen, however, a native Judge with local knowledge, has held that the "Komurpore" in the Will did properly designate that property. The reasons of appeal make no specific

objection to this finding; and the objection taken in argument before the Judges of the Sudder Court, who had not local knowledge, was only that the word might mean some other property; there was no attempt to show what it did mean. And their Lordships are disposed to think, that the Principal Sudder Ameen was correct in the conclusion that the spurious Will did treat the subject of this suit as part of the Mirza's estate.

The arguments founded on the dealing of the Mortgagors with the Respondent, Mussamat Hoosainee Begum, and on the purchase by the Appellants of Hoosein Buksh's title, do not, in their Lordships' judgment, do much to advance the case of either party. The Appellants have, with their eyes open, purchased a very doubtful title, and as far as they could, have provided for the refunding of the purchase-money (if any really passed), should they fail to substantiate it. As the Owners of the other moiety of the Talook, they had an obvious motive for entering into the speculation. On the other hand, though the recognition of the Respondent's title by the Mortgagors affords some ground for the inference that the Mirza was originally the real Mortgagee, yet the indulgent terms which the Respondents have granted them supply a motive for that recognition.

Upon the whole, their Lordships are of opinion, [357] that the Appellants have failed to establish the title of Hoosein Buksh by evidence which would justify the reversal of the decrees under appeal. Their Lordships' only doubt has been, whether they ought not to remand the suit for a further and more satisfactory trial of the issue, by whom was the money advanced? But considering the weight of suspicion which attaches itself to the title of Hoosein Buksh, the preference which the Principal Sudder Ameen has expressed for the Respondent's Witnesses, and the reasons which he has assigned for his judgment, they feel unable to say that that judgment was wrong, and finding it confirmed by the Superior Court, they have come to the conclusion that it is their duty humbly to recommend Her Majesty to dismiss the appeal. The costs must follow the result.

[358] BUNARSEE DASS, Executor of ROY RAMPERSHAD, and Guardian of DAMODUO DASS, a Minor,—*Appellant*; GHOLAM HOSSEIN, MUDDUN MOHUN, T. G. A. PALMER, and LALLA BHOLANATH,—*Respondents* * Feb. 21 and 22, 1870].

On appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

A contract entered into by a Railway Company and P. to supply the Company with Railway Sleepers, was partly performed by P. before he entered into a partnership with R., under the name or Firm of P. and Co., after which it was completed. P. before the partnership had entered into a sub-contract with H. and M. to supply the Sleepers, and after the partnership drew Bills in the name of P. and Co., payable at Calcutta, in favour of H. M. in part payment of their account. These Bills were dishonoured. Upon an action brought against P. and Co., the evidence showed, that R. was aware of P.'s contract, which was subsisting and completed after the partnership. Held, that R., as a member of the Firm of P. and Co., was liable, and that in order to take the case out of the principle, that every partner in a mercantile or ordinary trading partnership is liable upon Bills, drawn by a Partner in the recognized trading business of the Firm, for a transaction incident to the business of the Firm, although such Partner's name does not appear upon the face of the instrument, and although he be a sleeping and secret Partner; it must be established that the holder of the

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Bills knew at the time he received them, that the transaction was a private contract of P., not one within the scope of the partnership.

The facts of this case and the points raised by the appeal are fully stated in the judgment.

The appeal was argued by Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant, and Mr. Mackeson, Q.C., and Mr. J. Edwards, for the Respondent, Lalla Bholanath.

[359] At the conclusion of the arguments, their Lordships' judgment was pronounced by

The Right Hon. Sir Robert Phillimore.—This was an appeal from a decree of the late Sudder Dewanny Adawlut at Agra, which confirmed the decree of the Principal Sudder Ameen of the City of Cawnpore. The decree was in favour of Gholam Hossein and Muddun Mohun, who were Plaintiffs in the Court below; Palmer and Roy Rampershad were Defendants. Lalla Bholanath has since purchased the interest of Gholam Hossein and Mohun, and is in fact the only Respondent. The representative of Roy Rampershad, is the only Appellant.

Roy Rampershad entered into partnership with Palmer on the 8th of June, 1861. Palmer, at that time, carried on business at Allahabad, Cawnpore, and other places; and on the 6th of October, 1860, had entered into a contract with a Railway Company to supply them with a certain number of Sleepers, and, in order to fulfil his obligation, entered into a subsidiary contract with the Respondents, Gholam Hossein and Muddun Mohun, for the purchase of a certain number of Sleepers. This contract was, in fact, only an oral one. The delivery of the Sleepers began on the 15th of January, 1861, and continued till the 14th of July in that year. A considerable number of Sleepers were delivered after the 8th of June, which was the date of the partnership between Palmer and Roy Rampershad.

In December, 1861, Gholam Hossein and Muddun Mohun applied to Palmer for payment of their account. Palmer thereupon gave them five Hoondees, or drafts, one for Rs. 10,000 and four for Rs. 2500 each—[360] Rs. 20,000 in the whole, in part payment of their account. The drafts were dated, "Cawnpore, the 31st of December, 1861," and drawn by "Palmer and Co." upon "Palmer and Co., at Calcutta." These Bills were all dishonoured and protested; but, subsequently, it appears that the Respondents received Rs. 10,000, on account. There was a further sum of Rs. 24,000 due to the Respondents, the value of articles purchased from them by Palmer, while in partnership with Roy Rampershad in the course of business.

The total amount of the debt, therefore, from Palmer and Co. to Gholam Hossein and Muddun Mohun, was Rs. 34,000. 4. 3. For this amount they brought their suit, on the Hoondees and on a general statement of account, against both Palmer and Roy Rampershad, and also against Ram Putt and Kalloo Mull (to whom, after the Bills had been dishonoured, the Respondents had been referred for payment), in the Court of the Principal Sudder Ameen of Cawnpore, and obtained a decree in their favour, from which an appeal was presented by Roy Rampershad alone to the Sudder Dewanny Adawlut at Agra, which Court confirmed the decree of the Principal Sudder Ameen.

From these decrees the representative of Roy Rampershad and Guardian of his Minor Son have appealed to this Tribunal. The principal grounds upon which this appeal is founded are derived from the terms of the agreement between Palmer and Roy Rampershad; that agreement was as follows:—

"Deed of agreement executed by Mr. Palmer, dated 8th June, 1861.

"We, Thomas George Adam Palmer, residing in the House situated in Mouzah Nubee Bagh, [361] Pergunnah Chayal, and Roy Rampershad, Banker, Guardian of Damodur Dass, Minor, his Son, resident of Daragunj, one of the quarters of the City of Allahabad, Pergunnah Chayal, Zillah Allahabad, having agreed between ourselves to enter into equal partnership, for the purpose of carrying on a certain trade, we do accordingly record the conditions of that engagement, and testify to its truth and veracity. 1st. This business shall proceed under the style and title of Palmer and Company. 2nd. A sum not exceeding one lakh of Rs., shall be embarked on behalf of Damodur Dass, Minor, Roy Rampershad's Son, in this business, and

Danodur Dass shall remain Owner of this money with its interest, at the rate of 12 per cent. per annum out of the profits, interest at the above rate due to the Minor aforesaid being carried to account of the business aforesaid, shall be paid to Danodur Dass at broken rates. The interest on the money embarked by Mr. Palmer in this business shall also be paid to him at broken rates, and of the remainder of the profits, Danodur Dass and I, Mr. Palmer, shall be Owners in equal shares. 3rd. I, Mr. Palmer, shall draw the sum of Rs. 1000 out of the profits monthly, as remuneration for my services, and after payment of this and other expenses, we shall have equal shares in the profits. 4th. I, Mr. Palmer, shall not undertake any contracts, etc., for any amount in this business without the consent and signature of Roy Rampershad, and all sums paid as expenses for the management of this business, shall be paid with the consent of Roy Rampershad. If any matter should be undertaken without such consent, it shall be considered distinct from this business. [362] 5th. All the money in this business, and the accounts, shall be kept by the Treasurer, selected and recommended by Roy Rampershad, and Roy Rampershad shall be responsible for his honesty. 6th. This business shall be carried on for the space of two years and a half, and if, at the end of this period, I, Roy Rampershad, should for any special reason desire to close the business, six months' previous notice of closing the business shall be given to Mr. Palmer. At the time of closing, Danodur Dass, Minor, shall realize the whole amount that may be due to him, with interest at one per cent. from the goods and property then pertaining to the business. And if, after payment of the amount aforesaid, with interest, there is any balance left, or profits, we, the parties to this agreement, shall, without objection, divide equally between us. If any deficiency should be found to exist, the loss shall be borne by us in equal proportions. 7th. Whatever profits in this business may be realized on my, Mr. Palmer's, share from year to year, shall be yearly carried to account of a separate debt jointly due to Roy Rampershad and Ram Rikh by me, Mr. Palmer. 8th. Whatever Servants I, Mr. Palmer, may employ for the management of business, and whatever necessary expenditure I may incur, I shall employ and incur after consulting Ram Rampershad, the salaries and expenditures shall be discharged from the profits of this business. Accordingly this Deed of agreement is drawn up that it may be used when occasion requires.

" Given this day, the 8th June, 1861.

" (Signed)

PALMER AND Co.

It has been contended that the particular terms [363] of this agreement show that it was of a limited nature, that it had reference only to future contracts and transactions which were authorized by the express consent and signature of Roy Rampershad, and, therefore, had no reference to the previous contract of Palmer with the Respondents for the purchase of the Sleepers, and that there was no privity of contract between the Respondents and Roy Rampershad with respect to purchase of the Sleepers.

The proposition of law applicable to these facts is well known and indisputable. Every one of the partners in a mercantile firm of ordinary trading partnership is liable upon a Bill drawn by a Partner in the recognized trading name of the Firm, for a transaction incident to the business of the Firm, although his name do not appear upon the face of the instrument, and although he be a sleeping and secret Partner.

In order to take a case out of these principles of the general law, it must be shown that the holder of the Bill knew at the time he received it that the transaction was the private affair of a single Partner.

Their Lordships are unable to see that the facts of the present case are such as to bring it within this exception. The evidence does not establish that the Respondents were cognizant of the limitations in the partnership agreement between Roy Rampershad and Palmer; the contract for the delivery of the Sleepers is not shown to have been one contract, but it appeared that, from day to day, separate consignments of Sleepers were passed to the Firm of Palmer and Co. The consignments continued to be delivered, in the same form after the date of the partnership, a condi-[364]-tion of which was that the business should proceed under the

style and title of "Palmer and Co." The money advanced by Roy Rampershad, more than Rs. 92,000, went, with Roy Rampershad's knowledge, into this very transaction, and was consequently brought within the scope of the agreement.

What the "certain trade" was, which is mentioned in the Deed of agreement, does not appear, but Roy Rampershad has himself been examined as a Witness, and he has not explained what the "certain trade" was, but has advanced his money for the purpose of this business, has made no complaint of misappropriation of the funds, and has not endeavoured to satisfy the Court that it had been diverted to any purpose not contemplated by him. The Hindoos were drawn in the ordinary name of the Firm. Moreover, the Courts below gave credit to the Witnesses who deposed to the fact that the Gomashtah for Roy Rampershad was present at Mooradabad, and that the Sleepers were purchased and despatched in his presence and under his instructions; and their Lordships see no reason to dissent from this view, though it is not necessary for their Lordships' judgment to place reliance on this evidence.

Their Lordships will humbly advise Her Majesty to dismiss this appeal, with costs.

[365] SETH LUKHMEE CHUND RAO, BAHADOOR AND SETH GOBIND DASS,

—Appellants; SETH INDRA MULL and Others.—Respondents * [Feb. 24 and 28, 1870].

On appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

Suit to recover balance due on account taken on the winding-up of a partnership transaction between two Firms for the purchase and sale of opium. The Books of the Firms, which were kept at different places where the Partners traded, were not satisfactory; but the Courts in India allowed certain items to be due to the Plaintiffs. On appeal, held, by the Judicial Committee, that although it was not clear, whether those items in taking the account, ought to have been allowed, yet the Plaintiffs, who had had every means of proving their case, had failed to establish their claim against the Defendant, the Court of last resort would not on that ground, after twenty-one years' litigation, remit the case to India for further inquiry and investigation to enable the Plaintiffs to amend their case.

This suit was instituted by the Appellants and one Rudhakishen, deceased, to recover upwards of ten lacs of rupees from the Respondents, as the balance of account found to be due on the winding-up of a special partnership which had previously been entered into between them, as was alleged by the Plaintiffs, but denied by the Defendants, for the purchase and sale of opium in the Provinces.

The case was commenced in November, 1849, and [366] the Plaintiffs were non-suited, for want of jurisdiction, in 1851. On appeal to Her Majesty in Council, that decision was reversed (see case reported on this point, 8 Moore's Ind. App. Cases, p. 291), and the suit sent back to India for trial.

The principal question in dispute in the present appeal between the parties was, whether a partnership had been in fact entered into by the Defendants. A subsidiary question arising as to the agency of one Saliq Ram, deceased, through whom the purchases and sales were effected for the joint benefit, as alleged by the Plaintiffs, of the parties in the partnership, and also as to the authenticity of a certain Letter purporting to have been written in the name of Dan Mull and Indra Mull, being the name of the Firm in which the Defendants carried on their trade and business at Ruttam, in the independent State of Malwa, and other places in India. Also, whether certain Opium transactions which the Defendants admitted

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Right Hon. the Lord Justice Giffard. Assessor.—The Right Hon. Sir Lawrence Peel.

they had been engaged in with the Plaintiffs had been carried on by them merely as Agents of, and not as co-partners with, the latter.

By the decree of W. S. Paterson, Esq., Judge of the Civil Court at Agra, it was decided on the evidence, that the Respondents had in fact entered into the partnership, and that the authenticity of the Letter was proved and established, that the Defendants' plea to the effect, that the Opium transactions were carried on by them merely as the Agents of the latter, had wholly failed, and the Judge accordingly decreed to the Plaintiffs Rs. 41,329: 5 as the balance found by him to be due to them by the Defendants in re-[367]-spect of the partnership business, with Rs. 3851 interest on the same.

On appeal, the late Sudder Court at Agra, consisting of Messrs. J. H. Batten and C. R. Lindsay, decided that the balance so found by the Court below was incorrect; that the Books of the Plaintiffs' firm, which had been produced in evidence, did not afford sufficient proof of the alleged partnership; and that the Letter above mentioned, relied on by the Plaintiffs, was not proved, and accordingly reversed the decree, with costs, of the Civil Court at Agra.

The present appeal was brought from the Sudder Dewanny Court's decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants. Submitted, that as a partnership had been established, the Appellants were entitled to a decree, not merely for the amount due to them by the decree of the Lower Court, but for the full amount claimed to be due to them by the plaint, including one-third of the sum of Rs. 18,56,148, remitted by them to Ruttam, and one-third share of the sum of Rs. 1,94,931, remitted by them to Bombay, which was disallowed by the Court.

Mr. Field, Q.C., and Mr. J. D. Bell, for the Respondents, contended, that there was no partnership; but even if there was evidence to establish a partnership, as alleged in the plaint, there was no evidence of any balance being due by the Respondents to the Appellants.

[368] Their Lordships' judgment was pronounced by

The Right Hon. Sir James W. Colvile.—On the question of partnership their Lordships do not think it necessary to say much. If the proof of the partnership had depended on the evidence given of the agency of Saliq Ram, and of the circumstances which are alleged to have taken place at Muttra, their Lordships would certainly have been unable to find against the Respondents that Saliq Ram, as their accredited Agent, had made there a contract of partnership binding on them. The reason why the Appellants in their plaint gave such prominence to the earlier negotiations, and brought so much evidence to prove Saliq Ram's alleged character at that time, may possibly be, that they then felt pressed by the difficulty of making the Respondents amenable to the Court at Muttra, and thought that it was necessary to establish a contract made at Muttra, in order to found the jurisdiction of that Court. When the case came here on appeal from the Courts of India (see *Luckmee Chund v. Zorawur Mull*, 8 Moore's Ind. App. Cases, 291), which had found that there was no such jurisdiction, the view which this Committee then took was, that the Letter written at Ruttam, if genuine, amounted either to a contract of partnership, or to a ratification of what had been previously done by Saliq Ram; and that the partnership, being one which was to be carried on principally at Muttra, any cause of action arising out of the balance resulting from the partnership transactions must be taken to have arisen at Muttra: and the cause was accordingly sent back for trial on the merits in that Court.

[369] Their Lordships now think, that if there was a partnership at all, it was a partnership created, constituted and defined by the Letter written at Ruttam. They are disposed to think that the evidence preponderates in favour of the genuineness of that Letter, and, at all events, for the disposal of this case, they will assume that that Letter was written contemplating such a partnership as is there described.

The partnership so contemplated seems to have been a joint adventure of the two Firms in opium speculations, to be managed principally by Saliq Ram, who was to buy up opium in Malwa, and other parts of Western India, and was to act with the consent of both parties. The capital with which those transactions were to be carried on, was to be furnished by the Appellants' Firm at Muttra. They were to

advance the capital, and to be allowed interest at the rate of 6 annas per cent. Therefore, if that agreement were strictly carried out, the Firm at Muttra would become accountable to their Partners in their joint adventure; the Respondents taking credit for the money which they advanced, and accounting for the returns of the opium when sold; and, on the other hand, Salig Ram would have to account either to both Firms, to the Muttra Firm, as the Agent of the joint adventure, for the disbursement of all the moneys received by him, and for his application thereof.

This being the relation of the parties, the Appellants have brought their suit to recover from the Respondents their share in the alleged loss upon this joint adventure, and have attempted to prove that loss by producing the accounts kept by them at Muttra, showing the gross amount of their advances, [370] and giving credit for what they represent as the gross amount of the sum realized by the sales of the opium purchased. The accounts kept by Salig Ram are not produced; though some such accounts must surely have been kept and rendered, in order to show what opium was purchased, and for what it was sold, Salig Ram himself, who may have been alive when the suit was first instituted, though he is said to have been dead when it went back to India to be fully tried, is not examined. Punna Lall, the other Agent, is examined, and is unable to give any account whatever of these transactions. Therefore, the whole evidence seems to consist of the accounts and Books of account kept by the Appellants.

The learned Judge who tried the case in the first instance, allowed certain items of the sums, which the Appellants said they had advanced by way of capital for this adventure, and he disallowed other large items. The result was that, according to his mode of stating the account, there was a considerable amount of loss. It appears, however, that he made what is clearly a mistake in the calculation of the amount advanced. He gave the Appellants credit for the sum of twenty lacks of rupees remitted to Mundesore, whereas they had taken credit in their own accounts for only seventeen lacks sixty-six thousand and four rupees, the difference being the difference in value between the Company's rupee and the rupee current at Mundesore, calculated on the whole remittance. When the case went to the higher Court, that error was pointed out. It seems almost to have been admitted, and the result is, that if that error is rectified, and nothing more is allowed than the Judge below allowed, there is no proved [371] loss, but, as the account stands, an apparent profit on the speculation of upwards of a lack of rupees.

The question, therefore, whether the Appellants have made out a right to recover anything against the Respondents, turns upon the question, whether the sum which they have been allowed to charge against the Respondents can be increased by either of the disallowed items? Their Lordships have considerable doubt, whether there was sufficient evidence to justify the charge against the Respondents of even those items which have been allowed. It seems to rest entirely upon the Books kept at Muttra by the Appellants (which cannot be likened to Books of a partnership to which all the Partners of the Firm have access, and which are kept by the servants of all), and upon the Books kept at the Kootees of the Appellants at Mundesore and Indore. No doubt the Indore Books, and the Mundesore Books, carry the case, as to those two items, to this extent, that while the Muttra Books show *prima facie* that remittances to the amounts stated were made to those Kootees, the Books of those Kootees show *prima facie* that those sums did find their way into the hands of Salig Ram and Punna Lall. That those sums were really applied by those persons for the purposes of the joint adventure there is no evidence whatever. However, even this degree of proof is wanting as to the disallowed items. As to them, there is nothing more than the evidence of the Appellants' servants, corroborated by the Appellants' Books at Muttra, that certain drafts were drawn—one upon the Appellants' Kootee at Bombay, and another on the Appellants' Kootee at Ruttam—in favour of Salig Ram and Punna Lall; but that [372] those sums ever passed from those Kootees into the hands of those persons there is no evidence whatever.

Their Lordships, therefore, are clearly of opinion, that the Judge of the Court of first instance was right in disallowing the latter items as insufficiently proved. Whether he was right in allowing the other items, their Lordships think it extremely doubtful; and they would not be disposed, without further inquiry, to charge those items, if the case turned upon them against the Respondents. But, as the case

stands, the Appellants have failed to prove that there is any sum due to them from the Respondents; and the only question is, whether the suit is, therefore, to be dismissed as having failed, or whether their Lordships are, after this twenty-one years' litigation, to send it back for further inquiry and investigation, and allow the Appellants to amend their case? Their Lordships are of opinion, that they would not be justified in adopting the latter course. The Appellants seem to have had all the means they ever can have of proving their case. They had the benefit of all the machinery which the Courts of India afford for taking the account, and it is unreasonable that, having failed to prove their case, they now should ask their Lordships to send it back for further investigation, there being, moreover, no reason to suppose that they would have any better proof than they had before.

Under these circumstances, their Lordships think it is their duty to advise Her Majesty to dismiss this appeal with costs.

[373] BHYAH RAM SINGH and BHYAH JOBRAJ SINGH,—*Appellants*; BAYAH UGUR SINGH and BHYAH RUNDEER SINGH,—*Respondents* * [Feb. 28 and March 1, 1870].

On appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

According to the Mitacschara and the authorities of the Benares school of law as received in the North-West Provinces, Grandsons in the fourth and fifth removes are Sapindas and heirs to their common ancestors [13 Moo. Ind. App. 390, 391].

The question of preference in succession is distinct from exclusion, as the preference is founded by the Hindoo Law on the superior efficacy of funeral oblations [13 Moo. Ind. App. 392].

So held: where parties claimed under a Deed of gift and a sale from a Hindoo Widow (who was entitled to a life estate only by the Benares school of law), on the ground that Great great great-grandsons were excluded from the inheritance, being too remote to succeed as heirs to the estate of their common ancestor.

The Hindoo Law contains in itself the principles of its own exposition. The Digest subordinates, in more than one place, the language of the Texts to custom and approved usage, but nothing from any foreign source should be introduced into it, nor should the Courts interpret the Texts by application to the language of strained analogies [13 Moo. Ind. App. 390].

The overruling of the case of *Sibhoo Singh v. Pirthee Sing* (10 S.D.A., N.W.P., p. 415), by the Sudder Court of the North-Western Provinces confirmed.

The Respondents and others brought the suit out of which this appeal arose against the Appellants and others, to recover land and personal property which they claimed as belonging to them on the death of Mussumat Sheoraj Koraree, the Widow of Juskurun Singh, and which the Appellants, under a Deed of gift from her in their favour, had taken possession of as having been her absolute property.

The facts of the case were these:—

[374] Juskurun Singh was the Great-great-great-grandson of Chutter Puttee Singh, through a Son, named Kishur Singh. The Respondents were Great-great-great-grandsons of Chutter Puttee Singh, through another Son, Chyne Singh.

Juskurun Singh died in 1851, childless, leaving a Widow, Mussumat Sheoraj Kooraree, without any blood relations, save his Cousins, descendants of Chyne Singh, whose interests were represented by the Respondents.

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Right Hon. the Lord Justice Giffard. Assessor. —The Right Hon. Sir Lawrence Peel.

In 1852 those Cousins brought a suit, in the Principal Sudder Ameen's Court, against the Widow, Mussumat Sheoraj Kooraree, and one Juggernath Dhubay, to obtain possession of the estates left by Juskurun Singh. They claimed the property on the ground, that it was joint ancestral property, and, therefore, that they, as his Cousins, were entitled in preference to the Widow, she being entitled to maintenance only; and as to the Defendant, Juggernath Dhubay, as he claimed under a Deed of gift executed by the Widow, they sought to set that Deed aside. The Principal Sudder Ameen decided, that the property was ancestral, but that the Respondents had not been jointly interested therein with Juskurun Singh, and that, as it was the separate ancestral property of the deceased, his Widow was entitled to succeed to it, and he accordingly, on the 28th of March, 1853, dismissed the suit. On appeal to the Sudder Dewanny Adawlut, that decree was affirmed.

The Widow died on the 16th of December, 1861, when the Respondents discovered that the Appellants and other persons set up title to the property to which Mussumat Sheoraj Kooraree, as the Widow of her Husband, Juskurun Singh, had succeeded.

[375] The Appellants relied on a Deed of gift which they alleged had been executed by the Widow eleven days previous to her death, and which purported to give them all her property; and also on another document, alleged to have been executed by her on the 4th of December, 1861, by which she recognized the Appellants as her heirs. They also asserted, that the Widow had executed a conditional sale by way of mortgage, in favour of one Ram Surroop. It appeared, that the Appellants, in 1862, sold a part of the property to one Baboo Surjoo Pershad, and purported to convey and confirm other parts of the estate to other persons. Also that on the death of the Widow, the Appellants obtained an Order for a Curator to take possession of her property, according to the Act, No. XIX. of 1841, and that proceedings were instituted by one Thakooranee Buddun Koaree on behalf of her Grandson, Mungul Singh, a descendant of Chutter Puttee Singh, who was one generation further removed than the Respondents, seeking to recover from the Appellants the property now in dispute; that the Respondents presented a petition disputing the right of Mungul Singh to more than one moiety in the estate; but that no Order was made joining them as parties in the suit; and that the Judge, in their absence, decided the suit in favour of the Appellants, by upholding the Deed of gift from the Widow as valid.

In consequence, the Respondents, along with their Brothers and Cousins, commenced the present suit, making as Defendants to it the Appellants, and the persons to whom they had conveyed portions of the property.

It appeared, from a pedigree filed with the plaint, that the Plaintiffs and the deceased, Juskurun [376] Singh, were in the fourth and fifth removes from the common ancestor, Chutter Puttee Singh, and stood in the relation of his Great-great-great-grandsons. The Appellants filed a written statement, raising the following defences:—First, that Juskurun Singh, having died more than twelve years previously, and the claim of persons in the same interest as the Respondents having then been rejected, the Respondents' title to relief was barred by the Law of Limitation; secondly, that the Respondents had no right to inherit, and that the Respondents were bound by the decision passed in the above-mentioned suit, in which Mungul Singh, by his Grandmother, had sued the Appellants without success; and, thirdly, that the Deed of gift to the Appellants was valid.

Issues, to the following effect, were settled:—First, whether the Respondents, under the Hindoo Law, had a right to inherit the villages in dispute left by the Widow's Husband? Second, whether the claim was barred by the Statute of Limitation? And, third, whether the suit could be heard under the provisions of Act, No. VIII. of 1859, section 2? The Principal Sudder Ameen did not consider it necessary to raise the issues on the facts of the case.

At the hearing, on the 23rd of July, 1864, the Principal Sudder Ameen of Goruckpoor (Assud Allah Mahomet), dismissed the suit with costs. By his judgment he decided, first, that the Respondents were not heirs of Juskurun Singh; secondly, that the possession of the Widow from the time of her Husband's death, being for more than twelve years, was such an adverse possession as to make the Law of Limitation a bar to the suit; and, thirdly, that as in the other suit the Plaintiffs were

equal in relation-[377]-ship with the Respondents, and that section 2 of Act, No. VIII. of 1859 (a) applied to the case, and was a judgment *in rem*.

Against the Sudder Ameen's decree, founded on this judgment, the Respondents appealed to the Sudder Dewanny Adawlut at Agra; and on the 10th of July, 1865, that Court (consisting of Messrs. Ross and Roberts) overruled the Sudder Ameen's decision on every point. Their judgment was in the following terms:—

"We are of opinion, that the title on the part of the reversioners to sue for succession to the property, in this case, accrued on the death of the Widow, and that the period of limitation does not run from 1851, the date of the demise of her Husband. It was decided in 1853, that the Widow was entitled to succeed to her Husband, whose property was separate from that of the other descendants of Chutter Puttee Singh. The Widow was, therefore, entitled to hold it for her term of life, and on her death the property would pass, in the ordinary course of inheritance, to the nearest of kin to her Husband surviving at the time of her decease. Nor, secondly, do we think that the dismissal of the claim on account of Mungul Singh is to be regarded as a judgment *in rem*, or as barred by sec. 2 of the Civil Procedure Code of 1859. We observe, indeed, that several of the Plaintiffs are not nearer of kin to the late Widow's Husband, than the Plaintiff in the case of *Sibhoo Singh v. Pirthee Singh* (S.D.A., N.W.P., Vol. X. p. 415; 17th July, 1855). But, as the point of law in *Sibhoo* [378] Singh's case is of a doubtful nature, and one which No. 134 of 1861, dated 22nd June, 1863, *Koer Goolah Singh v. Rao Kurrum Singh*; No. 531 of 1862, dated 29th July, 1863, *Shoodyan Singh v. Mohun Pandey*, under some later precedents, does not invalidate the Plaintiff's claim, we think that the suit cannot be thrown out without considering the doctrine cited. It may be, that the exposition of the Law Officer, given in the case of *Sibhoo Singh*, in regard to the succession in certain cases of Sapindas not going beyond Grandsons from the common ancestor, is according to the letter of the law, as laid down in the *Mitaeshara*; but it is certain that later Expositors of that law have extended the line of succession further. In the first place, we would observe, as regards the immediate descent from the common ancestor, the Great-grandson is recognized among the near successors of the deceased. In Colebrooke's Translation of the *Mitaeshara*, ch. ii. s. 8, par. 1, the order of succession is thus given:— 'It has been declared that Sons and Grandsons [or Great-grandsons] (*Balambhatta*) take the heritage; or, on failure of them, the Widow or other successors.' This incorporation of the Words 'or Great-grandsons' in the text of the *Mitaeshara*, shows that the Translator (whose authority is of the highest order) considered that the inclusion of the Great-grandson, among immediate heirs, was the approved doctrine of the later class of the Expositors of the law of Benares. The same doctrine is implied in the *Dattaka Mimansa*, a Treatise on adoption, current in these Provinces, by Nanda-Pandita; a later Commentator on the *Mitaeshara* (*vide* preface to two Treatises on the Hindu Law of Inheritance, by Colebrooke, pref. x.), [379] *Dattaka Mimansa* (Sutherland's Translation, sections 1 to 3, and sec. vi., cl. 13 and 14). In treating on the text which prescribes adoption, 'by a man destitute of a Son only, must a substitute for the same always be adopted'; the Author explains, that Son there used, is inclusive also of the Son's Son and Great-grandson, and cites Menu:— 'By a Son, a man conquers worlds; by a Son's Son, he enjoys immortality; and afterwards, by a Son of a Grandson, he reaches the solar abode'; and the Expositor further explains, that 'they, as well as the Son, perform obsequies.' It appears, then, that the Great-grandson was latterly considered to be among the near heirs. Sons and the rest. In W. H. Macnaghten's *Hindu Law*, the exclusion of Great-grandsons is not noticed in the chapter on inheritance, in the first volume; and in the second volume, the Pundits, when referred to in a case of Benares Law, give it as their opinion, that 'supposing Dulgunjun (the title to whose estate was in dispute) neither to have left Sons, Son's Son, nor Son's Grandson at his death, but to have been survived by his Widow, then, under certain circum-

(a) Sec. 2 of Act, No. VIII. of 1859, is as follows:— "The Civil Courts will not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit, between the same parties, or between parties under whom they claim.

stances, she would succeed to the property.' We cite this, because we think that the opinion of the Pundit in the case of Sibhoo Singh, disturbed the hitherto settled law in these Provinces. But we do not find, when the direct line ceased and the succession ascended, that the male issue of such ascendant, who are entitled to inherit, extend lower than the grandson. But as it is not necessary to rule the point here, we do not feel called on to say more on this question, as our decision will be on other grounds. It is contended here, that the Plaintiffs, none of whom are Grandsons of any ascendant from [380] the common ancestor, are not among Sapindas, and not entitled to inherit. This is, however, opposed to the doctrine sanctioned by the Author of the Mitacshara, ch. II., s. v., cl. 6:— 'The relation of Sapindas, or kindred connected by the funeral oblation, ceases with the seventh person, and that of the Samanodacas or those connected by a common libation of water, extend to the fourteenth degree.' We find direct authority for disregarding the construction proposed to be put by the Respondents on the word 'Sapinda.' In a note on sec. vi., cl. 27, of the Dattaka Mimansa, is given the construction of the Author of the Mitacshara, on the text of Yagnyawalkya. 'Beyond the fifth and seventh degrees on the Mother's side and the Father's side respectively, the relation of Sapinda ceases as follows:—On the Mother's side, that is, in the line of the Mother, after the fifth degree. On the Father's side, that is, in the line of the Father, after the seventh degree, the relation of Sapinda ceases; as is understood . . . accordingly, there are six Sapindas in ascent—the Father and the rest; and six in descent, the Son and the rest; and the man himself is the seventh. Should the line diverge, the enumeration should be made until the seventh degree, commencing from whence the direction of the line varies. This is applicable to every case.' (Sutherland's Trans., p. 79.) We have thus furnished to us a rule for computing the order of succession in regard, not only to Sapindas, but to Samanodacas; 'the enumeration should be made until the seventh' (or until the fourteenth) degree, commencing from whence the line varies. So much so, that we find that in the case decided by the Privy Council, *Rang Srimuty Dibeah v. Rang Koond* [381] *Lata* and others (4 Moore's Ind. App. Cases, page 292 to page 303) the Pundits gave it as their opinion, that according to the Mitacshara, the descendant in the eighth remove, reckoning from and inclusive of the common ancestor, was entitled as Sagotra to take the property in suit. The decision went against the descendant, as his family, though formerly governed by the Mithila Law, had adopted the Bengal Law, and because, by the Bengal Law, Bundhoos took the precedence of Sagotras. No doubt was in that case expressed as to the correctness of the opinions of the Pundits, but, as noticed in the case of *Shoodhyam Singh v. Mohun Pandey*, No. 531, of 1862, 29th July, 1863, Reports, Sud. Dew. Ad. vol. II. of 1863, p. 134, had the claim been decided according to the Mitacshara, the Sagotra would have had his title to inherit allowed. Now some, at least, of the Plaintiffs, as Laish Singh and others, are within the Sapindas, and are, of course, entitled to the property, where no nearer relatives to Juskurun Singh are forthcoming. We would advert to the case of *Rutcheputty Dutt Jha v. Rajunder Narain Rae* (2 Moore's Ind. App. Cases, pages 133 to 252), in which was discussed the doctrine of the Mitacshara, relating as to the succession of certain Claimants who 'were lineally descended from Samroo Chowdhry (we quote from the report of the case *Gungadutt Jha v. Sreenarain Rai* (2 Sud. Dew. Ad. Rep. 11, referred to in the report in 2 Moore's Ind. App. Cases, 133, *Rutcheputty Dutt Jha v. Rajunder Narain Rae*), the paternal Great-grandfather of the great-grandson of Rajah Indernarain. It was ruled by the Sudder Court, that 'according to the Mithila authorities, the estate of a person, on failure of heirs, within the relation of Brother's Son, [382] devolves on the paternal kindred who are Sapindas, which relation includes the descendants of a paternal ancestor to the sixth degree, and ceases with the seventh person; in default of the Sapindas on the Samanodacas, or those connected by a common libation of water, viz., the more distant paternal kindred, extending to the fourteenth degree, and in failure of Samanodacas, to those termed Bundhoos or cognates.' 2 Sud. Dew. Ad. Rep. 12. The rule of inheritance thus compendiously stated, appears, from the full report in 2 Moore's Ind. App. Cases, 133, to have been disputed; and it was argued before the Sudder Court, that the Mitacshara did not support the pretensions of the descendants of Samroo Chowdhry in the sixth remove. But the Judge, Mr. J. H. Harrington, whose

decision, concurred in by his Colleagues, was affirmed by Her Majesty's Privy Council, who rejected that argument. After stating that the term *Putra*, or Son, in the *Mitacshara* and its commentary, the *Subhodini*, is frequently used as a general term for male issue or descendant, Mr. Harrington goes on to observe (2 Moore's Ind. App. Cases, p. 159):— 'To adopt the construction proposed by the Appellant, would be to cut off all the descendants below the Grandson of the Father, Grandfather, and every other ancestor, and would render nugatory the provisions in the *Mitacshara*, as well as the other Books of law, which expressly state 'the succession of kindred belonging to the same family, and connected by funeral oblations, to the seventh degree; or if there be none such, the succession devolves on kindred connected by libations of water, and they must be understood to reach seven degrees beyond the kindred connected by funeral oblations of food, or else as far as the limits of know-[383]-ledge as to birth and name extend.' (See Translation of the *Mitacshara*, ch. II., sec. v., par. 5 and 6.) Now, the doctrine thus overruled by the Sudder Court in 1812, is precisely that contended for in this case on the part of the Respondents; and as that doctrine was overruled in favour of the descendant in the sixth remove from a common ancestor, so here we overrule the same argument in favour of the descendants in the fourth and fifth removes, from the common ancestor of the Plaintiffs in this case. We do not consider the decision of the Judge of the 15th of October, 1863, to be any bar to the claim of the Plaintiffs here, as those nearest of kin were not parties to that suit. We should not have gone into the question of inheritance at such length, had we not seen instances of the Lower Court's tenaciously adhering to the erroneous doctrine in *Sibhoo Singh's* case (which has not been reprinted among the selected reports published in 1861, in two volumes), notwithstanding the several decisions of this Court to the contrary. No. 134 of 1861, dated 22nd June, 1863. *Kooer Golab Singh v. Rao Kurrun Singh*, Messrs. Edwards and Pearson. No. 53 of 1862, dated 29th July, 1863. *Shoodhyan Singh v. Mohun Pandey*, Messrs. Roberts and Pearson. No. 1079 of 1864, dated 19th December, 1864. *Shunkur Lall v. Bisram Dass*, Messrs. Ross and Edwards. It is true, that that decision has not been overruled by a full Bench, but it has been disregarded in decisions to which each individual Judge has, in a Bench of two Judges, been a party, and the former rule has been adopted in lieu of that laid down in *Sibhoo Singh's* case. We determine, therefore, that the Plaintiffs have a title to inherit under the Hindoo Law current in these Pro-[384]-vinces, and we annul the decision of the Principal Sudder Ameen. As his judgment has thrown out the claim on these preliminary grounds, and as the Plaintiffs deny the *factum* of the Deed of gift to the Defendants as well as its validity (and if it be proved even to be made by the Widow *motu proprio*, it is not valid), the case must go back for decision on the question of this transfer, as well as the other transfers sought to be set aside, on the ground that they were not made by the Widow, or made at the time when she was not in her senses. It is also by the Respondents contended, that the Deed of gift in their favour was made by reason of the direction of the late Owner, *Juskurun Singh*; this point will also need investigation. We annul the decision, and remit the case for re-adjudication on the points indicated." The costs of the appeal will be costs in the suit.

From the decree founded on this judgment the present appeal was brought.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants.—This suit, being in the nature of ejectment, the Respondents, as Plaintiffs, were bound to prove their title as nearest heirs of *Juskurun Singh* before the Appellants, the Defendants, can be called upon to defend their title and possession. The Respondents as the Principal Sudder Ameen and the Sudder Court held in the suit of 1853, which is, we submit, *res judicata*, and an estoppel by the Civil Procedure Code, Act, No. VIII., 1859, sec. 2, have failed to prove that they are the heirs entitled to succeed to *Juskurun Singh*; they are not within the class or [385] degree of *Sapindas*, as claimed by them, nor are they even within the more remote class of *Samanodacas* in the order of succession contained in the *Mitacshara*, ch. II., sec. v. cl. 5.

Even if the Respondents had proved that they were distant and collateral heirs, yet we submit, that as the immoveable estate of *Juskurun Singh* had been held and enjoyed by him in severality, he had, as a childless Hindoo, power to make the virtual appointment he did in favour of his Widow, which would enable her to

appoint the Appellants as his successors. Again, the moveable property in possession of his Widow at the date of the Deed of gift, was not proved to have been derived from her Husband; on the contrary, it has been always contended to be her own in absolute proprietary right, and, therefore, either as Widow acting under the authority derived from her Husband, or in her own right, she had full power of alienation, *Mussumat Thakoor Deyhee v. Rai Baluk Ram* (11 Moore's Ind. App. Cases, 139, 171), *Bhugwandeem Doobey v. Myna Bae* (*ibid.* 504).

Mr. Field, Q.C. and Mr. J. D. Bell, for the Respondents.—By the Hindoo Law current where the Benares school of law prevails, the Widow of Juskurun Singh took only a life interest in the real and personal estate which belonged to Her Husband. As a Hindoo Widow, she had no power to alienate any part of her Husband's estate to the prejudice of his heirs. *Bhugwandeem Doobey v. Myna Bae* (11 Moore's Ind. App. Cases, 487); *Mussumat Thakoor Deyhee v. Rai Baluk Ram* (*ibid.*, 139); therefore, any [386] Deed of gift, absolute sale, or mortgage, would be void as against his heirs.

Upon the death of Juskurun Singh, the Respondents, the Great-great-great-grandsons, being in the fourth and fifth removes from the common ancestor, Chutter Puttee Singh, through Chyne Singh, who was in equal degree with Juskurun Singh, were, by the Benares school of law, Juskurun Singh's heirs. W. H. Macnaghten's Hindoo Law, Vol. I., p. 33; *Ib.*, Vol. II., p. 92; Dattaka Mimansa, sec. vi., p. 125 (Trans. by Sutherland); The Mitacshara, ch. II., secs. v. and vi. (Trans. by Colebrooke); Menu, ch. V., par. 60; Grady's Hindoo Law of inheritance, p. 230; *Rutheputty Dutt Jha v. Rajunder Narrain Rae* (2 Moore's Ind. App. Cases, 157); *Rang Srimuty Dibeah v. Rang Koond Lata* (4 Moore's Ind. App. Cases, 292); *Thakooram Sahiba v. Mohun Lall* (11 Moore's Ind. App. Cases, 386); *Gungadutt Jha v. Sreenaram Rai* (2 Ben. Sud. Dew. Ad. Reps., 12); as they were Sapindas, which extends seven removes down and seven up from the common ancestor, and consequently were entitled to succeed, on the Widow's death, to the inheritance. With respect to the defence set up by the Appellants, that the Respondents are too remote in degree, as Gentiles, to succeed, that argument is founded on a fallacy, as the question really is, that we claim generally as heirs, and the issue is not a competition between heirs, but as to the power of the Widow to alienate to the prejudice of her Husband's heirs. The *onus*, therefore, of showing that the Respondents are too remote to be heirs is on the Appellants, which they have failed to establish.

[387] The consideration of the judgment was reversed. Judgment was delivered by

The Right Hon. Sir Robert Phillimore (June 28, 1870).—The suit out of which this appeal arose was brought in the Court of the Principal Sudder Ameen of Goruckpore, by the Plaintiffs, as heirs, after the death of his Widow, who survived him, of one Juskurun Singh, to recover certain moveable and immoveable estate, the property of the deceased at his death.

The title as heirs was described generally in the plaint, but the course in which it was derived appeared by a pedigree exhibited by the Plaintiffs, and filed with the plaint. It thus appeared that the Plaintiffs claimed as kindred of the deceased, connected with him by descent from their common ancestor, Chutter Puttee Singh.

By the pedigree it appeared that the Plaintiffs and the deceased were in an equal degree removed from the common ancestor, being his Great-great-great-grandsons. The Appellants contended that the Plaintiffs were too remote in descent from the common ancestor to be capable of succeeding to the deceased.

At the Widow's death, the heirs of her Husband, at that time alive, were the legal heirs. The property claimed was at that time in the possession of the Defendants, under alleged alienations by the Widow. Into the validity of their titles, respectively, no inquiry could be made by the appellate Court in India, from the mode in which the case was submitted to it; and the Appellants may be treated simply as parties who had a right to put the Plaintiffs to proof of their title. It was conceded in the argument that they were not descendants of the common ancestor.

[388] The Defendants denied the Plaintiffs' title. Admitting the pedigree to be correct as far as it went, and assuming, for the purpose of raising their objection to the title, all that the pedigree stated to be true, they contended by their answer,

that the Plaintiffs were not within the line of heirs. They raised, also, two other objections in bar of any inquiry into their own title, viz., that the suit was barred by limitation of time, and that the matter of the Plaintiffs' title was *res judicata*, and had been adjudged against parties in privity of title with the Plaintiffs. As these two objections were not insisted upon on the argument of this appeal, it is unnecessary to state the facts as pleaded on which they rested.

The suit did not proceed in the Zillah Court beyond the framing of issues, at which stage the Judge framed three issues in bar, involving the three points above stated. Deciding all three against the Plaintiffs he dismissed their suit. On the title he took the opinion of the Pundit of the Court, whose Bywustha was to the effect, that the Plaintiffs were beyond the line of heirs, and was in direct affirmance of the objection raised by the answer.

From this decision the Plaintiffs appealed to the late Sudder Court of the North-Western Provinces, which reversed the decision of the Court below on all the three issues in bar, and remanded the case to the Court below for trial. The correctness of this decision on the second and third issues in bar admits of no dispute, and it is unnecessary to notice them further.

As no decision was given in the suit below, except on the issues in bar, as the Sudder Court remanded the suit for trial, and as the appeal to Her [389] Majesty in Council is limited necessarily to the decree reversing that of the Court below on the issues in bar, their Lordships will be careful to limit their observations as well as their decision in this case, strictly to the matter on which the decree under appeal proceeded.

The decision in the Sudder Court, as well as that in the Court below, may be viewed as in the nature of a demurrer, on which any consideration of possible title on other assumed state of facts would have been irregular. The decision of this case involves the consideration of a most important part of that vexed and difficult subject—the Hindoo law of succession. It must be limited to the validity of the title pleaded.

The title pleaded is, that of some in the class termed "Gentiles," asserting priority in that class. The derivation of title to the succession of the deceased opening on the death of his Widow, who survived him, is made necessarily from a common ancestor, who is named, and from whom the lines of the deceased and the Claimants are respectively traced. The pedigree, if it be full and true, establishes community of family, kindred, and priority, unless the objection of the Defendants be sustained; and nothing more is needed to be pleaded or proved in support of that title, if valid. If it be not a good title of inheritance by the Hindoo Law, the Plaintiffs' suit must fail. The issue in bar submits the objection to decision. The pedigree for the purpose of the appeal must be taken to be both full and true.

No objection founded on alleged facts not apparent on the face of the pedigree can be urged against a decree which did not proceed upon, and could not have proceeded upon, grounds not raised by the issue [390] in bar. The question, then, is reduced to this, whether the Plaintiffs, being Great-great-great-grandsons of the common ancestor, were too remote in degree to be heritable as Gentiles.

The subject is important; it is beset by difficulties raised by varying opinions, decisions, and comments on a text clear enough, if interpreted by the principles of the Hindoo Law according to the Benares School, which is the most orthodox of the different Schools. The governing authority of that School is the Mitashara. The compiler of the Mitashara is said to have been an Ascetic, or Devotee, and from that source nothing at variance with the religion of the Hindoos is likely to have flowed. The Hindoo Law contains in itself the principles of its own exposition. The Digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies. Approaching this somewhat delicate subject with an unfeigned desire to decide it in harmony with the religious feeling of Hindoos, their Lordships observe, that the case furnishes no evidence whatever that the decision under appeal disturbs that harmony. On the contrary, the Judges of appeal overrule a former decision given in their own Court which, in their opinion, had disturbed it.

The Mitashara, in the 5th and 6th sections of the 2nd chapter, recognizes two

successive classes of heirs: first, "Gentiles"; next, Bandhoo; after them it places certain special persons, and after these last the State, the *ultimus haeres*.

Whatever descent prevails, and even where the [391] State takes by escheat, the duty of some ceremonial performance to the deceased is still enjoined.

The family is the cherished institution of Hindoos. Individual separate ownership is less the subject of the general remarks of Commentators on the Hindoo law than the associated aggregate community, the family. In this respect an analogy is observed between family ownership and that of the old village community. Consequently, family union or connection derived from a common head, the founder of the family, may reasonably be regarded, amongst a patriarchal people, as the source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession, from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males, who, for the same reason, may obtain a constant preference. The text of the whole of the 5th and 6th sections of the 2nd chapter of the *Mitaeshara* is in the strictest conformity to these principles. The Gentiles, or Gotraja (from the Gotra), are described as descending from one common stock, a male, and derived generally through males, as forming a family, though embracing, possibly, many families, and such original bond of union is regarded as necessary to the constitution of the Gotra. These conditions are all that are stated as necessary to the constitution of the class of Gentiles.

As regulating preference of succession amongst them, the law of succession amongst Gentiles classifies them further, as Sapindas and Samanodacas; the first it treats as prior to the second, but excludes neither, within limits wide enough to include the [392] present Plaintiffs. As the Plaintiffs, then, in this case show a common ancestor, a Gotra, a community of family, a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text, and as the decision appealed from proceeds upon the above grounds, and strictly conforms to the language of the *Mitaeshara*, it follows that it must be affirmed, unless it can be shown that the plain language of the *Mitaeshara* has received some qualification by usage or judicial construction.

The decision of the present case does not require that the Court should distinguish Sapinda from Samanodaca, nor define where Sapindas cease and Samanodacas begin. This is not a case of priority between two persons claiming as heirs, or between two classes of heirs, it is one of asserted exclusion from inheritance, raised by persons not competitors in the prescribed degrees of heirs.

The question of preference is distinct from that of entire exclusion. When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. It obtains properly when a succession opens to a deceased, when the question mooted is a real one (at least in the contemplation of pious Hindoos), viz., who best can confer on the deceased and his ancestors not fully benefited, the benefits which the grades of oblations offer in differing degrees. Where no sexual or personal incapacity exists, no ground of entire exclusion from inheritance exists if the opposing parties confer inferior benefits, or benefits in equal degree only. In such a case, what reason could justify a sentence of exclusion from inheritance on a claim to put a limitation on language [393] which declares the whole class heritable, and not simply some persons found in it? Where all the contending kindred are in an equal degree remote, and where the benefits conferred are equal, though slight, the principle of selection founded on superior efficacy, is inapplicable to the solution of that question of precedence.

Had a course of decisions, or had the actual practice of Hindoos confirmed the view, which some framers of genealogical tables appear to have taken of this subject, it would have been the duty of the Courts of Justice to interpret the language of the *Mitaeshara* by the aid of this modern light: but such is not the case, the weight of opinion and of decision is against the appeal.

The Sudder Court observed, that the judgment below had followed a case which had been overruled in two succeeding cases in the same Court. It treated the overruled case as one which broke in upon the uniformity of the law. The Sudder further supported its opinion by the authority of two cases decided in the Privy

Council. The case of *Rang Srimutty Dubeah v. Rang Khoond Luta* in 4 Moore's Ind. App. Cases, p. 292, was governed by the law of the Mitacschara, but the point as to the calculation of the degrees for which it was cited as an authority was rather assumed than decided, for the decision proceeded on the ground that the Bengal School was the one to be followed in that case. In the case of *Rutcheputty Dutt Jha v. Rajender Narain Ray*, in 2 Moore's Ind. App. Cases, p. 133, the very passages of the Mitacschara, and that from Menu, which has been relied on in this case and in the Court of appeal in India, referring to the "seventh [394] person," and the limits of the line of Sapindas, received an authoritative exposition. That case, it is true, was one to which the doctrine of the Mithila School was applicable, but the interpretation of the text was unaffected by that distinction.

If this last case be attentively considered, and the learned and elaborate opinion of Mr. Harrington be carefully studied, it will clearly appear that the preponderance of the opinions of the various Pundits then consulted was greatly on the side of the literal construction of the Mitacschara. The judgment of the Privy Council concludes, that the Bandhoos do not inherit "till those on the Father's side to the seventh degree have been exhausted." As the judgment is founded in a great degree on that of Mr. Harrington, and expresses no dissent from his method of arriving at the seventh person, by taking six degrees in the descending or ascending line, the Sudder Court was justified in treating this point as settled by authority, and the Plaintiffs, as Gentiles within the degrees, and so entitled to inherit. The Pundits may be taken as fair exponents of the views of the Hindoo people on such subjects, and as the great majority of them supported the inclusive construction which ranks the descendants to the sixth degree amongst the class of Sapindas, there is no reason for supposing that the plain construction of the language of the text of Menu, and of its authoritative comment, will clash with the religious feeling of Hindoos.

Their Lordships are of opinion, that the decision appeared from, on the materials before the Court, on the issues in bar was correct, and they will humbly advise Her Majesty that the appeal be dismissed with costs.

[395] NAWAB AZIMUT ALI KHAN,—Appellant; HURDWAREE MULL and NARAIN DOSS,—Respondents * [June 22, 1870].

On appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

Claim by Father against the execution Creditors of his Son, on the ground that his Son held the estate Benamee for him, dismissed.

The Courts look with jealousy on Benanee transactions, and require from one claiming under such title, strict proof, and he can only recover on the strength of the case he asserts.

In this case the suit was instituted by one Rooknoodowlah Nawab Ali Khan, deceased, the Father of the Appellant, in the Court of the Principal Sudder Ameen of Saharanpore. The object of the suit was to establish the right of the Appellant, as absolute Owner, to an estate which had been attached and ordered to be sold, in satisfaction of a judgment execution obtained by the Respondents against the estate of the Appellant's Son, Ruhmut Ali Khan, on the ground that such estate was held Benamee, or in trust for the Appellant, having been purchased, as he alleged, with his money, though in the name of his Son, Ruhmut Ali Khan, in furtherance of a family arrangement to benefit the Appellant's Daughters, who would, as it was

* Present:—Members of the Judicial Committee. The Right Hon. Lord Romilly (Master of the Rolls), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

alleged, otherwise have been excluded by custom from their shares in such estate.

The sole question involved was, whether Ruhmut Ali Khan, the Son of Rooknoodowlah Nawab Ali [396] Khan, who was in ostensible possession as Owner, held the estate Benamee for his Father. All the Courts in India considered the claim fraudulent as against the judgment Creditors. The appeal was from the decree of affirmance of the Sudder Dewanny Court at Agra.

The material facts upon which the Courts arrived at the conclusion that the claim was fraudulent, are fully stated in their Lordships' judgment.

Pending the appeal, the Plaintiff died, and the suit was revived by the present Appellant.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—It appears from the evidence, that Ruhmut Ali Khan never had any beneficial right or interest in the property seized. He held Benamee for his Father, who had purchased the same with his own funds. It is the ordinary custom in India for Fathers, among Mahomedans as well as Hindoos, to purchase and hold land in the name of their Sons and other members of their families. Such custom has been recognized and established in the Courts in India, *Amanee Tewaree v. Rai Rughoo Bun Suhai* (3 Ben. Sud. Dew. Rep., 363), *Obhoy Churn Mookerjee Panchanan Bose* (Marshall's App. Ca. Ben., 564); and by this Tribunal, in *Gopeekrist Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53), *Moulvie Sayyud U'shur Ali v. Mussumat Bebee Ulfat Fatima* (*ante* [13 Moo. Ind. App.], p. 232), *Bhowan Doss v. Sheikh Mahomed Hossein* (*ante* [13 Moo. Ind. App.], p. 346). A purchase by a Father, [397] though in the name of a Son, does not raise any necessary presumption of such purchase being intended as an advancement for his Son.

Mr. Field, Q.C., and Mr. J. D. Bell, for the Respondents.—This is not a case of a pure Benamee conveyance. The Plaintiff in the plaint states his own fraud, and he alleges that the transaction was to alter the succession with respect to his Daughters, which was a fraudulent transaction. It is clear that a Benamee transaction cannot affect the succession. There is no evidence that the Father advanced the purchase-money out of his own funds, and the *onus* of such payment being so made was upon the Plaintiff. The criteria in a Benamee purchase, is to know from what source the purchase-money came. It was held by the Courts in India to be a fraudulent pretence set up by the Plaintiff to defeat the just rights of judgment Creditors of his Son, and this Court will watch with extreme jealousy such a claim as this, made under circumstances so suspicious, and already decided on by the native Courts. The estate in question was in fact the property of Ruhmut Ali Khan, who was in possession, and was, therefore, liable to be taken in execution as his property at the suit of the Respondents.

The case stood over for consideration.

Their Lordships' judgment was now delivered by

The Right Hon. Sir Joseph Napier (July 12, 1870).—The Nawab Rooknoodowlah, the original Appellant, has died pending the appeal, and is now repre-[398]-sented by his Son, the Nawab Azimut Ali Khan. The original Appellant will, to prevent confusion between them, be called the Nawab in the observations of their Lordships on this case.

This appeal is brought from a decision of the late Sudder Dewanny Adawlut at Agra, affirming a decree of the Judge of the Zillah Saharunpore, who had affirmed, on appeal to him, a decree of the Principal Sudder Ameen of that place, dismissing the suit of the Nawab against the present Respondents.

The Respondents, by trade Bankers, were Creditors of a deceased Son of the Nawab, named Ruhmut Ali Khan. The debt was evidenced by an instrument in writing, in the usual form there, of a Bond; but this instrument does not appear to have been a Mortgage Bond hypothecating any property of the Debtor. The Respondents obtained a decree in the Civil Court of Saharunpore for the amount of their demand against Ruhmut Ali Khan, who died before execution was had on that decree. The Respondents, after the death of Ruhmut, proceeded, agreeably to the law and practice of the Court, to attach the property of their Debtor, in order to obtain payment of their debt. They were proceeding to bring to sale the property

which is the subject of the present appeal, when the Nawab intervened in the execution proceeding as an Objector, claiming the whole property as his own absolutely, and stating, the deceased Ruhmut to have been merely a fictitious or Benamee holder of the property for him. The Judge of that Court, for reasons which it is unnecessary here to state or consider, refused to allow the Nawab to proceed on that objection, and referred him to a regular suit. The Nawab accordingly pre-[399]ferred his claim by a civil suit against the Respondents, viz., the original suit before referred to in the Court of the Principal Sudder Ameen of Saharunpore. The properties sought to be recovered are named respectively Binsee and Bakree.

The whole contest in this suit was, whether Ruhmut held these properties Benamee for the Nawab. No case was made by the Nawab that the Son had a postponed interest or estate in the property. Such a case, even if substantiated, would not have enabled the Nawab, as an Opponent of the sale, to defeat by intervention the claim of the Creditors wholly. The ordinary mode of conveyance, under such a judicial sale, viz., of the right, title, and interest of the Debtor, would have enabled the Creditors to realize their debt, or some portion of it, by a sale of the interest, whatever it might prove to be. The Nawab instituted no suit to protect any alleged life interest in himself against a title derived under the judicial sale. The Court, therefore, had in the Nawab's suit simply to decide, whether he had proved his Son, Ruhmut, to have been, from the time of the conveyance to Ruhmut until the death of the latter, a Benamee holder of these properties for the Nawab.

The title to Bhensee was one derived originally by mortgage. The Owner, Wuzer Ali mortgaged this, with fifteen other mouzabs, to one Bluwance Pershad, for a certain sum, which, by a second advance and charge, amounted to Rs. 26,400; Bluwance Pershad, as the Nawab alleged, sub-mortgaged the whole sixteen mouzabs to him for the same sum, and he, according to his statement, had the [400] conveyance taken Benamee, in the name of two of his infant Sons, of whom Ruhmut was one. The other of these two Sons died young; on his death, the Nawab, who was his heir, substituted another Son. This Son died young, unmarried, and without issue; his Father was his sole heir. The interest, therefore, of Ruhmut, if real, was to a moiety of this share of Bhensee originally conveyed to the two Sons. The title to Babree was by conveyance, as upon an ordinary purchase, for a money consideration, and the conveyance was in the name of Ruhmut. Some contest has been made about the real facts of this purchase, and the Respondents deny that it was, what it purports to have been, a purchase at all; but in the view which their Lordships take of this case, it will be unnecessary to advert further to this head of contention, or to distinguish further between the titles of the respective properties, since the explanation of the Nawab as to the reasons for the conveyance to his Sons applies alike to both properties.

The case made by the Nawab at the hearing of this appeal before their Lordships was, that the funds which purchased both properties were exclusively the funds of the Nawab; that a legal presumption thence arose that the proprietary right was the Nawab's, and that the Respondents, who have no better title than that of Ruhmut, have not rebutted this presumption.

The Counsel for the Nawab relied on the case of *Gopeekrist Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53), which they contended had been disregarded in the decision of this case in the Courts below.

Had this appeared to their Lordships to have been [401] so, they must necessarily have recommended to Her Majesty to reverse the decisions under appeal, since the law as to Benamee conveyances taken by a Father in the name of a Son, whether in Hindoo or Mahomedan families, should be considered in all Courts in India as conclusively settled by that decision.

It becomes necessary, therefore, to see what were the real grounds of the decision in the Court of the Principal Sudder Ameen. It appears to their Lordships, that that Judge found as a fact, that the Nawab purchased the property with his own funds; a conclusion which, on the evidence before him, and in the absence of all evidence of property at that time in the Sons, their Lordships think a reasonable and proper conclusion. Had this fact received no other addition than that the conveyance was taken in the names of the Nawab's Sons, the case would have fallen within that of *Gopeekrist Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App.

Cases, 53), and the argument for the Appellant must have prevailed with their Lordships, but the Principal Sudder Ameen remarks, and relies on a very important addition to these facts, in the Nawab's own explanation of the cause of the conveyance to his Sons; the Court thence inferred that a motive existed for it in the state of his family, the existence of Daughters, and his desire, as expressed, to vary the rule of succession between Sons and Daughters in his family. The Sudder Dewanny Adawlut also, in their judgment, rely on these additional facts.

If the conveyance to the Sons was designed to produce an effect thereafter, by changing the amount of shares of the whole property on a succession between Sons and Daughters, it could not be designed [402] as a mere naked Benamee conveyance, because, as Mr. Bell correctly observed, a mere Benamee conveyance would in no way affect such succession. But if, as the Nawab himself represented the transaction, it was designed to affect the Daughter's claims, or interests, it could only so operate as a real transaction, that is, by a conveyance of interest to the Sons. It is immaterial in this case to consider, whether the legal effect of the arrangement would be to confer a resulting life estate on the Nawab or not, since the only contest made in the suit was, whether it was an absolute Benamee transaction. The case admitted, certainly, of being viewed thus, that the conveyances were merely colourable, to be treated as real should it become necessary to defeat a Daughter's claim, but fictitious as between Father and Sons. It is to be observed, however, that this view of the case was not presented to the Judge; and if it had been so presented, the Judge would have been justified in declining to act on such an allegation of fraud against Creditors of the Son made after the Son's decease in favour of the Father, alleging his own fraud. Their Lordships, therefore, think that the Principal Sudder Ameen was justified in regarding the whole evidence before him as not sufficient to establish the case of Benamee ownership, which the Nawab advanced. As the decision under review does not appear to conflict with any rule of law, as the question decided is one of fact, as the decision is sustained by sufficient evidence, and establishes the claim of Creditors against property of which their Debtor was allowed for many years to have, at least, the ostensible ownership, it is one which their Lordships would not disturb, unless [403] it were clearly shown to be wrong. It is the duty of a Court of Justice in such a case to put the Objector to the rights of Creditors founded on apparent ownership to strict proof of his objection; he must recover, if at all, on the case that he asserts. It would be easy, if such vigilance and jealousy were not exhibited, for a family to place the family property out of reach of Creditors. If the Father became indebted, the titular right would be then stated to have conveyed the real interest; but if the Son were indebted, then the claim would take the form to which this suit is adopted. Views of these dangers to the rights of Creditors seem to have been present to the Courts below; and in the present case their Lordships are unable to see that jealousy of a probable fraud has induced an incorrect estimate of the evidence. Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed with costs.

[404] NAWAB AZIMUT ALI KHAN.—*Appellant*: JOWAHIR SING and Others.—*Respondents* * [June 22 and 23, 1870].

On appeal from the Sudder Dewanny Adawlut of the North-Western Provinces, Agra.

Purchasers of the equity of redemption of a portion of certain Mouzahs—held, entitled to redeem, on payment of a proportion of the mortgage debt.

Principles upon which the mortgage debt chargeable on each separate village, ought to be apportioned [13 Moo. Ind. App. 413].

When a Creditor sues for his principal and interest, the latter being equal or more than equal at the time of the commencement of the suit to the amount

* Present: Members of the Judicial Committee.—The Right Hon. Lord Romilly (Master of the Rolls), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

of the principal, he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his Debtor's resistance to the demand [13 Moo. Ind. App. 414].

Such a rule, with respect to interest, does not apply to a case in which a Mortgagee in possession under a usufructuary mortgage is not a party suing for the money, but resisting a claim for redemption and settlement of the account [13 Moo. Ind. App. 414].

The appeal in this case was brought from the decree of the late Sudder Dewanny Adawlut at Agra, which affirmed a previous decree of the Judge of Zillah Saharunpore.

The suit in which those decrees were made was instituted by some of the Respondents as Purchasers of the equity of redemption of the Mortgagor in Mouzah Hosseinpore or Boopara, against the Appellant, the Mortgagee and other of the Respondents, the Purchasers of the same Mortgagor's interest in other Mouzahs, namely, Jeetpore and Rookunpore, and a fourth share of Mouzah Chundharee, and other Mouzahs, all comprised in the same Mortgage [405] Deed, and purchased by the Appellant; who, in consequence, contended that the whole proprietary right and interest of the original Mortgagor was now vested in him.

The object of the suit was for a degree of redemption and possession of the above three Mouzahs, and a fourth of another Mouzah.

The material facts and the nature of the proceedings, together with the grounds of argument urged on the appeal, appear in their Lordships' judgment.

As the Respondents did not appear, the appeal was heard *ex parte*.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.

Judgment having been reserved, was now delivered by

The Right Hon. Sir James W. Colville (July 12, 1870).—The original Appellant in this case was, in April, 1846, the Mortgagee of an estate comprising sixteen different Mouzahs, and known as Talook Bhainsee. This estate has been originally mortgaged (it is said by way of usufructuary mortgage) by its then Owner, Vuzeer Ali, for Rs. 26,400, to one Bhowany Pershad, who may be taken to have transferred, in 1822 or 1823, his interest as Mortgagee to the Appellant. Further sums, amounting to Rs. 15,700 in all, were afterwards advanced by the Appellant on the security of the estate, upon terms which will be afterwards considered. In 1839 the representatives of the [406] Mortgagor brought a redemption suit, which was finally dismissed by the Sudder Court of the North-West Provinces on the 1st of August, 1843, by a decree, which is one of the exhibits in this cause. On the 8th of April, 1846, the estate was sold, subject to the mortgage, under process of execution, in satisfaction of decrees against the original Mortgagor or his representatives. It was sold in different parcels. One Mouzah (Hosseinpore) was purchased by Jowahir Singh, and the four other persons who, with him, are the Plaintiffs in this cause: Mouzah Jeetpore was purchased by Buhai Singh and Bustee Ram: Mouzah Rookunpore by Hosein Ali Khan and two other persons: and one-fourth of Mouzah Chundharee by Mussumat Imamee Begum. The residue of the estate was purchased by the Appellant; and the result of the sale was, consequently, that whilst he retained the rights of Mortgagee over the whole property, he became the Owner of the equity of redemption in twelve and three-quarters of the sixteen Mouzahs of which it was composed.

In 1862 the Plaintiffs, as the Owners of the equity of redemption in Mouzah Hosseinpore, brought a suit against the Appellant for the redemption of their Mouzah on payment of Rs. 4737. 7a., which they alleged to be the rateable share of the mortgage debt payable by them. The suit was tried first by the Principal Sudder Ameen, and afterwards, on appeal, by the Zillah Judge. The latter held, that the Plaintiffs were entitled to redeem their Mouzah on payment of an additional sum of Rs. 1212. 13a. But his decision was reversed, and his suit finally dismissed by the Sudder Court on special appeal on the 29th of April, [407] 1864, principally, if not wholly, on the ground, that the Purchasers of the other three parcels of land should have been made parties, and that the Plaintiffs should at least have offered to redeem those parcels, by paying their proportionate part of the mortgage debt attributable to them. The decree affirmed the principal established by a previous case in the

Court, that the Plaintiffs were at liberty to redeem their Mouzah without bringing into Court that portion of the mortgage debt which was attributable to the Mouzahs, wherein the equity of redemption had been purchased by the Mortgagee.

On the 22nd of December, 1864, the Plaintiffs instituted their present suit. It was framed in the manner indicated by the last-stated decree. The Purchasers of the parcels other than those purchased by the Appellant or the Plaintiffs, were made parties on the record; and the Plaintiffs, having claimed absolutely to redeem the latter, and to recover possession of that and the three other parcels, with mesne profits, from the date of the institution of the suit. This suit, like the former one, was tried in the first instance by the Principal Sudder Ameen, who decreed in favour of the Plaintiffs; and his decision was affirmed on regular appeal by the Zillah Judge, and afterwards on special appeal by the Sudder Dewanny Adawlut at Agra. The present appeal, which has been heard *ex parte*, is against these decrees.

The Appellant does not, as their Lordships under-[408]-stand, contest the proposition of the Plaintiffs, as purchasers of the equity of redemption in a portion of the mortgaged premises, are entitled to redeem that portion on payment of some proportion of the mortgage debt. His objections to the decrees may be divided into three classes:—First, objections to the mode in which the rateable share of the debt payable in respect of Hosseinpore has been calculated; secondly, objections to the mode in which the gross amount of the mortgage debt to be apportioned has been ascertained; and, thirdly, to the mode in which the decrees deal with the villages whereof the equity or redemption belongs, or is alleged to belong, to the other Defendants on the record.

Under the first head of objection it was strongly argued, that the principle upon which the debt was apportioned amongst the different villages was erroneous; that the apportionment should have been made according to the actual and ascertained values of the several Mouzahs, and not according to the amount of revenue assessed on and payable in respect of such Mouzahs to Government.

Their Lordships do not deny that there is some force in this objection.

The proportion of the debt chargeable on such village ought to vary according to the actual value of the village; and the amount of Government revenue assessed on a village may not always be a correct criterion of its actual value.

On the other hand, there might be a difficulty in applying the principle contended for by the Appellant to cases in which the amount payable by a Mortgagor seeking to redeem, is not ascertained, as in this Case [409]-try, by inquiry and account, but must be calculated and tendered or brought into Court by him before the commencement of the suit. Their Lordships, however, do not feel called upon to affirm the correctness of the principle adopted in the Courts below, or to give any opinion which may have the effect of sanctioning its adoption in other cases, because they are clearly of opinion, that the objection is not one which this Appellant is now entitled to take. They cannot find any trace of its having been taken in the Courts below. The written statement of the Appellant does not raise the question. On the contrary, he seems, in coming to the conclusion, that Rs. 27,387. 6a. 6p. was the amount which the Plaintiffs ought to have brought into Court to have adopted the same principle of apportionment, as will be seen by referring to his own petition and the account annexed thereto; though the latter account claims something more than the Rs. 27,387. 6a. 6p. as the sum payable in respect of all the four villages.

It is questionable, whether the Appellant has lost anything by reason of the principle of apportionment of which he now complains; but it is certain that by yielding to the objection now for the first time taken, and re-opening the whole account, their Lordships would do great injustice to the Respondents, and make a very dangerous precedent.

It is true that the Appellant's written statement did object to the particular application of the principle, on the ground that the revenue assessed on Hosseinpore was taken at somewhat less than its real amount; and contended that consequently the amount brought into Court by the Plaintiffs was less [410] by a few rupees than even on their calculation it ought to have been. But this objection does not seem to have been pressed in the Courts below—certainly not in the two appellate Courts. And their Lordships are of opinion, that the decrees, if otherwise correct, ought not to be disturbed on that ground.

The next question is, whether the gross amount of the debt to be apportioned has been correctly ascertained in the Courts below. Mr. Leith, in the course of his argument, remarked strongly on the scantiness of the evidence on which those Courts have proceeded. It is, however, to be observed, that for this and any consequences that may have followed from it, the Appellant is chiefly responsible.

The Plaintiffs are mere Purchasers of the equity of redemption in a portion of the estate at an execution sale, and are not likely to have a single document relating to it, except the Bill of sale of their particular village. On the other hand, almost every document of title relating to the property or to the mortgage debt incurred upon it, is presumably in the possession or power of the Appellant, who has been in actual possession of the estate since 1823. In truth, both the parties and the Courts have been content to proceed upon certain findings in the decree of the 1st of August, 1843, which dismissed the redemption suit of the representatives of the original Mortgagor. On these findings it has been taken as proved that the principal money secured by the mortgage amounts to Rs. 42,100, and that that sum consists of Rs. 26,100, advanced in two sums on two different occasions to Vuzeer Ali, upon usufruct [411]uary mortgages of the property, of a sum of Rs. 5000, advanced to his representatives, and bearing no interest on condition of their agreeing not to sue for redemption for twenty years, and of a number of different sums advanced to several of those representatives on their respective bonds at interest, and aggregating to Rs. 10,700. These were all held, by the decree of the 1st of August, 1843, to be charged on the estate; and the suit in which that decree was made was dismissed, on the ground that the Plaintiffs had not tendered or deposited a sum sufficient to cover those charges.

The following is the manner in which the Courts below have dealt with the questions of interest on these items. They have treated the interest on the Rs. 26,400 as satisfied by the rents and profits of the property of which the Mortgagee has been in possession, no account of those rents and profits having been required from or rendered by the Mortgagee. They have held that no interest ran upon the Rs. 5000; and that, under section 5 of Ben. Reg. XXXIV. of 1803, no larger sum could be recovered in respect of interest on the Rs. 10,700, than the amount of the principal. The result of taking the account would be to make the whole mortgage debt apportionable amongst the different villages, Rs. 52,800.

The original contention, however, of the Appellant, seems to have been this:—He treated the decree of the 1st of August, 1843, as having conclusively determined, as between the Mortgagors and the Mortgagee, that the mortgage debt from that date was to be taken to be Rs. 42,100, carrying interest [412] at the rate of twelve per cent per annum. He calculated the amount of such interest for twenty-one years and some months at Rs. 1,08,093. 12a., and insisted that the amount due on the mortgage at the date of the commencement of this suit must be taken to be Rs. 150,193. 12a., of which the proportion attributable to Hosseinpore and the other premises sought to be redeemed was Rs. 27,387. 6a. 6p. This mode of calculation, which does not give credit for one rupee in respect of the rents and profits realized from the property during more than twenty-one years is obviously erroneous.

Moreover, the whole argument is based upon a misconception of the nature and effect of the decree of the 1st of August, 1843. That decree, in fact, did nothing but dismiss the then pending suit for redemption, on the ground that the full and entire amount of the mortgage money had not been deposited (the sums tendered being only Rs. 26,400, and Rs. 400). According to the course and practice of the Court in India, the only point to be determined in such a suit is whether the mortgage debt has been fully satisfied after taking into account the sum tendered or deposited; nor is the finding of any particular amount as still due conclusive against the Mortgagee in a subsequent suit. But in truth, this decree, after dismissing the suit, merely said that the Plaintiffs would not be entitled to redeem until they should liquidate the whole of the money due to the Appellant, both on account of the past and the present, according to the conditions set out in the various deeds. If, therefore, according to the terms of the original contract no interest was to run upon [413] the Rs. 5000, this decree would not convert that loan into a loan bearing an interest. Nor would it alter the rights or liabilities of the parties in respect of the other sums which made up the Rs. 42,100.

The question now under consideration, viz., the amount of the whole mortgage debt to be apportioned between the different mouzahs, may be treated without reference to apportionment, and as if it arose between a sole Mortgagor and the Mortgagee. It is also to be considered with reference both to the sufficiency of the tender or deposit, and to the actual sum payable on redemption.

It was clearly not necessary for the Mortgagor to deposit anything by way of interest on the Rs. 26,400 if, as seems to be assured, that sum was secured by usufructuary mortgages. He had a right to assume, until the contrary was shown, by taking an account, that that interest was covered by the rents and profits. Again, he was under no obligation to deposit anything in respect of the Rs. 5000, if no interest was chargeable on that loan. The question of sufficiency is, therefore, reduced to this: Was he or was he not justified in the assumption that the Mortgagee was not entitled to recover by way of interest on the Rs. 10,700 more than the principal, and in limiting the deposit in respect of interest to that sum.

The contracts on which this liability arose were entered into long before the passing of Act, No. XXVIII. of 1855, and *prima facie* fall within the rule enacted by the 5th section of Regulation XXXIV. of 1803. The contention on the part of the Appellant is, that they are taken out of the scope of that rule [414] by the application of Construction No. 359, to the facts of this case, and in particular to the two former suits for redemption which were dismissed by the decrees of the 1st of August, 1843, and the 29th of April, 1864. Their Lordships are, however, of opinion, that the Courts below have correctly held that the Construction in question does not apply to this case. The effect of it is, that when the Creditor sues for his principal and interest (the latter being equal or more than equal at the time of the commencement of the suit to the amount of principal), he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his Debtor's resistance of the demand. Neither the rule nor the reason of the rule seem to their Lordships to apply to a case in which a Mortgagee in possession is not a party suing for the money, but the party resisting by every means in his power a claim to redemption, and the final settlement of the account.

Their Lordships are, therefore, of opinion, that the sum to be apportioned between the different villages has for the purposes of deposit been correctly taken to be Rs. 52,800.

With respect to the final adjustment of the account, their Lordships have to observe, that if the suit had been conducted in the ordinary way, the Mortgagee must have accounted for the rents and profits received by him whilst in possession. The result of such an account would not improbably have been considerably in favour of the Mortgagor, who does not, however, complain that it has not been taken. But, however that may be, the Mortgagee, whose duty it was to [415] render such an account, who has the best means of knowing what would be the result of such an account, if taken, and who does not suggest that he has been prejudiced by the omission to take it, cannot be heard to complain of these decrees in so far as they treat the interest on the Rs. 26,100 as satisfied by the rents and profits. And what has been already stated shows that in their Lordships' opinion he is not entitled to claim any interest in respect of the Rs. 5000, or interest on the Rs. 10,700 in excess of the principal.

The remaining question is, what upon the facts found by the Courts below ought to have been their decree? The Appellant now complains that the Plaintiffs have been allowed to redeem as against him the villages other than their own village of Hosseinpore, *i.e.*, to put themselves in his shoes as Mortgagee in respect of these villages: and further, that the decree was wrong in refusing to treat him as the Owner under a subsequent purchase of three-fourths of Rookunpore.

The first objection does not come with a good grace from the Appellant, who defeated the Plaintiffs' former suit on the ground that they had not offered to redeem the villages in question, and who in this very suit has included in his calculation of the amount which, as he alleged, ought to have been brought into Court the shares of the mortgage debt which he said were chargeable on these villages. The Courts below, however, seem to their Lordships to have mistaken the effect of the former decision of the Sudder Court. It merely ruled that the Plaintiffs were bound to offer to redeem the villages in [416] question, it did not rule that they were entitled to

do so, or to acquire the interest of the Mortgagee in them against his will. It is unnecessary to determine in this suit, whether in the peculiar circumstances of this case the former proposition is correct. Their Lordships are of opinion, that the latter cannot be supported. They think that Appellant, if desirous of retaining possession of these villages as Mortgagee, is entitled to do so against the Plaintiffs, whose right in that case is limited to the redemption and recovery of their village of Hosseinpore, upon payment of so much of the sum deposited in Court as represents the portion of the mortgage debt chargeable on that village. On this view of the case it is unnecessary to consider, whether the Appellant had or had not given sufficient evidence of his alleged purchase of three-fourths of the equity of redemption in Rookunpore.

Their Lordships are, nevertheless, of opinion, that the Appellant was properly condemned in the costs of the suit, and ought not, any variation in the decree notwithstanding, to be relieved from them. His defence in the former suit, which is inconsistent with his present contention, defeated that suit, rendered the present suit necessary, and invited the claim on the part of the Plaintiffs which he now resists. In this suit he ought at the earliest stage to have submitted to the redemption of Hosseinpore alone on payment of that portion of the sum deposited which represented the debt due in respect of that village. Instead of doing so, he raised issues touching the sufficiency of the deposit, [417] which have been determined against him. It is the course of practice in India that the costs of this kind of suit follow the result of the finding on such an issue, and are not, as in an English redemption suit, added to the mortgage debt. And their Lordships are of opinion, that this rule has, in the present case, been most properly applied to a Mortgagee who has so long, and by so many expedients, inequitably and vexatiously resisted the right of redemption. Their Lordships will, therefore, if the Appellant desires it, humbly recommend to Her Majesty that the decree of the Principal Sudder Ameen be varied by declaring that the Appellant is entitled to receive Rs. 5947. 1a., part of the Rs. 9654, deposit, and that the balance of that sum be returned to the Plaintiffs; and that the Plaintiffs are entitled to redeem and recover possession of the village of Hosseinpore with mesne profits, from the date of the commencement of this suit until the date of the delivery of possession; and that the Appellant should pay his own and the Plaintiffs' costs in the Court below. The Plaintiffs have not appeared on this appeal, and their Lordships give no costs of the appeal.

By an Order in Council, dated the 24th of October, 1870, it was ordered, that the decree of the Principal Sudder Ameen of Zillah Saharunpore, of the 13th of April, 1865, be varied by declaring that the Appellant was entitled to receive Rs. 5947. 1a., part of the Rs. 9654, deposit, and that the balance of that sum be returned to the Plaintiffs; and that the Plaintiffs are entitled to redeem and recover [418] possession of the village of Hosseinpore, with mesne profits, from the date of this suit until the date of the delivery of possession; and that the Appellant should pay his own and the Plaintiffs' costs in the Court below.

[419] GERESH CHUNDER LAHOREE,—*Appellant*; MUSSUMAT BHUGGOBUTTY DEBIA and MUSSUMAT RAM SOONDREE DEBIA,—*Respondents* * [June 23, 24, 25, 1870].

On appeal from the High Court at Fort William, in Bengal.

Construction of Act, No. 1 of 1845, secs. 20 and 21:—Held, not to raise a presumption of law against a Benamee purchase by a Hindoo Widow in trust for her Husband [14 Moo. Ind. App. 423].

A Hibbanamah (Deed of gift) by a Hindoo Widow (a Purdah woman) of real

* Present: Members of the Judicial Committee.—The Right Hon. Lord Romilly (Master of the Rolls), the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart. Assessor.—The Right Hon. Sir Lawrence Peel.

estate, purchased by her out of her Stridhun, of which she had a disposing power, when in a state of ill-health and shortly before her death, in favour of her Brothers, in their Wives' names, to the exclusion of her Husband's adopted Sons; in circumstances raising suspicion of fraud, and in the absence of satisfactory proof that she knew the nature of the Deed, pronounced against. The Courts in India, and Court of final appeal, require that where an instrument is executed by a Purdah woman, it must be clearly proved, that the party was a free agent and knew the nature and effect of the instrument she executed [14 Moo. Ind. App. 431].

The question in this appeal was the right to the possession of certain mehals in the Collectorates of Zillah Rajshahye and Zillah Bograh, of which [420] the particulars were set forth in the plaint in the Court below, and which consisted of, first, the entirety of a property called Dehee Somashpara; secondly, a 6 $\frac{3}{4}$ -annas share of an estate called Goakhara; and, thirdly, an 8-annas share of an estate called Tuppah Arungnugur.

These properties were claimed by the Respondents under a Hibbanamah, or Deed of gift, executed in their favour on the 2nd of the month Srabun, in the year 1263 B.E. (18th of July, 1856), by Mirnomoye Debia, the uterine Sister of the Respondents.

Mirnomoye Debia was the Widow of one Kally Kant Lahoree, who died in the year 1855, having, by his Will, made, in effect, a general devise of his property, subject to certain charges which he specified in his Will, to Mirnomoye Debia for her life, with remainder to Saroda Pershad Lahoree, his adopted Son.

The Appellant claimed as the heir-at-law of Saroda Pershad Lahoree, and contended, that the estates in dispute were not the absolute property of Mirnomoye Debia, but were a portion of the estate of Kally Kant Lahoree, and became subject to certain limitations contained in his Will, and consequently passed on the death of Mirnomoye Debia to Saroda Pershad Lahoree.

The Respondents insisted, that the whole of the property in dispute was purchased by Mirnomoye Debia with her own separate moneys (Stridhun); that the conveyance was made in her name, and remained her property down to the date of the Hibbanamah.

This suit was brought in the Court of Zillah Rajshahye, by the Respondents, claiming, under the above Hibbanamah, against the Appellant, for possession of the three mehals.

[421] After hearing evidence, the nature of which is stated in their Lordships' judgment, Mr. C. S. Belli, the Judge of the Civil Court of Zillah Rajshahye, by his judgment, dated the 16th of April, 1862, decreed the Respondents possession, with costs.

The Appellant appealed to the High Court at Calcutta, which Court, consisting of Messrs. L. S. Jackson and E. P. Levinge, affirmed the decree of the Civil Court of Zillah Rajshahye. The material part of the judgment of the High Court was in these terms:—"Reviewing the evidence adduced on the part of the Plaintiffs to prove the execution of this Deed, its registry, and the execution of the different documents to effect the registry, the evidence of the declaration made by the Widow to a respectable Witness (a Pundit named Gobind Kant) that she had so disposed of her estates; the fact of possession of the land being made over to the Plaintiffs in the Lady's lifetime, not being denied by the Defendants, and the object of her bounty being her own Sisters (or, taking the Defendant's view of the object of the Deed of gift, namely, in trust for her Brothers) we are obliged to come to the conclusion, on the evidence adduced, that the Deed was the voluntary act of Mirnomoye Debia, and that the validity of the Deed is established."

The appeal was from this decree, and was argued by Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant; and Mr. Field, Q.C., and Mr. H. A. Giffard, for the Respondents.

The points raised on appeal were:—

[422] First, whether, as a fact, the estates were purchased by the Widow, Mirnomoye Debia, out of moneys constituting her Stridhun, or peculiar estate, or were held by her Benamee for her Husband. Upon this point, *Gopeekrist Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53) was cited; and,

Second, as the *factum* of the Hibbanamah, whether it was (1) executed by Mirnomoye Debia, or (2), if so executed by her, whether she, being a purdah woman, and from illness in an unfit state to execute such an instrument, it was obtained by fraud. Their Lordships reserved judgment, which was now delivered by

The Right Hon. Sir James W. Colville (July 12, 1870).—The Appellant in this case is the heir-at-law of Saroda Pershad Lahoree, who was the adopted Son and heir of Kally Kant Lahoree. The Respondents are the Sisters of Mirnomoye Debia, deceased, who was the Widow of Kally Kant Lahoree. The suit which has given rise to this appeal was in the nature of an action of ejectment brought by the Respondents, claiming under a Deed or gift from Mirnomoye to recover from the Appellant three several parcels of land. Their case was that these lands, which, on three different occasions, had unquestionably been purchased in the name of Mirnomoye, were part of her Stridhun, or peculiar property; that she had, therefore, the power of disposing of them; and had effectually exercised that power by the Deed of gift in question. The case of the Appellant was, that the lands, though purchased in the name of Mirnomoye, [423] were purchased by Kally Kant Lahoree with his own funds in the name of his Wife, and formed part of his estate, in which, under his Will, she had only a life interest; and, further, that the alleged Deed of gift was either a forgery, or, having been procured from Mirnomoye by the fraud and contrivance of her Brothers, was not an effectual disposition of the property. It lay, therefore, upon the Respondents, who were seeking to disturb the possession of the Appellant, to establish both that the property was the Stridhun of Mirnomoye, and that she had effectually conveyed it by this Deed of gift. If either of these issues be determined against them, it follows that, on the death of Mirnomoye, the title to the lands in question passed to Saroda Pershad Lahoree, who was the heir-at-law of both his adoptive Father and his adoptive Mother; and that the Appellant as his heir is entitled to retain possession of them. Both issues were, however, determined, first by the Zillah Court, and afterwards, on appeal, by the High Court, in favour of the Respondents; and the present appeal is against those decisions.

Their Lordships are of opinion that, upon the evidence before them, they ought not to disturb the finding of the Courts below upon the first of these questions. They do not adopt all the reasons assigned by either Court for coming to this conclusion. They desire to state in particular that they are not satisfied that the 20th and 21st sections of Act, No. I. of 1845, raise a presumption of law fatal to the case of Benamsee purchase set up by the Appellant; and they observe that this objection, if well founded, would at most apply only to one of the three parcels of land in dispute (Somashpara); and [424] not, as is stated by the learned Judges of the High Court, "to all the denominations of lands claimed by the Defendants." They find, however, that Mirnomoye had certainly some Stridhun. They find that Kally Kant Lahoree in his lifetime solemnly and deliberately admitted that these purchases were made out of her funds, and for her benefit, as well as in her name. The evidence no doubt fails to show satisfactorily that her peculiar funds amounted to a sum which would cover all the purchases which she is said to have made. But it cannot be said conclusively to prove the contrary.

Again, though the extracts from Kally Kant Lahoree's Books afford some evidence in support of the allegation that these purchases were made out of his funds, and were, therefore, presumably taken Benamsee for him, they are not absolutely conclusive. Their Lordships are unable to say how the separate funds of the Husband and Wife may have been intermixed by them. We know by his own statement that he did on one occasion take and employ Rs. 8000, belonging to her. It seems, therefore, to their Lordships, that this evidence cannot fairly be taken to outweigh the positive admissions of Kally Kant Lahoree himself. It is argued, however, that credit is not to be given to those admissions, because they may be assumed to have been made falsely, with the object of defeating the claim of the present Appellant to share in the self-acquired property of Kally Kant Lahoree, including these parcels of land. But looking to the remarkably fair and open character of the pleadings in which the statements in question were made, and considering that the defence of Kally Kant Lahoree (a defence which proved successful) was that the Plaintiff in that suit [425] (the present Appellant) was not entitled to

share in any part of his self-acquired property, whether held Benamee or otherwise : and that those pleadings admitted that some of the purchases then in question had been taken Benamee : their Lordships feel that they would not be warranted by the evidence before them in imputing to Kally Kant Lahoree that he had been guilty in a judicial proceeding of deliberate falsehood. It is, therefore, unnecessary to consider how far a Court of Justice is at liberty to disregard admissions so made, in favour or for the benefit of a person, claiming as the heir of him by whom they were made.

Assuming then, that the Courts below have correctly found that the property in question was the Stridhun of Mirnomoye their Lordships have to consider, whether the Respondents have established that the Deed of gift was, under the circumstances of its execution, a valid disposition of it in their favour.

It cannot be said that this issue has been fully or satisfactorily tried in the Courts below. It does not appear on the record, whether there was any formal settlement of the issues ; or, if there was any, in what terms this particular issue was framed. The statement of the Zillah Judge, that the conveyance by Mirnomoye to her Sisters is not denied by the Defendant, implies either that he mistook the effect of the Defendant's written statement, which unquestionably disputed the validity of the Deed, or that he never addressed his mind to try an issue on which nevertheless both sides had put in a considerable amount of evidence. The appellate Court observed on this part of the case, that the Judge below had [426] apparently, by inadvertence, taken for granted that the conveyance was not denied, and had passed no opinion, except inferentially, on its validity. But instead of sending the cause back for the trial of the issue on which the Court of first Instance had thus failed to pass any satisfactory judgment, the learned Judges of the High Court proceeded to dispose of it on the evidence which had been taken in the Court below. It follows, therefore, that the only Court which has really tried the question was equally with their Lordships under the disadvantage of having to determine it on the written depositions, and without an opportunity of seeing the Witnesses.

What are the undisputed facts of the transaction ? About the end of May, 1856, Mirnomoye, labouring under the disease of which she died, left her House in Rajshahye, and went, for the sake of medical advice, to Shoyabad, near Moorshedabad, where she took up her residence in the House of the Pundit, Gobind Kant. She was accompanied by her Sisters (the Defendants), her Dewan, Krishonath Sannyal, and other servants. Early in the following July, her Brothers, Ram Kristno Chowdry and Doorgadoss Chowdry, came to her from Rajshahye. The Hibba, or Deed of gift, bears date the 16th, and was produced for registration on the 18th, and actually registered on the 19th of July, 1856, under a Mookternamah, purporting to have been executed by her contemporaneously with it. Early in August, 1856, other Mookternamahs, and a petition purporting to have been also executed by Mirnomoye, were produced : the first in the Collectrates of Rajshahye and Bogra, the last in the Court of the Judge of Zillah Rajshahye. Their object was to give publicity to the Hibba, and to cause the pro-[427]-perties comprised in it to be transferred in the Books of the Collector into the names of the Respondents. The Zillah authorities required that these documents should be verified. On their requisition the Principal Sudder Ameen of Moorshedabad appears to have sent a Peishkah to take Mirnomoye's deposition at the House of the Pundit, and on his report to have declared them to have been verified. The order to that effect was passed on the 19th of August, and on the 25th of August, 1856, Mirnomoye died. Nothing further was done between these dates to give effect to the Hibba, or Deed of gift. After her death the validity of the Deed, as well as the power of Mirnomoye to dispose of the property, was disputed by the Guardian of Saroda Pershad Lahoree, and a contest for the mutation of names was carried on in the Revenue Courts, which was finally determined by the Board of Revenue in favour of Saroda Pershad Lahoree, whose possession was confirmed, the Respondents being left to assert their title by a regular suit in the Civil Court.

Their Lordships now proceed to consider more particularly the evidence by which the Respondents have attempted to prove the due execution of the Hibba by Mirnomoye. Their principal Witnesses are the Pundit, Govind Kant, whom the learned Judges of the High Court seem to have considered a respectable Witness, the Dewan,

and Ram Kristno Chowdry, one of the Brothers of Mirnomoye. The Pundit seems now to be employed as Pundit in one of the Civil Courts, but at the date of the transaction he did not hold that office, but stood in some kind of spiritual relation to the two Brothers (the Chowdries), they being his "Jujman." His story is that, early in July, 1856, Mirnomoye expressed to him an intention [428] to give all the property, over which she had a disposing power, to her Brothers; and desired him to write to them, and request them to come to Shoyabad. He did so write, but the Letters are not produced. He goes on to state, that Ram Kristno Chowdry came to the place several days before Doorgadoss Chowdry, who accounted for the delay in his coming by saying, that it had been occasioned by his having caused a draft of the instrument, for which he had been brought, to be prepared at Rampoorra.

From the cross-examination of the Pundit, it appears that finally, Mirnomoye was made to execute two Hibbas, viz., the one in question in this suit, and one by which she gave other part of her Stridhun to her Brothers in the names of their Wives; that the actual form of this disposition, varying as it did from the intention said to have been expressed by her to the Pundit, was prompted by the Brothers, one of whom brought the drafts, from which the instruments executed were prepared, with him. He also states a conversation which supports the allegation of the Defendant, that the gift in question, though nominally made to the Sisters, was for the Brothers. To the actual execution of the instrument this Witness does not speak. He accounts for his absence by saying that he was suffering from fever, and unable to bear the press of the crowd which assembled on that occasion; that he retired to the House of one Prem Baboo, situated at a short distance from his own, and was informed, from time to time, of what was going on by his Disciples; that he made one short visit to his own House, where he saw the Dewan writing with stamped paper before him, but could not stay there.

[429] Their Lordships are compelled to say, that this absence of the Pundit begets a suspicion in their minds which the story told by him of its cause does not dispel. It is by no means improbable that a person in a respectable position in life, knowing that a Deed was about to be unfairly obtained, would take care not to be personally present, and would contrive to give only such corroborative evidence of the transaction as he might think he could safely give. In the present instance the only legal proof which the Pundit gives of the actual execution of the document is the subsequent and verbal admission of Mirnomoye in a conversation with him. The learned Judges of the High Court laid some stress on this admission. But their Lordships need not remark upon the danger of trusting to that kind of evidence, unless the Witness is wholly above suspicion.

Doorgadoss Chowdry deposes, that he has no interest in the Deed of gift, and treats it as made for the benefit of the Respondents. He does not confirm the account given by the Pundit of the change of intention on the part of Mirnomoye; he does not speak of having brought any draft with him; or give any account of the preparation of the Deed; or show how it came to be made in the names of the two Sisters; or who gave the instructions for it.

The Dewan who wrote the Hibbanamah, says that the gift was intended to be in favour of the Brothers; that he cannot tell why it was executed in the names of the Sisters; and he does not state from what draft or under whose instructions he wrote the Deed in the form in which it was executed. He [430] says that the Respondent, Ram Soondery, put Mirnomoye's seal to the document at her request. The Brother and the subscribing Witnesses say that Mirnomoye sealed it herself.

Of the testimony of the subscribing Witnesses it is unnecessary to speak at length. They are either Cultivators living at a distance from the place of execution, or menial servants. It is not satisfactorily explained why some of them were there at all. And the testimony of the Dewan makes it, to say the least, extremely doubtful, whether they were in fact there; and whether, according to a reprehensible practice, not uncommon in India, their names were not afterwards written on the Deed. Only one of them professes to have written his own name. They were not examined when the Deed was registered, and the subscribing Witnesses who were then examined were not produced at the trial of this cause. Some of them speak of Mirnomoye as present in the verandah, amidst a crowd of men, giving her own

instructions, and describing the property verbally, and personally asking the Witnesses to become subscribing witnesses.

It is further to be observed that, although the Pundit says he heard of the execution from the Kobiraj, and other respectable persons, and although Doorgadoss Chowdry names several persons far more respectable in station than the subscribing Witnesses, as present at the execution, none of those persons either subscribed the instrument, or have given their testimony in support of it. Again, if it had been clearly proved by the Officer sent to verify the execution of the Mookternamahs by Mirnomoye that she had acknowledged those instruments to be hers, that would have [431] been an important corroboration of the Respondent's case. But that Officer was not called as a Witness; his actual report is not forthcoming, and the testimony of the Dewan leads to the conclusion that he performed his duty in the most perfunctory manner, and was satisfied, on the report of a maid-servant, not called or examined, that Mirnomoye had admitted the execution of the Mookternamahs.

Is, then, the evidence adduced by the Respondents, and considered without reference to any conflicting testimony on the part of the Appellants, sufficient to establish the due execution of this Deed of gift? Their Lordships, differing respectfully from the Judges of the High Court, have come to the conclusion that it is not.

The disposition is one by a Purdah woman, made not very long before her death, and whilst she was labouring under a mortal disorder. Their Lordships consider that it is not open to the objection of inofficiousness. Her preference of her own blood relations to a Son adopted by her Husband, and otherwise provided for, was not unnatural. But this Committee and the Courts in India have always been careful to see that Deeds taken from Purdah women have been fairly taken; that the party executing them has been a free agent; and duly informed of what she was about. Again, when the disposition, as in this case, is in the nature of a death-bed disposition, the Court that upholds it ought, from whomsoever it proceeded, to be satisfied that it was the free voluntary act of the party by whom it purports to have been executed, and expresses his real intentions. In the present case, the Respondents' evidence is conflicting as to [432] the party intended to be benefited, and leaves it uncertain, to say the least, what were the instructions for the Deed, and from whom those instructions emanated. Evidence so untrustworthy, so uncertain, and so conflicting, is not such as enables their Lordships to declare affirmatively that the Hibba was in any sense the act and deed of Mirnomoye, or even that she herself put her hand and seal to it.

Their Lordships, therefore, have come to the conclusion that the Respondents, having failed to prove a material link in the title upon which alone they can recover, the decrees under appeal ought to be reversed, the suit dismissed with costs in the Courts below, and that the Respondents should pay the costs of the appeal. And they will humbly advise Her Majesty accordingly.

[433] GUNGOWA KOME MALUPA,—*Appellant*; ERAWA KOME JOGAPA,—*Respondent* * [June 27, 1870].

On petition from the High Court of Judicature at Bombay.

The Judicial Committee will not entertain an application for special leave to appeal to Her Majesty in Council from a decree of the High Court, where the subject-matter in suit is under the appealable value prescribed by the 39th and 40th section of the Bombay Charter of 1862, unless the Petitioner has applied to the High Court for such leave, and has been refused.

This was an application for special leave to appeal from a decree of the High

* Present: Members of the Judicial Committee,—The Right Hon. Lord Cairns, the Right Hon. Sir William James Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Right Hon. Sir Joseph Napier, Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

Court at Bombay, in a case in which the amount involved in the suit was below the appealable value, Rs. 10,000.

The petition set forth, that a plaint was filed by the Petitioner, Gungowa Kome Malupa, in the Court of the Sudder Ameen of Bazalcote, as the Widow and heiress of her Husband, Mublapa Desace, against the Respondent, Erawa and others, to obtain a declaration of her right to, and to recover possession of certain ancestral property, being a portion of her Enam, consisting of a house and lands, situate in the village of Amaljari, which had been let to Erawa on a lease at will. That the Sudder Ameen dismissed the suit, on the ground that the suit had not been brought within the period of twelve years from the time the cause of action arose, and consequently was barred by the Act of limitation of suits. That an appeal was made to the District Judge of Kullhadghed, who confirmed the decree of [434] the Sudder Ameen. That the Petitioner presented a petition for special leave to appeal from this decree of affirmance to the High Court of Judicature at Bombay, which Court admitted and confirmed the decree of the Court below. That as the value of the property in dispute amounted to Rs. 1500 only, the Petitioner was excluded from obtaining from the High Court leave to appeal to England; but it was submitted that besides the property in dispute there was other property, belonging to the Enam of the Petitioner, which exceeded in the aggregate Rs. 10,000, the appealable amount, and that the other property was in occupation of Tenants of the Petitioner, who had continued to hold the same according to custom, as tenants at will, for terms much longer than the period prescribed for limitation of suits, and the petition alleged, that in consequence of the decree of the High Court being adverse to the Petitioner, many of the Tenants had refused to pay rents in respect of property which they occupied, and had set up their claim as absolute Owners thereof, and that the Petitioner had reason to fear that the remainder of the Tenants would follow their example, and prayed for special leave to appeal from the above decree.

It appeared that an application for review of judgment was made to the High Court, but no application was made to that Court for leave to appeal on the ground, that it was a fit case for appeal to the Queen in Council, as provided for by the rules of the High Court founded on the Bombay Charter (see Macpherson's Civil Procedure for India, Appx. p. cccxxviii [Ed. 1871]), but the present petition for special leave to appeal was made direct. The petition was heard *ex parte*.

[435] Mr. H. C. Merivale, for the Petitioner.—It is admitted, that the amount in issue is under the appealable value, but the question raised in the suit is one between Landlord and Tenant, which involves indirectly the Petitioner in litigation with other Tenants having similar holdings to an amount far exceeding Rs. 10,000, the appealable value. He referred to the 39th and 40th sections of the Bombay Charter of 1862 (a).

[436] Lord Cairns.—If there were any grounds in this case to be assigned as an ex-

(a) The sections of the Letters Patent of the 14th of May, 1862, constituting the High Court of Judicature of Bombay, in pursuance of the Act, 24th and 25th Vict. c. 104, in respect of appeals to the Privy Council, are these:—

Sec. 39. "And we do further ordain that any person or persons may appeal to Us, Our heirs or successors, in Our or their Privy Council, in any matter not being of Criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature at Bombay, made on appeal, and from any such final judgment, decree, or order, made in the exercise of original jurisdiction, by a majority of the full number of Judges of the said High Court, as hereinbefore mentioned: Provided, in either case, that the sum or matter at issue is above the amount or value of Rs. 10,000, or in case such judgment, decree, or order shall involve, directly or indirectly, any claim, demand, or question to or respecting property amounting to or of the value of Rs. 10,000; or from any other final judgment, decree, or order, made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council. Subject always to such rules and orders as are now in force, or may, from time to time, be made, respecting appeals to Ourselves in Council from the Courts in the said Presidency. Except so far as the said existing rules and orders

planation of the circumstance, that no leave to appeal to Her Majesty in Council was applied for to the High Court, those grounds ought to have been stated in the petition: but in refusing the prayer of this petition their Lordships proceed upon this ground—the value of the property in question in this particular litigation is clearly below the appealable value. The only reason, therefore, that would induce their Lordships to make an exception in this case would be, if they found that there were some general right affecting other holdings, the aggregate amount of which would be above the appealable value: that such general right was called in question in this suit: and that the decision of this suit would affect litigation that might arise in other suits respecting other holdings similarly circumstanced. When their Lordships look to the statements which were made in the grounds of appeal to the High Court of Judicature at Bombay, they find that none of such grounds were otherwise than peculiar to this particular case, or such as would, in their Lordships' judgment, affect the decision in any other [437] case which, it is suggested, might arise; they are grounds with reference to the admission or rejection of particular evidence in this particular case, to the applicability of the Statute of Limitations to this case, and to the question of the character in which a particular House was occupied by a person who was called the servant of the Petitioner, in this case. All these are matters peculiar to this individual litigation which could not rule or govern any other litigation, with reference to any other parts of the same property. Therefore, even if there were no other difficulty in the case, their Lordships do not see that the decision here is one which could govern other cases, and that, therefore, an exception ought to be made to the general rule in favour of this Petitioner.

[438] ALEXANDER JOHN FORBES,—*Appellant*; MEER MAHOMED TUQUEE and Others.—*Respondents* * [July 8, 12, 1870].

On Appeal from the High Court at Fort William, Bengal.

In a suit by an auction Purchaser of a zemindary, for resumption of Jaghire lands forming part of and within his zemindary, as Mal., it was proved that the lands in question had been granted by Sunnuds for the performance of certain services, which, though now obsolete, might again be required to be performed, and had been held, under such Sunnuds, rent free anterior to the Decennial Settlement:—held by the Judicial Committee,—

First, that the Sunnuds created a Chakeran, or Service tenure, not affected by sec. 41 of Ben. Reg. VIII. of 1793, and were *pro servitiis impensis et impendendis* partly as reward for past, and partly as an inducement for future, services; and that the Grantees, though liable to forfeit the lands, if they wilfully failed in the performance of the duties imposed by the Sunnuds, were not liable to have such lands resumed, on the ground that there was no

respectively are hereby varied, and subject also to such further rules and orders as we may, with the advice of our Privy Council, hereafter make in that behalf."

Sec. 40. "And we further ordain that it shall be lawful for the said High Court of Judicature at Bombay, in its discretion, on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the said High Court, in any such proceedings as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences."

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longer occasion for the performance of the particular services required [13 Moo. Ind. App. 465];

Secondly, that as it was a tenure created before, and subsisting at the time of, the Decennial Settlement, and then held rent free, the presumption was that the lands were treated as Lakhiraj, and the Jaghire was within the exception of the 26th section of Act, No. I. of 1845 [13 Moo. Ind. App. 456]; and,

Thirdly, that the *onus* was upon the auction Purchaser, who sought to dispossess, or to rack-rent the Grantees under the Sunnuds, to make out a clear title for resumption [13 Moo. Ind. App. 466].

The case of *Bhugoo Rae v. Azim Alee Khan* (16 Sud. Dew., Dec. 1858, p. 84), observed upon and questioned [13 Moo. Ind. App. 463].

This suit was instituted by the Appellant, for resumption of 9000 beegahs of Jaghire Chakeran lands of Talook Ramgunge and Talook Gurrah, in Pergunnah Sultanpore, which were held by the Defendants as rent free, but were alleged by the [439] Appellant to be comprised in, and to form part of, a zemindary, called mehals Havelee Purneah, which had been sold for arrears of Government revenue, on the 24th of July, 1850; and the suit also sought for the recovery of possession of 2000 beegahs of land, called "Towfeer," alleged to be held surreptitiously by the Defendants, in excess of the before-mentioned 9000 beegahs, and under colour of the Sunnud or grant relating thereto. The Appellant sued, as Zemindar of Pergunnah Sultanpore, under a title from Baboo Pertaulb Sing, the auction Purchaser. The Respondents were sued as heirs of the original Grantees in possession. After the admission of the appeal by the High Court, the principal Defendant, Meer Mahomed Tuquee, died, and the Respondents, as his representatives, were made parties in his place.

The following were the facts of the case:—

In the year 1183 Moolkee (1775 A.D.), the East India Company, by a Sunnud, dated 11th Rujub of that year, granted to Meer Syed Ally, 9000 beegahs of "Kharij jumma" lands from villages specified in a Chukbund, situate within or on the boundaries of Pergunnah Sultanpore, in the District of Purneah. The consideration for the grant was expressed to be founded on the past services of the Grantee, whereby the incursions of Elephants in the Pergunnah Sultanpore, from the direction of the Morungs upon the cultivated lands of the Pergunnah, had been prevented; and the grant was made as a reward for such and future services, in order that the cultivation of the Pergunnah might become extended, and the Ryots thereof be protected by the Grantee. The Chukbund referred to in the Sunnud was executed under the seal of the Collector of [440] Purneah, dated the 2nd Assin, 1183 (1775 A.D.), and contained the names, boundaries, and measurement of the lands comprised in the grant, the total measurement being stated at 9012 beegahs, whilst the area of Ramgunge included in the grant, was given at 1464 beegahs.

At the date of the Sunnud, the East India Company also granted to Meer Syud Ally other lands, not embraced in this suit, in the same Pergunnah, as Istimrari, or in perpetuity at a fixed rental, the Grantee being styled Istimrardar or Mookurreedar, and the last-mentioned lands known under the general description of Talook Remae, etc., as a rent-paying Jaghire. The lands which had been granted free from rent, became known under the general description of Ramgunge Peepra, or Jaghire Peepra Ramgunge Gurha, etc., as a rent-free Jaghire, but comprised in fact, only a very inconsiderable portion of those particular mouzahs, the rest being included within Pergunnah Sultanpore, and paying a Government revenue.

On the 21st Cheyt, 1192 (2nd April, 1786), at which time Meer Syud Ally was dead, the East India Company, in consideration of his merit and past services, executed a further Sunnud in respect of the same lands under the description of Ramgunge Peepra, etc., to Meer Abdool Hossein Khan and Meer Ally Rezza (who claimed to be the elder Brother and Nephew of the original Grantee), who were by the Sunnud authorized to cultivate the same and to enjoy the produce thereof with their children: the words used in the original Sunnud being "Ba Farzandan," the ordinary words of inheritance employed in deeds of that kind.

[441] It was alleged that the real heirs of Meer Syud Ally were at this time

resident in Persia, and ignorant of his death, and that the last mentioned Sunnud was, therefore, in fact obtained in fraud of their rights.

On the 11th of February, 1802, Ranee Indrawuttee, being the then Zemindar of Sultanpore, having made the settlement with the East India Company, entered into a kooboleat or agreement of that date, fixing the revenue which she was to pay for all the lands held by her; and by that agreement, Lukhiraj (rent-free) and other specified lands were excluded from revenue, the Ranee engaging not to interfere with former settlements made by the Government, and not to resume any lands without their sanction. In the register of properties belonging to Pergunnah Sultanpore, included in the Ranee Indrawuttee's settlement, none of the properties comprised in the Chukbund appeared by name, except Mouzah Shabazpore, and the Jaghire was always held rent-free.

On the 8th of February, 1804, Mirza Mahomed Saduk Golastana, the Nephew, Vakeel and Agent of Mirza Mahomed Rezza, Mirza Abdoollah and Mirza Mahomed Jaffer, who were the Brothers and heirs of Meer Syud Ally, brought a suit in the Civil Court of the District of Purneah against Meer Ally Rizza and the Widows of Meer Abdool Hossein, for recovery from them of the rent-free Jaghire lands, and a judgment was obtained by him on the 15th of June, 1804, which was afterwards confirmed on appeal to the Court at Moorshedabad on the 2nd of August, 1805, whereby it was held that the Sunnud of the 21st Cheyt, 1192, was granted to the parties named therein as the supposed heirs of Meer Syud Ally, [442] and that it being shown that they were not such heirs, and that the Plaintiffs in that suit were the heirs, it was decided that those Plaintiffs were entitled to the rent-free Jaghire.

By the decree of the Moorshedabad Court, of the 9th of August, 1805, it was declared that a formal Sunnud or sanction of their decision by the Government was required, and subsequently upon the application of Mirza Mahomed Saduk Golastana, the East India Company, in order to give effect to the decision of that Court, and to confirm the original grant of the lands to the rightful heirs of Meer Syud Ally, executed a further Sunnud, dated the 10th of January, 1807, wherein were recited the two previous Sunnuds, as well as the decisions of the Purneah and Moorshedabad Courts, and the Sunnud confirmed the lands to Meer Mahomed Jaffer, Meer Mahomed Rezza, and Meer Abdoollah, with similar words of inheritance as in the Sunnud of the 11th of April, 1786.

By virtue of these Sunnuds, the lands continued to be held rent-free by the original Grantees and their respective descendants, till they devolved on Meer Mahomed Tuquee, and the other Defendants, who at the time of the institution of the present suit were in undisturbed possession. It appeared that the zemindary of Sultanpore passed in that interval from the Ranee Indrawuttee into the hands of different Zemindars. None of them ever had attempted to disturb the title under the Sunnuds.

In the year 1819, the Collector of Purneah called for a list of the Mookurreedars and Jaghiredars of Pergunnah Havelee Purneah, etc., and a return was made by the Surburrakar of the names of the Zemindars, showing that for Talook Ramea, which was held [443] under the Istimrari Sunnud, Rs. 2107. 9. 10½., were paid as jumma, or rent, and that nothing was paid in respect of Jaghire Peepra, Ramgunge Gurha, etc., they being covered by the rent-free Sunnuds.

It also appeared that the Sunnuds were confirmed in a suit instituted in the year 1838, by the Government for assessment of Government revenue on 9000 beegahs, in Talooks Peepra Ramgunge, etc., and a decision was given by the Collector of Purneah which declared the lands free from Government revenue.

On the 24th of July, 1850, arrears of Government revenue having accrued in respect of Pergunnah Havelee Purneah, etc., the zemindary was put up for auction sale under the provisions of Act, No. 1, of 1845, and Baboo Pertaub Sing became the Purchaser thereof; who afterwards sold and conveyed to the Appellant the entire zemindary of Sultanpore and Talook Ramae with all their rights.

After the Appellant's purchase, disputes arose between him and the Respondents, both in regard to the rent-free and to the Istimrari lands. Proceedings were first taken by the Appellant in respect of the Istimrari lands, which being disposed of, in 1862, the present suit was instituted.

The plaint sought to recover possession of the 9000 beegahs of Jaghire Chakeran.

and to have the Sunnud of the 10th of January, 1807, reversed and the rent-free Jaghire lands resumed, on the ground that the grant was invalid as being beyond the power of the Government after the Permanent Settlement, and also that it created a mere Jaghire Chakeran, or service tenure, which had become inoperative when the services for which the Sunnud stipulated were no longer required by the Zemindar, and also, [444] 2000 beegahs of land, alleged to have been acquired by gradual encroachment.

The Respondent, Meer Mahomed Tuquee, and the other Respondents put in answers, in which various grounds of defence were taken. The absence of boundaries or other sufficient description of the lands sued for, so as to show where they lay and in what mouzahs of the Plaintiff, was objected to as fatal to the suit, and the Defendants also set up an uninterrupted possession from 1183 *a.h.*, before the Decennial Settlement, under the three several Sunnuds before mentioned, the last being relied on as a confirmation of those previously given, and not as a fresh grant: that all the grants were made for past as well as future services, and that the services were continued as long as required without any default on the part of the grantees. Meer Mahomed Tuquee also raised the further defence that the right of resumption, if any, was in the Government, under sections 7 and 8 of Ben. Reg. XIX. of 1793; and as to the Towfer lands, that all they held under their Sunnuds did not, according to the revenue survey, exceed 8242 beegahs.

The Government of India, who were made parties Defendants, but as against whom no relief was sought, put in an answer, supporting the Sunnuds relied on by the other Defendants, and alleging that the rental fixed with the Ranee Indrawuttee was exclusive of rent-free lands covered by Sunnuds, and that although the disputed lands were within Pergunnah Sultanpore, they were not to be found among the thirty-nine mouzahs of which that Pergunnah consisted according to the Quinquennial Register.

After hearing evidence, the Principal Sudder Ameen (Moulvie Anwur Ally Khan), on the 31st May, [445] 1864, passed a decree in favour of the Plaintiff for the land within the boundaries appended to the plaint:—From the Principal Sudder Ameen's judgment, it appeared, that his decree as to the lands claimed by the Respondents as rent-free, proceeded on the following grounds: That those lands were given for the performance of duties incumbent on, and of personal benefit to, the Zemindar; that the Zemindar had to pay the rents of those lands, with those of the rest of the zemindary; that the lands were held purely as a return for services performed and dependent on their performance; that the necessity for them having ceased, the right to the lands likewise ceased; and that the Sunnud of 1807 was invalid, as being executed after the Decennial Settlement with Ranee Indrawuttee. As to the Towfer Lands, the Sudder Ameen's judgment rested on the Ameen's investigation, which he held did not prove any such lands to be in the Respondents' possession, but rather that there were less than the 9000 beegahs covered by the Sunnuds.

Meer Mahomed Tuquee appealed to the High Court at Calcutta against this decree, and the Plaintiff, the present Appellant, filed a petition of Objection, by way of cross appeal, under section 348 of Act. No. VIII. of 1859; such cross appeal being confined to that portion of the decree which disallowed the claim for 2000 beegahs as Towfer land.

On the 31st of March, 1865, the High Court, consisting of Messrs. H. V. Bayley and J. B. Phear, passed a decree, reversing the decree of the Lower Court in respect of the 9000 beegahs, and affirming such decree as to the 2000 beegahs of Towfer lands. The reasons on which that decree [446] was founded were as follows:—“The Plaintiff comes into Court with an allegation that these lands were at the time of the Permanent Settlement, assessed mal lands, for which the Zemindar pays revenue as for an asset of his zemindary. Under the rules of pleading, it is for him to prove this allegation. The only evidence adduced by him before on this point is an extract of a Quinquennial Register, and a statement of the Defendants' Mooktar as recorded in the decision in the resumption suit, under Ben. Reg. II. of 1819, of Government and the Defendant the Jaghiredar.* * * * The extract of the Quinquennial Register is not authenticated by any public Officer or by any signature at the time when it was filed, *i.e.*, in the resumption suit, or even now, except

that of the Plaintiff's Pleader filing it in this case. It is not stated for what period it purports to be, and nowhere noted that (as indeed the term itself implies) the Register is to be made at periods of five years. It is contended, as to the date, that it was filed by the Defendants' Mooktar in 1845, but that this identical paper was then filed is not shown in any way whatever, nor its identity recognized. It is contended for the Respondent that Talook Ramgunge and mouzah Gurha are the two villages which have been held as jaghire, rent-free, by the Defendant, and are in fact the assessed lands of the Pergunnah. It is pleaded that it is so because Rs. 850 is the jumma mentioned in the resumption proceeding of 1845, but this alone is not in our opinion sufficient proof of the identity. Next, we find that the area of the jaghire, as in the extract of a Quinquennial Register so relied on by the Plaintiff, is recorded — Ramgunge, 4646bs. 3c.; Gurha, 1253bs. 9c. = 5919bs. 12c. While the grants are admitted by the Plaintiff to be for beegahs 9000, [447] we are shown no other documentary evidence whatever by the Plaintiff to prove his allegation that the land is mal. Now, as to the admission of the Defendants' Mooktar in the resumption suit, the Principal Sudder Ameen himself says, that he would not rely on this alone in the face of the ruling of this Court, dated 29th June, 1852, which would be advantageous to the Defendant. The resumption proceeding recites that the Defendant Jaghiredar's Mooktar was asked whether these lands were Istimrari, or rent-free; that he replied that he could not say, but would inquire; that on being subsequently asked the same question, he pleaded that the Quinquennial Register filed by him was proof that the lands 9000 beegahs in Talook Ramgunge, sought then to be resumed and assessed by Government, already paid rent, *i.e.*, Rs. 850. There is no copy or record of proof of what Quinquennial Register was so filed in that suit. There is no copy or record of the deposition of statement of the Mooktar, or of his power of attorney, or his signature of any paper showing that he made such a statement. The Zemindar was no party to that suit. It is true that the claim of Government was for 9000 beegahs held by Defendant in Ramgunge, and that the decretal order dismisses the claim because the lands had already been assessed. We, however, think on this point the ruling in the Sudder Dewanny Adawlut in the case of the 29th of June, 1852, is correct, *viz.*, that a party's statements in Court regarding a dispute with another party do not create a valid title in a third party, not in that suit, whether these statements were made in good or bad faith. On these grounds, we clearly think, that the Plaintiff has in no way proved what he was bound [448] to prove, *viz.*, his allegation that 9000 beegahs of land, for which he sues, are or ever were part of this zemindary, and that consequently it would be almost unnecessary to go into the case further. But as it has been pressed on us by the Respondent that the Sunnud of 1807 A.D. is a new grant, and not a confirmation of an old one, we will express our opinion unhesitatingly that a perusal of the three Sunnuds of 1183, 1192, and 1807 (the authenticity and genuineness of which is not disputed), taken and read together, leaves no doubt in our minds that the Sunnud of 1807, is but a confirmation of the two previous Sunnuds of date before the Decennial Settlement. Their terms are nearly identical. The Sunnuds of 1192 and 1807 are clearly hereditary, and that of 1192 alone is quite sufficient for a valid hereditary grant. The words used in all are 'Kharij,' 'free,' or literally 'out of' 'jumma,' which means 'assessment.' This term is a descriptive title of rent-free. It is urged on us that the word 'Lakhiraj' is only used in the Sunnud of 1807 A.D. 'La' is the Arabic word 'without,' and 'Khiraj,' assessment. 'Lakhiraj' is technically the generic word for all rent-free, and 'Khiraj jumma' is in its terms of the same effect, whether generic or specific. The Sunnuds cannot in our view be in any way regarded as Malchakeran Sunnuds, and indeed the claim of the Plaintiff to the land as chakeran is solely in conjunction and resting upon his unproven assertion of the Defendant's lands having been mal assets, for which he paid revenue as such chakeran lands incorporated with his mal."

The Appellant brought the present appeal from this decree.

[449] Sir R. Palmer, Q.C., Mr. Leith, and Mr. F. T. Forbes, for the Appellant.—The Appellant, the Zemindar of Pergunnah Sultanpore, claims to resume 9000 beegahs of land originally granted and held on condition of the Grantees, or tenants, performing certain services. These lands belong to a zemindary called Havelee Purneah, within the Appellant's zemindary of Sultanpore, which was sold

in 1850 for arrears of Government revenue, pursuant to the provisions of Act, No. I. of 1845, under which the Appellant became Purchaser. It appears, from the original Sunnuds granting these lands, that the object of the grant, and the condition on which they were held by the Grantees, was that they should keep off the incursions of wild Elephants, and attend to the safety of the tenants on the boundaries of the Pergumrah. The Respondents, who are in possession, and claim under a title from the original Grantees, insist, besides that these lands are Chakeran lands, that they have never been assessed to the Government revenue, and were rent-free lands before the Decennial Settlement. This assertion, we contend, is not proved by the evidence: on the contrary, it appears from an extract from the Quinquennial Register, filed in the suit, that these very lands were assessed and settled as Mal, or revenue-paying lands, for which the then Zemindar was liable, and did pay for them the Government revenue; they would, therefore, be included in the Decennial Settlement within the meaning of Ben. Reg. VIII. of 1793, sec. 41. The original Sunnud of 1775, to Meer Syud Ally was a personal grant, without any words of inheritance, and, therefore, determined at his death. The Sunnud of 1786 was obtained by false [450] pretences, and was rightly set aside by the decree of the Court of appeal of Moorshedabad, in 1805. As to the Sunnud of 1807 made by the Governor-General it is illegal, as it purports to grant as a Jaghire, lands which had been, at the Decennial Settlement, included by the Government in the settled and assessed zemindary of the Appellant. Even if such grant had been a valid grant, the decision of the Principal Sudder Ameen was right in decreeing possession of these Jaghire chakeran lands, with reference to the service on which the grant was originally made, it being found and decided that such service was now unnecessary and obsolete, being no longer required from the Appellant to be performed, and consequently that the lands had reverted to him as part of his revenue-paying zemindary. *Mahbub Hossein v. Potasi Kumari* (1 Ben. Rep. 120). These were Lakhiraj lands, and, whether exempted from the public revenue with or without authority, are expressly included in the Settlement made by Reg. VIII. of 1793, and by section 36 are directed to be assessed; and the 41st section of the same Regulation directs chakeran lands, held by public Officers and private servants, in lieu of wages, to be annexed to the malguzarey lands, and to be responsible for the public revenue. These lands are, therefore, clearly within the assessment made on the Appellant's zemindary, and the services for which they were originally granted being no longer required, or capable of performance, the tenure has ceased, and they have reverted to the zemindary out of which they were originally taken.

Mr. Doyne, and Mr. Cave, for the Respondents.—The judgment of the High Court, held that the [451] Appellant had failed to identify the lands sued for as forming any portion of the settled zemindary of Sultanpore, was correct, and supported by the evidence in the suit. But, even if the 9000 beegahs of land had been shown to be within the geographical limits of the Appellant's zemindary, it is clear from the evidence, as has been found as a fact by the decree of the High Court, that these very lands were sixteen years before the Settlement in 1802 unconditionally granted to the supposed heirs of Meer Syud Ally, upon an executed consideration, and no right to disturb that grant has accrued by virtue of the sale to the Appellant. The claim for the 2000 beegahs as Towfah is clearly without foundation, as the quantity, as ascertained, is under 9000 beegahs. The lands are chakeran, held on that tenure, and are incapable of being resumed and assessed to the public revenue; and this has been held in this Court to be a sufficient exemption, even when, as it is alleged here, the services for which the lands were granted have become obsolete or not required to be performed. *Raja Lelanund Sing, Bahadoor v. The Government of Bengal* (6 Moore's Ind. App. Cases, 101), where the nature and effect of a tenure of this nature is fully discussed and considered. So in the case of *Joykishen Mookerjee v. The Collector of East Burdwan* (10 Moore's Ind. App. Cases, 16); which resembles the present case. There the lands were granted for personal services that were no longer required; but as the Grantees might have been called upon to perform them, the tenure was held to continue, and the exemption from resumption by the Government was the result. *Unde Rajaha Raje Bommaruce*, [452] *Bahadur v. Pemmasamy Vencatadry Naidoo* (7 Moore's Ind. App.

Cases, p. 128); *Raja Lachalund Singh v. Sarwan Singh* (9 Sevestre's Rep. 311); *Nilmong Singh Deo v. Ramgolal Singh Chowdry* (Marshall's App. Cases, 518). The Indian authorities concur in treating chakeran lands as exempt from resumption and Government assessment. Ben. Regs. I. of 1793, sec. 8, cl. 14; and VIII. of 1793, secs. 36 and 41, taken together show that Lakhiraj lands are excluded; and when held as chakeran lands, they are exempt. In support of this contention they cited the decisions which are referred to and commented on by their Lordships in the judgment.

The consideration of the judgment was reserved, and was now pronounced by

The Right Hon. Sir James W. Colville (July 26, 1870).—The Appellant is the Owner of the zemindary right in Pergunnah Sultanpore, and Talook Renua, in Zillah Purneah. These mehals were purchased by him in April, 1851, from one Baboo Pertaub Sing, who, on the 24th of July, 1850, had purchased the estate of which they then formed part, at a sale for arrears of Government revenue; and the estate so purchased by Baboo Pertaub Sing had once been part of a far more extensive zemindary, which, in 1802, was first permanently settled with one Ramee Indrawutte.

In July, 1862, the Appellant commenced the suit which has given rise to this appeal, in which he claimed against the Respondents, first, the right to [453] resume 9000 beegahs of land held by them upon the tenure which will be afterwards considered; and, secondly, the right to recover from them 2000 beegahs of land, described as Towfer, or excess, being lands which, he alleged, they had wrongfully acquired under colour of their tenure by gradual encroachment, or otherwise.

The Court of First Instance allowed the first of these claims, but rejected the second. On appeal and cross appeal, the High Court of Calcutta rejected both claims, reversing the decree of the Court below on the first, and affirming it on the second; and dismissed the suit. This appeal again raises both questions.

The claim of Towfer may be shortly disposed of. It was very faintly pressed at the Bar. Mr. Leith, it is true, relied upon a passage in the Ameen's report; but the Principal Sudder Ameen was of opinion that, on the Ameen's report, taken as a whole, no excess of land was shown to be in the Respondent's possession; but that, on the contrary, they appeared to hold less than 9000 beegahs in all. The High Court has confirmed that decision, and no grounds have been laid before their Lordships which would justify them in disturbing the concurrent finding of the two Indian Courts on what is, in fact, a mere question of boundary and measurement.

In dealing with the question of resumption, their Lordships desire to state, in the first place, the conclusion to which they have come touching the origin and duration of the tenure on which the lands sought to be resumed are held.

The following is its history:—In 1775 the lands [454] in question were granted by Sunnud to Meer Syud Ally, a Persian, who had done, and was doing, good service in repressing or preventing the incursion of wild Elephants coming from the Morunghs or Terai upon the cultivated lands of Pergunnah Sultanpore. This first Sunnud contained no words of inheritance. In 1786, Meer Syud Ally, being then dead, the Government granted the second Sunnud in favour of Meer Abdool Hossein Khan and Meer Ally Rezza, who represented themselves to be the elder Brother and Nephew of Meer Syud Ally, and as such, his heirs. This Sunnud does contain words of inheritance, and made the Grantees and their descendants fixed Jaghire-dars. It is not shown what, if any, interruption of possession took place between the death of Meer Syud Ally and the date of this second Sunnud.

In February, 1804, Mirza Mahomed Saduk Goolastana and others brought a suit against Meer Ally Rezza and the Widow of Meer Abdool Hossein, alleging that they were the true heirs of Meer Syud Ally, and that the Grantees under the second Sunnud had falsely pretended to be his Brother and nephew. The first decree in this suit declared the Plaintiffs to be the true heirs of Meer Syud Ally, and directed the Defendants to relinquish the possession and enjoyment of the Jaghire to them, treating, apparently, the former as Trustees for the true heirs. On appeal, the Provincial Court affirmed this decree, and dismissed the appeal. But considering, apparently, that it could not, without the sanction of Government, transfer the benefit of the second Sunnud from the persons named in it to the true heirs of Meer

Syud Ally, it directed that [455] the possession of the former should remain undisturbed "until an Order should be issued from head-quarters," meaning the Governor-General in Council.

In consequence of these decisions, the third Sunnud was granted on the 10th of January, 1807. It recited the two former Sunnuds, and that by the decrees in the last-mentioned suit the heirship of the Plaintiffs had been proved, and the Jaghire continued to the Plaintiffs. And it went on to state that, under these circumstances, the Government had, on the application of Meer Mahomed Saduk, confirmed the Jaghire lands to the Plaintiffs, from whom the present Respondents derive their title.

Under the three Sunnuds, the lands comprised in the Jaghire have been held rent free for nearly a century.

One of the questions raised in the suit is, however, that, under the circumstances above stated, the title of the Respondents must be held to have been first created by the third Sunnud in 1807; and that inasmuch as the zemindary, of which Pergunnah Sultanpore was then part, was permanently settled in 1802, the Appellant, who claims through an auction purchaser, is entitled under Act, No. 1, of 1845, to set aside the tenure as one created within his zemindary since the perpetual settlement.

Their Lordships are of opinion, that this contention cannot be supported. It is perfectly clear that the effect of the second Sunnud was to create sixteen years before the settlement of the estate, in 1802, an hereditary Jaghire tenure; and that the settlement was made upon the assumption of the subsistence of that hereditary Jaghire. The grant was perfectly [456] good against the Zemindar, who could not have come into Court to set aside the second Sunnud on the ground that the Grantees had obtained it from Government by fraud or misrepresentation. Nor, in fact, has any Court or any authority ever revoked or set aside that second Sunnud. The decrees in the suit between the real and pretended heirs of Meer Syud Ally made (subject to the sanction of Government) the latter Trustees for the former, and directed them to relinquish the enjoyment of the lands accordingly. And the Government by the third Sunnud sanctioned that arrangement, and confirmed the title of the true heirs. On this view of the transaction, the action of Government, and the inaction of the Zemindar in 1807, become intelligible. For it is not to be presumed that the Government would have assumed the power of granting a new tenure in a settled zemindary, or that the Zemindar would have submitted to such an invasion of his rights. Their Lordships, therefore, concurring on this point with the High Court of Calcutta, are of opinion, that the Jaghire of the Respondents must be held to be a tenure created before, and subsisting at the time of, the Decennial Settlement: and consequently that it is within the exception of the 26th section of Act, No. 1, of 1845: whether the Appellant has or has not in respect of his estate the powers of an auction Purchaser under that Act (as to which their Lordships express no opinion): and, whether the lands comprised in it were or were not part of the zemindary settled in 1802.

Has, then, the Appellant established his right to resume the lands comprised in this ancient Jaghire? His case is that they are within the limits of the [457] zemindary settled in 1802; that as between the Government and the Zemindar they were then treated as mal or revenue-paying lands, and a revenue assessed upon them: although they were then, and have ever since been, held rent-free as between the Zemindars and the Jaghiredars: that under these circumstances they must be deemed to be chakeran or service lands, and that the services on which they were held being no longer required or performed, the right of the Zemindar to resume them has accrued.

Some attempt has been made on the part of the Respondents to show that the lands comprised in the Jaghire are not even within the geographical limits of the settled zemindary, or, at least, have not been proved to be so. But, looking at the pleadings and the evidence, their Lordships are of opinion, that upon this point the Appellant has established his case. He has given strong *prima facie* proof of the fact, and there is no evidence at all to the contrary.

If this be so, the next question is, How were the lands dealt with on the occasion of the Settlement? They were then unquestionably held rent-free, under a sub-

sisting Sunnud, and the presumption is that they would be treated as Lakhiraj. In that case no revenue would be assessed upon them. Nor would the Zemindar acquire any right to question the validity of the title on which Lakhiraj land of that extent was held. That question could only be raised by Government: and having been decided adversely to Government in 1845, the title of the Respondents would now be indefeasible.

On the other hand, it seems to follow that if on the occasion of the Settlement, revenue was assessed on these particular lands as between the Government [458] and the Zemindar, they must, since they produced no money-rent payable to the Zemindar, have been treated as in the nature of chakeran lands within the meaning of the 41st section of Regulation VIII. of 1793, upon the notion, that the services to be performed by the Tenant were equivalent to rent payable to the Zemindar. It is, therefore, a very material issue whether, in point of fact, these lands were, on the occasion of the Settlement, treated as part of the mal assets of the zemindary.

Their Lordships are not prepared to say that the Appellant has established the affirmative of this issue beyond reasonable doubt.

He relies mainly on the evidence afforded by the Quinquennial Register, and the proceedings in the resumption suit, brought by Government against the Respondents, or those through whom they claim, which was finally determined in 1848.

Their Lordships do not concur with the High Court in thinking that the first of these documents has not been properly authenticated. The learned Judges of that Court seem to have confined their attention to the extract of the Quinquennial Register of the Mehal Pergunnahs attached to the Collectorate of the District of Purneah, and to have taken no notice of the fuller extract of the Registry also put in evidence, which not only bears the Collector's seal, but is shown by the indorsements upon it to have been the identical paper produced by the Jaghiredars in the resumption suit. The Appellant's case, is, that the lands in dispute are included in the villages Talooka Ramgunge, and Mouzah Goorka, part of Talooka Remae, on which a revenue of Rs. 850 appears to have been assessed.

[459] Their Lordships cannot assent to the proposition of the learned Counsel for the Respondents, that Talooka Remae is something different from Pergunnah Sultanpore; and that the Appellant is bound to show that the lands in question are mal lands within Sultanpore proper. They think it is proved, that Talooka Remae was part of Pergunnah Sultanpore in the larger sense of that denomination. Nevertheless, if the Appellant's case depended solely on the Quinquennial Register, their Lordships would doubt, whether it had been sufficiently proved that the lands in question were subject to the assessment. For even if it be assumed that the different villages or divisions of land mentioned in the Chukbund and Ameen's report are comprehended within the denominations of Talooka Ramgunge and Goorka, it seems consistent with that Register that those mouzahs may have included the 9000 rent-free beegahs in excess of the 5819 beegahs mentioned in it as the lands in respect of which the revenue of Rs. 815 was assessed. But it is argued that the identity of the Jaghire lands with the mal lands in Talooka Ramgunge, etc., has been admitted by the Respondents, or those through whom they claim in the resumption suit. The question then arises, what is the weight to be given to that admission?

Their Lordships cannot agree with the learned Judges of the High Court in treating it as a mere admission or argument at the Bar by a Mooktar, whose authority to make it is not proved. It seems to them to be the foundation and substance of at least one of the defences deliberately pleaded by the Jaghiredars in the resumption suit to the claim of Government. It was not the sole defence, nor can [460] the ultimate decision of the case be said to proceed upon a finding by the Collector that the lands were mal, and not Lakhiraj. For he seems to have held that the proof of the Sunnud was of itself a bar to the claim of Government in that proceeding. Nevertheless, the admission appears to their Lordships to be one of a grave character; and though it is not to be treated as an estoppel, it at least casts upon the Respondents the burthen of explaining it, and of showing that what was then deliberately asserted was not the fact. The *onus*, then, of showing that the Jaghire lands are something distinct from the mal lands of Talooka Ramgunge

and Goorka is shifted upon them. And this fact they have not attempted to establish by direct evidence. They have been content to rest on the alleged insufficiency of the proof on the other side. Their Lordships, therefore, are constrained to say that though the evidence before them is not conclusive, the preponderance of it is in favour of the allegation that the Jaghire lands were made the subject of assessment, in the Settlement between the Zemindar and the Government in 1802.

But is it a necessary consequence of this finding that the Appellant is entitled to resume these Jaghire lands? His right to do so must depend on the nature of the tenure; and it is worthy of observation that, so little value did the Zemindar in possession between the years 1835 and 1845 attach to this supposed right of resumption, that he did not intervene, as undoubtedly he might have intervened, to resist the then claims of Government.

The settlement between Government and the Zemindar cannot affect the rights of the Jaghiredars. The lands held on this tenure, even if then treated [461] as in the nature of chakeran lands, differ widely from the ordinary chakeran lands contemplated by section 41 of Ben. Regulation VIII. of 1793. They seem hardly to fall within the description of "lands held by a public Officer or a private servant, in lieu of wages." Neither Meer Syud Ally nor his descendants were by the Sunnuds appointed to an office known as "Elephant Hunter for the Pergunnah," or by any like description. Still less ground is there for saying that they were the private servants of the Zemindar. Their right, whatever it be, was derived not from any Zemindar, but from the Supreme authority in the State.

Their Lordships have carefully considered the various authorities cited at the Bar; but they can find none which expressly govern the case.

Of those which have been decided by this Committee, it is sufficient to say that in the Madras case, *Unde Rajah Raja Bommaruze, Bahadur v. Pemasamy Venkatadry Naidoo*, in 7 Moore's Ind. App. Cases, p. 128, the question really discussed and decided was, whether the tenure in question was Enam or Amaram, it being established and almost admitted that, if it were the latter, it was resumable at pleasure; and the case of *Joykishen Mookerjee v. The Collector of East Burdwan*, in the 10th Moore's Ind. App. Cases, p. 16, decided that lands held in lieu of remuneration by a village Chowkeedar, though unquestionably chakeran, within the meaning of Regulation VIII. of 1793, sec. 41, were not resumable at the pleasure of the Zemindar, if the public, or the Government representing the public, had an interest in the appointment of the Chowkeedar.

The Indian authorities are not quite consistent [462] with each other, but taken altogether, they do not appear to their Lordships to establish the right for which the Appellant contends in this case.

In the case of *Hurrenarain Ghose v. Mussumat Urnoo Dasse*, the 11th May, 1857 (14 S.D. Dec. Ben., p. 786), the chakeran lands had been assigned for the maintenance of a Chowkeedar, and the existing Chowkeedar had no connection with them, being otherwise remunerated. Other provision had, therefore, been made for the service to be rendered in return for them.

In the case of *Moharaja Sreeshechunder Rae v. Madhub Mochee*, of the 30th November, 1857 (15 S.D. Dec. Ben., p. 1772), the tenant whose services had been dispensed with, or had otherwise ceased, was clearly the mere private servant of the Maharajah (the Zemindar). He was the person bound to perform all the leather work required in the family.

The case of *Tekayet Jugmohun Singh v. Raja Neelandund Sing*, the 11th December, 1857, 15 S.D. Dec. Ben., p. 1812, was one of Ghatwallie tenure; and one of the learned Judges who decided it (Mr. Justice Trevor), in the subsequent case of *Munrunjun Singh v. Rajah Lelanund Singh*, decided by him and Mr. Justice Campbell (3 Weekly Reporter, 1865, p. 84); and again in the case of *Baboo Kooladeep Narain Singh v. Mahadeo Singh*, decided by the full Bench, 6 Weekly Reporter, 1866, p. 199, concurred in the ruling that all that was laid down in the first-mentioned case, beyond the decision that the Zemindar was entitled to resume, when the Ghatwal had actually failed to render the service which he was bound to render, was mere *obitre dictum*. Both these cases in the Weekly Reporter [463] support the contention of the Respondents rather than that of the Appellant. Both also relate to Ghatwallie tenures. The case of *Mahhub Hossein v. Patasu Kumari*,

decided in 1868 (1 Ben. Law Reports, p. 120), is to the effect that, the Government having concurred in the suppression of the office, the Son of a Ghatwal, who had held his office, not by hereditary right, but on the appointment of the Zemindar (though practically the Son had continually been appointed in succession to the Father), could not successfully sue to recover lands which the Zemindar had resumed.

Then Lordships do not think it necessary for the determination of this case to examine minutely these decisions touching the Ghatwallie tenures. And they abstain the more willingly from doing so since it was stated at the Bar that some of them are likely to be brought regularly before this Board by appeal. But they cannot but express their concurrence in many of the general principles laid down by the Chief Justice in the case in the 6th vol. of the Weekly Reporter, p. 203.

Another case cited is that of *Bhugoo Rae v. Azim Alee Khan*, of the Sudder Dewanny Adawlut Decisions for Bengal for 1858, p. 84. The property, as in this case, was a Jaghire. The decision did no more than remand the case for re-trial, with the following intimation of opinion, p. 85:—"The issue raised by the Plaintiff is not solely whether the grant to the ancestor of the Defendant is hereditary, but also whether it has any condition of service annexed to it or not, and if it has, whether that service be still performed; should a condition of service be annexed to the grant, the hereditary nature of the grant will not be the test of its present validity, but the performance [464] of the required service; and if this service be not performed, then, notwithstanding its hereditary nature, the tenure will be liable to resumption."

To this ruling, if it be understood to mean only that where the continued performance of certain services is, upon the true construction of the grant, the condition on which the lands are to be held, their Lordships conceive no exception can be taken; but if it means that whenever service enters into the motive or consideration for a grant, the grant will become void if for any reason the service ceases to be performed, their Lordships think that the proposition is far too wide.

The conclusion which they would draw from the decided cases, as well as from the reasons of the thing is, that in every case the right to resume must depend in a great measure upon the nature of the particular tenure, or the terms of the particular grant.

They agree with the observation of Mr. Justice Jackson, Weekly Reporter, Vol. 6, p. 209, that there is a clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands.

They have already stated that, in their opinion, that grant in question does not fall within the latter category.

Assuming it to be a grant of the former kind, their Lordships do not dispute that it might have been so expressed as to make the continued performance of the services a condition to the continuance of the tenure. But, in such a case, either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument [465] would, by express words, declare that, the service ceasing, the tenure should determine.

It appears to their Lordships that neither the first nor the second Sunnud is a grant of the kind last mentioned. Each proceeds in part upon the past services of Meer Syud Ally: nor is the consideration, so far as it is unexecuted, wholly the keeping up of a body of men to repel the incursions of the elephants, for the grantees are also to cultivate the waste land. The latter stipulation was probably designed to protect the already cultivated districts of Pergunnah Sultanpore by interposing a further belt of cultivation between them and the forest. Hence the grant may be said to have been made *pro servitiis impensis et impendendis*—partly as a reward for past, partly as an inducement for future, services. Again, neither Sunnud contains any words which expressly import that the tenure shall cease if and when any of the services cease to be performed. Such a provision is something very different from one which merely casts upon the Grantee the performance of certain duties so long as they are necessary. The former makes the grant determinable when there is no further occasion for the services. But, in the latter case, if the operation of any natural cause (as, *e.g.*, the progress of cultivation, which has caused the wild Elephants to cease out of the land) removes

the necessity for the services, the Grantee will hold the lands practically freed from the condition originally imposed upon him. Their Lordships are, therefore, of opinion, that upon the true construction of these Sunnuds the Grantees, though bound to protect the Pergunnah from the incursions of wild Elephants so long as those incursions lasted; and though still bound to do so should, [466] by any chance, those incursions be renewed; and though they may be liable to forfeit the tenure if they wilfully fail in the performance of this duty, are not liable to have their lanes resumed because there is no longer any occasion for the performance of this particular service, "there being now no fear of the depredations of Elephants in those places."

Had this been a grant reserving to the Zemindar a small money-rent, as well as the services, if indeed the latter are reserved to the Zemindar, their Lordships would have had no doubt upon the case. But it seems to them that the unexplained anomaly of making mal lands rent-free in the hands of the Jaghiredars, does not affect the construction of the Sunnud, or the rights of the parties.

It emphatically lay upon the Appellant, who is seeking to dispossess, or to rack-rent, the Respondents, who by themselves, or their ancestors, have brought these lands into cultivation, and enjoyed them for so long a period; who must have been permitted by former Zemindars to continue undisturbed in such enjoyment long after the incursion of wild Elephants had become mere matter of tradition, to make out a clear title to resumption. In their Lordships' opinion he has failed to do so; and therefore, though they dissent from the particular grounds on which the High Court has dismissed the suit, they think its dismissal was right, and ought to be affirmed. They will, therefore, humbly advise Her Majesty to dismiss this appeal with costs.

[See *Kooldeep Narain Singh v. The Government*, 1871, 14 Moo. Ind. App. 257.]

[467] FELIX LOPEZ,—*Appellant*: MUDDUN MOHUN THAKOOR, BRIJ MOHUN THAKOOR, and HURRY MOHUN THAKOOR,—*Respondents** [July 11, 1870].

On appeal from the High Court of Judicature at Bengal.

Land forming part of a mouzah on the banks of the Ganges, by reason of continual encroachments of that River became submerged, the surface soil being wholly washed away. After recession and re-encroachment by the River, the waters ultimately subsided and left the land re-formed on its original site. Held, applying the principles of English law, and following *Mussumat Imam Bandi v. Hurgovind Ghose* (4 Moore's Ind. App. Cases, 403), that the land washed away and afterwards re-formed on the old ascertained site, was not land gained by increment, within the meaning of sec. 4 of Ben. Reg. XI. of 1825 [13 Moo. Ind. App. 476-7].

The case of *Katteemonee Dossee v. Ranee Monmohinee Dabee* (3 Ben. W.R. 51, 26th May, 1865) observed on and dissented from [13 Moo. Ind. App. 477].

This was a case of disputed boundaries in respect to land which had been submerged and partially washed away by the River Ganges, and afterwards re-formed on the original site.

The suit, in which the two decrees appealed from were made was brought by the Appellant to recover possession of 1262 beegahs 1 biswas of land which had re-formed, through alluvial deposit, upon a part of the original site of mouzah Maghajan, which had [468] been previously partially washed away and submerged, lying under the waters of the River Ganges, and which land was at the time of the submersion appertaining to his Talook Sharfooddeenepore, Pergunnah Colgong. The

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James. Assessor,—The Right Hon. Sir Lawrence Peel.

Plaintiff also sought to obtain a declaration of his right in respect of the remaining 194 beegahs 4 dhans of land, being the other part of the mouzah still remaining when the suit was brought, then submerged and not above the surface of the water of the Ganges. These two several quantities of land, making together a total area of 1456 beegahs 1 biswas 4 dhans, constituted the extent of the original area and actual measurement of the mouzah, according to a Government survey and measurement previously made, and referred to in their Lordships' judgment; and, as ancillary to the above relief, the Plaintiff sought to reverse three summary Orders of the Criminal Court of the 30th of March, 10th of April, and 8th of June, 1861, passed under Act, No. IV. of 1840, under which possession was given of the re-formed lands to the Respondent, Muddun Mohun Thakoor.

The defence set up by the Respondents was, that the whole of the land of the mouzah, namely, all that was visible above the then level of the river, had been cut or washed away, and that the land in dispute had re-formed, adhering to mouzah Kusba Burraree, the Respondent, Muddun Mohun Thakoor's, adjoining property; that he held possession of the land as lying opposite the boundary of mouzah Kusba Burraree, and that under Ben. Reg. XI. of 1825, sec. 4, he was entitled to it as an increment to his mouzah.

By the judgment of the Principal Sudder Ameen [469] (Moulvie Syud Mahomed Waheedooddeen) dated the 9th of February, 1865, it was decided on the evidence, that the land of the mouzah Maghajan had been clearly identified, and that the mouzah had re-formed on its own original site; and that, under these circumstances, the Plaintiff was entitled to the whole of the newly formed land that might be found, by ostensible identification to have formed on this former site, and within the boundaries of mouzah Maghajan, and particularly, as between the Plaintiff, Muddun Mohun Thakoor, and Juggomohun Thakoor, a Tanabundee (measurement paper) had been made and the boundaries of the mouzah Maghajan defined. Consequently, that the Plaintiff could not be allowed by the Court to transgress his limits contrary to the above document, as the principle and scope of that Tanabundee would become defeated. The judgment also disposed of the Defendant's title to the land in dispute, in these terms:—"The Defendant's assertion of his title to this land with reference to cl. 1, s. 4, Regulation XI. of 1825, and the Sudder Dewanny precedent of the 18th of January, 1854, does not hold good, because such title appears to be created in such a case as when one River runs between two mouzahs, in that case the land would belong to that to which it would adjoin, and no mark of the other mouzah may be found; whereas, in this instance, this is not the case, as mouzah Maghajan, the property of the Plaintiff, is situated on the bank (*i.e.*, south side) of the Ganges, and Kusba Burraree, the property of the Defendant, is to its, the mouzah Maghajan's, south (*i.e.*, the further side of mouzah Maghajan, going from the River), and mouzah Maghajan, which has been newly formed, is clearly identified."

[470] On appeal the High Court, the Division Bench, consisting of Messrs. E. Jackson, and F. A. Glover, reversed the decree, founded on the above judgment, and dismissed the Plaintiff's suit. The material part of the judgment of the Court on which it was based stated as follows:—"It is admitted on both sides that the mouzah in question was at one time situate on the north side of the Defendant's mouzah of Burraree, and that it was gradually washed away by the River Ganges, the diluvion commencing in the year 1800-41. In the year 1848 land began to re-form on the original site of the mouzah, and the alluvion increased until it became a considerable tract. The Plaintiff then endeavoured to get possession of it through the Criminal Court, under Act, No. IV. of 1840, but not succeeding brought the present suit." And the Court decided in favour of the Defendants, on the ground, that the land in dispute was to be considered as an accretion, either wholly, or in part, to the Defendant's mouzah Burraree, relying upon *Kenny v. Bechee Sumeeroonissa* (3 Ben. W. R., p. 68).

The present appeal was from this decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant, submitted, that the newly found alluvial land was only a re-formation on the original site of mouzah Maghajan, admitted to be the Appellant's land, and had not been relinquished; but, on the contrary, that the Appellant had exercised ownership after the submergence, and

that the original site of the re-formed land was clearly identified by the Government survey. They cited *Mussumat Imam Bandi v. [471] Hurgorind Ghose* (4 Moore's Ind. App. Cases, 403); *Rex v. Lord Yarborough* (3 B. and Cr. 91; S.C. 5 Bing. 163 In Dom. Proc. 2 Bligh, N.R. 147; 1 Dow. and Cl. 178); *Romanth Thakoor v. Chundernarain Chowdhry* (Marshall's Ben. App. Cases, 136); and insisted that the Court below were wrong in deciding that the case of *Denny v. Beebe Sumeroonissa* (3 Ben. W.R. 68, 26th May, 1865), was in point, as that decision was distinguishable, and did not apply to the particular facts of this case.

Mr. Field, Q.C., and Mr. Doyne, for the Respondent, Muddun Mohun Thakoor, contended, that according to the law of alluvion prevailing in India, the land in question was the property of that Respondent, as having wholly accreted to his mouzah Burraree. They cited on this point, Ben. Reg. XI. of 1825, sections 4 and 5, *Ishurchund Rai v. Ramchund Mokhurja* (1 Sud. Dew. Ad. Rep. 221); *Rajah Gueschund v. Maharaja Pezchund* (*ibid.*, 274); *Kenny v. Beebe Sumeroonissa* (3 Ben. W. R. 68, 30th May, 1865); *Baboo Gooman Bhungim Singh v. Maharajah Mohessur Buksh Singh* (Sud. Dew. Dec. 18th Jan., 1854, p. 49); *Kazei Forabooddeen v. Sham Kans Banerjee* (6 Ben. W. R. 249, 30th Sep., 1866); *Kalteemonee Dossee v. Ranee Monmohinee Dabee* (3 Ben. W. R. 51, 26th May, 1865); *In re The Hull and Selby Railway* (5 Mee. and Wel. 327).

[472] Without calling for a reply, their Lordships' judgment was pronounced by

The Lord Justice James.—The Plaintiff in this case, Felix Lopez, was the proprietor of a very considerable estate, a mouzah, on the banks of the Ganges. By the year 1840, by reason of the continued encroachment of the River, it was wholly submerged, and it was, to adopt an expression used in this class of cases in India, "diluviated"; that is, the surface soil, the culturable soil, was wholly washed away. After the lapse of some years, and after one temporary recession and re-encroachment which has occurred in the interval, the water has ultimately retired, and the land, having been for some time in a state described as admitting of only temporary cultivation by hand sowing, has become hard and firm soil, capable of being cultivated in the usual manner. The Plaintiff says, "This was my property. The Ganges, which swallowed it, has again yielded it up, and I claim my property, which, having been buried and lost to sight, has again reappeared."

The rule of the English law applicable to this case, is thus expressed in a work of great authority, Hale, de Jure Maris, p. 15:—"If a subject hath land adjoining the Sea, and the violence of the Sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced, yet if by situation and extent of quantity and bounding up on the firm land, the same can be known, or it be by art or industry regained, the [473] subject doth not lose his property." "If the mark remain or continue, or the extent can reasonably be certain, the case is clear." And in another place, p. 17, he says: "But if it be freely left again by the reflux and recess of the Sea, the owner may have his land as before, if he can make out where and what it was: for he cannot lose his propriety of the soil, although it for a time becomes part of the Sea, and within the Admiral's jurisdiction while it so continues."

This principle is one not merely of English law, not a principle peculiar to any system of Municipal law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a Vineyard which is covered by lava or ashes from a Volcano, or a field covered by the Sea or by a River, the ground, the site, the property, remains in the original Owner.

There is, however, another principle recognized in the English law, derived from the Civil law, which is this,—that where there is an acquisition of land from the sea or a River by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the Owner of the adjoining land, *Rex v. Lord Yarborough* (2 Bligh, N.R., 147). And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable

River, so that there the Owner of the River gained from the land in the same way as the Owner of the land had [474] in the former case gained from the Sea (*In re The Hull and Selby Railway*, 5 Mee. and Wcl. 327). To what extent that rule would be carried in this Country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a Mine under the Sea, or other means of that kind, has never been judicially determined.

This principle of law, so far as relates to accretion, has, to some extent, been made part of the positive written law of India, and it is on the operation of such positive written law that the Defendants' case is based. This law is to be found in the Regulation XI. of 1825, a Regulation for declaring the rules to be observed on the determining of claims to lands gained by alluvion, or by the dereliction of a River, or the Sea. There is a recital in that Regulation, as to disputes which had arisen with regard to such claims, and the necessity of having some definite rule laid down with regard to several matters, only one of which is material or relevant to the present case; and that is the case provided for by the 4th section of the Regulation. By cl. 1, of that section it is provided that, "when land may be gained by gradual accession, whether from the recess of a River or of the Sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from the Government," or from any intermediate landowner. And the Defendants' contention is, that the Plaintiff's land having been wholly submerged, so as to make their (the Defendants') land the River boundary, the subsequent recession of the River has caused a gradual accession to their land, and an increment by annexation to their estate, notwithstanding that the land has been re-formed on the ascertainable and ascertained site of the Plaintiff's mouzah.

It is to be observed, however, that that clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. The Plaintiff here says,— "I had the property. It was my property before it was covered by the Ganges. It remained my property after it was submerged by the Ganges. There was nothing in that state of things that took it from me and gave it to the Government. When it emerged there was nothing that took it from me and gave it to any other person." And in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another.

In truth, when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then Legislative authority was dealing with, was the gain which an individual proprietor might take in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the Sea belonging to the State, a public River belonging to the State; this was a gift to an individual whose estate lay upon the River or lay upon [476] the Sea, a gift to him of that which, by accretion, became valuable and usable out of that which was in a state of nature neither valuable nor usable.

And on the very words of the section itself, if the ownership of the submerge site remained as it was (and there seems nothing to take it away), it is difficult to see why a deposit of alluvion directly upon it is not at least as much an accretion and annexation vertically to the site as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property.

If we had then to consider the question for the first time, we should have come to the conclusion that the 4th section did not govern the case, and that the question would have to be determined by the general principles of Equity, to which all cases not in terms provided for are referred by the 15th section. Those principles would not give the Plaintiff's property to the Defendant. But the question is not raised for the first time. The very point came for consideration in India before a Court comprising Sir Barnes Peacock, Mr. Justice Baily, and Mr. Justice Kempe; and after

full consideration, it was decided that lands washed away and afterwards re-formed on an old site, which could be clearly recognized, are not lands gained within the meaning of section 4, Regulation XI. of 1825, viz., they do not become the property of the adjoining Owner, but remain the property of the original owner.

And the same point arose in a case in this Court of *Mussumat Imam Bandi v. Hargovind Ghose*, reported in 4 Moore's Ind App. Cases, 103. It is there said, "The whole of the District adjoining the land in dispute, as well as that land itself, is flat, and [477] very liable to be covered or washed away by the waters of the Ganges, which River frequently changes its channel. The land in dispute was inundated about the year 1787: it remained covered with water till about 1801, and then became partly dry, until, in the year 1814, it was again inundated. After this period it once again reappeared above the surface of the water, and, by the year 1820, it became very valuable land." That is a state of things very singularly like what has occurred in this case.

In that case it was held as follows:—"The question then is, to whom did this land belong before the inundation? Whoever was the Owner then remained the Owner while it was covered with Water, and after it became dry."

This authority appears to their Lordships conclusive in the present case.

In a subsequent case, however, *Katteemohinee Dossee v. Ranee Monmohinee Dabee* (3 W.R. p. 51, 26th May, 1865), it was held by a Court comprising Justices Trevor, Loch, Bayley, and Morgan, that all gradual accessions from the recess of a River or the Sea are an increment to the estate to which they are annexed without regard to the site of the increment, and a distinction was taken between the two cases; and it seems to have been considered that the former case did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification; where there was a complete diluviation of the usable land, and nothing but a useless site left at the bottom of the River. Their Lordships, however, are unable to assent to any such distinction between surface and site. The site is the property, and the law [478] knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained.

Their Lordships, however, desire it to be understood that they do not hold that property absorbed by a Sea or a River is, under all circumstances, and after any lapse of time, to be recovered by the old Owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the Sea or River of the State, and so liable to the written law as to accretion and annexation.

But in this case not only did the parties themselves take the proper, prudent, and honest means of preventing the necessity of any dispute arising by interchanging the Tanabundee which has been put in evidence, but the Plaintiff, as between him and the State, did also take the most effectual means in his power (having the description and measurement of the submerged mouzah recorded, and continuing to pay rent for it) to prevent the possibility of any question of dereliction or abandonment being raised against him. Their Lordships are, therefore, of opinion that the property now being capable of identification by means of that Tanabundee and otherwise, the property having been the property of the Plaintiff when it was submerged, never having been abandoned or derelict, having now emerged from the Ganges, is still his property; and they will, therefore, recommend to Her Majesty to reverse the decision of the Court from which the appeal has come, to affirm the decision of the Principal Sudder Ameen, and that the costs of the litigation both below and here should be given to the Appellant, the Plaintiff.

[Approved, *Hursuhai Singh v. Syud Looft Ali Khan*, 1874, L.R. 2 Ind. App. 28.]

[479] MAHARAJAH DHEERAJ MAHTAB CHUND, Bahadoor.—*Appellant*;
BULRAM SINGH, and Another, —*Respondents* * [July 14, 1870].

On appeal from the High Court of Judicature at Bengal.

Construction of the Act of Limitation of suits, No. XIV. of 1859, sec. 20.

A. obtained a decree, and as the judgment debtor absconded, an attachment issued whereby A. realized part of the judgment debt. Both the decree-holder and judgment-debtor died before the debt was satisfied. The heir of the decree-holder applied in 1861 to enforce the decree. The Nazir, or Sheriff's Officer, made a report that the heirs could not be served with the notice, and afterwards, in 1862, by a proceeding before the Principal Sudder Ameen, it was ordered, that the number of the case be struck off the record, on the ground, that final process could not be issued against the heir of the judgment-debtor. In 1865, within three years from the date of the recording of the proceeding in 1862, the decree-holder again applied for execution of the decree, but the Courts in India held, that he was barred by the Limitation of suits Act, No. XIV. of 1859, sec. 20, as the period of three years' limitation was to be computed from the Nazir's report, and that the date of the recorded proceeding founded thereon did not give the decree-holder a fresh starting point to calculate the period of limitation. Such holding reversed, on appeal, by the Judicial Committee, on the ground, that the application in 1862 for execution of the decree, and the proceeding of the Court striking the case off the file, was a proceeding to keep in force the decree originally made, as provided by the 20th section of the Act, No. XIV. of 1859.

In this case the Appellant applied for execution of a decree against the Respondents, and the only question considered by the High Court was, whether he was barred of his right to have execution by the pro-[480]visions of the 20th section of Act, No. XIV. of 1859, for limitation of suits (a).

The circumstances of the case were as follows:—

On the 21st of December, 1829, Maharajah Dheeraj Rajah Tej Chund, Bahadoor, to whose estate the Appellant succeeded as heir-at-law, obtained a decree for Rs. 8100 for arrears of rent against Khetter Mohun Singh, whose heirs, the Respondents, represent his estate.

In Assar, 1238, corresponding with June, 1831, the decree-holder applied for execution of his decree against the estate of the judgment-debtor, and notice was accordingly ordered to be given to the latter.

On the 10th of September, 1838, the case was, according to the usual practice of the Indian Courts, struck off the file, inasmuch as the estate of the judgment-debtor which had been then attached had been sold, and the proceeds paid to the Creditor in part satisfaction of his claim, of which, however, the greatest part remained unsatisfied.

Previous to the striking-off the file of the case, and subsequently to the first application for execution, on the 3rd of Assin, 1238 B.S., the decree-holder made a second application, stating that the judgment-debtor had absconded and the decree was not satisfied, and asked for process against the person of the judgment-debtor, or for attachment and sale of his property.

[481] On this application, an Order was made for the attachment of the scheduled property, but the judgment was not thereby satisfied.

* Present:—Members of the Judicial Committee,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier, Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

(a) The 20th section enacts that, "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce any such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution."

The decree-holder having died, and the Appellant being a Minor at the time of his succession, as his heir-at-law aforesaid, no further steps were for some time taken; but on the 18th of Jeyt, 1258 B.S., corresponding with June, 1851, the Appellant applied for process against the person of the judgment-debtor, in order to obtain payment of the unpaid balance with interest, and after some delay, apparently occasioned by inquiries as to the time when Appellant had attained his majority, on the 29th of September, 1852, the process prayed for was ordered.

On the 18th of May, 1853, the case was again struck off the file, in consequence of the Appellant's Mooktar being unable to point out the judgment-debtor to the Officer of the Court.

On the 7th of December, 1861, the judgment-debtor having in the meantime died without the decree having been satisfied, the Appellant applied to the Judge of East Burdwan for process of execution against the persons of the Respondents, as his heirs, stating that in case of non-arrest the Appellant would file a list of property, with the view of proceeding against such property. On the 26th of December, 1861, the case, which was then marked and described as No. 106 of 1861, was accordingly sent by the Judge to the Principal Sudder Ameen, who accordingly ordered and directed the usual notices to issue.

On the 24th of January, 1862, the Nazir of the Court of the Principal Sudder Ameen made his report, that the Court Peon had gone to the place stated and searched for the judgment-debtors, their Gomastahs, [482] servants, or any adult member of the family, but was unable to find any of those persons, and had in their absence served the notice committed to him for that purpose, by affixing it according to the ordinary practice in like cases to the outer door of the judgment-debtor's house, taking receipts for such notice from the village Chowkeedar (watchman) and others.

On the 2nd of Falgoon, 1268 B.S., corresponding to February, 1862, the Respondent, Bulram Singh, with one Rughoonath Singh, on behalf of the above-named Minor, who, as appeared from the Nazir's report, had kept out of the way to evade process, filed a petition of objections before the Principal Sudder Ameen, in which they did not dispute the due service of notice, or question the original right of this Appellant under the Decree, but objected to execution proceeding on the grounds first, that it was barred by limitation, and secondly, that no estate of the judgment-debtor had come into their possession.

In March, 1862, the Appellant filed another petition, by which he submitted, that he was not barred by Act of limitation, and offered to prove that Bulram Singh and others, against whom he had applied, were in possession of the estate of the judgment-debtor, Khetter Mohun Singh, and prayed for attachment and sale of certain of his property, described in the schedule to his petition, and satisfaction thereout of his claim.

On the 4th of March, 1862, the Principal Sudder Ameen ordered upon this petition, that if there were no objections, the notice of sale, etc., should be drawn up in due order.

A proceeding was held and recorded by Baboo Nobin Kisto Paulit, the Principal Sudder Ameen, on [483] the 29th of November, 1862, and in the matter of the petition of the Appellant, when he ordered as follows:—"Whereas the heir of the judgment-debtor is a respectable woman: the final process cannot be issued against her. Let the number of the suit be struck off from this record, at present."

No distinct adjudication appeared to have taken place on the points raised by the petitions, and, apparently without any inquiry as to the liability of the male heirs or of the property of the judgment-debtor, of which, attachment and sale in execution were prayed by the last-mentioned petition.

On the 20th of November, 1865, being within three years from the date of last-mentioned proceeding, the Appellant applied by petition, to the Judge for execution of the decree against the Respondents by attachment and sale of certain scheduled property belonging to the estate of the judgment-debtor. The case was again sent by the Judge to the Principal Sudder Ameen, who ordered the application to be registered and notice to be given to the judgment debtors.

On the 1st of February, 1866, a petition was filed by Bolodeb Singh and Ram Kristo Singh, alleging themselves to be Grandsons of Khetter Mohun Singh,

the judgment-debtor, and objecting to the execution on the ground of limitation, by reason of the lapse of time since the execution had taken place in the case, No. 106 of 1861, and also on the ground, that no portion of the estate of the judgment-debtor had come into their possession.

To this petition the Appellant replied: and on the 29th of March, 1866, the Principal Sudder Ameen (Mr. J. Reily), held that the Appellant's right of [484] execution was barred under the provisions of Act, No. XIV. of 1859, sec. 20, inasmuch as the period of three years was to be computed from the last step taken in the case, namely, the report of the Nazir on the 24th of January, 1862, from which date up to that of the application then under adjudication more than three years had elapsed.

The Appellant appealed therefrom to the High Court in Calcutta, which appeal was heard by a Division Bench, consisting of Messrs. Loch and G. A. Macpherson, and by a decree, dated the 20th of August, 1866, that Court affirmed the decision of the Court below, stating as follows:—"It has been held by a full Bench (*Gooroo Doss Auckholee v. Modhoo Koondoo*, and *Baboo Kishen Succa Mookerjee v. Mohendro Lal Shome*, 6 W.R. Mis. 98), that the date on which an execution case is struck off the file does not give the decree-holder a fresh starting-point from which to calculate the period of limitation. The date from which the time for executing a decree is calculated commences from the date on which any act is done by the decree-holder in good faith, or by the Court in furtherance of the decree, but the striking off a case is not an act in furtherance of execution."

The appeal was from this decree. As the Respondents did not appear, it was heard *ex parte*.

Sir R. Palmer, Q.C., Mr. Leith, and Mr. Doyne, for the Appellant.—The decree was kept alive, and in force on the 29th of November, 1862, when, by the proceeding of that date, the case in execution of the decree was struck off the file; and the next application of the Appellant for execution of the decree was made [485] within three years from the date of such proceeding before the Principal Sudder Ameen. According to the true construction of the 20th section of the Act, No. XIV. of 1859, the new law of limitation of suits, the pendency of the execution case down to the 29th of November, 1862, should have been considered sufficient to take the case out of the operation of that section, as the words in that section "Unless some proceeding shall have been taken to enforce such judgment," should have been construed by the Court as referring not merely to the issue of the first Order for process, but to the whole time that the execution case, or proceeding, was pending and remained in force. To hold otherwise would be to offer an undue advantage to Defendants who could evade or withdraw themselves from the process of the Court. The cases of *Gooroo Doss Auckholee v. Modhoo Koondoo*, and *Baboo Kishen Succa Mookerjee v. Mohendro Lal Shome* (6 W.R. Mis. 98), relied on by the High Court, are really in our favour; for if *bona fides* in the decree-holder be essential, the present case shows that every effort to enforce execution was *bona fide* made by the Appellant during a series of years and down to the striking the suit off the file, No. 106 of 1861, in November, 1862, but the Appellants' efforts were defeated by the artifice and evasion of the Respondents, or by the action of the Court below.

The Right Hon. Lord Cairns.—The question in this appeal is, the proper construction of the 20th section of Act, No. XIV. of 1859, which enacts [His Lordship read the section, *ante*, p. 480] and proceeded:—Was there, at any time [486] within three years preceding the application for execution made in the Court below, any proceeding which had been taken to keep in force the judgment, decree, or order originally made in favour of the present Appellant?

What took place was this. The original Debtor died. The Appellant desired to have the benefit of his judgment against the heir, or heirs-at-law of the Debtor. In this state of things he applied to the Judge for process of execution against the Respondents as heirs, and on the 26th of December, 1861, this application was made to assume the form of a cause. It was marked and described as No. 106 of 1861, and was sent by the Judge to the Principal Sudder Ameen, who directed the usual notices to issue. It is the history of that cause which we have to trace for the

purpose of seeing, whether it was kept alive, or whether it became at any, and what stage, inoperative.

On the 24th of January, 1862, the Nazir of the Court made his report that another Officer, a Peon, had gone to the place stated, and searched for the Judgment-debtors, but was unable to find them, and had affixed the notice in a particular way, and served it upon the village Watchman. Then, in February, 1862, the next month, the Respondents filed a petition of objections before the Principal Sudder Ameen, not disputing the service of the notice, but objecting to execution proceeding on the grounds, that it was barred by limitation, and that no estate of the Judgment-debtor had come into their possession. There was, therefore, a *litis contestatio* between the parties to this suit, the representatives of Defendants to the suit appearing, and contesting the right of the Plaintiff to have the benefit of the execution [487] against the original Defendant. In March, 1862, without any delay, the Appellant put in a petition by way of answer to the petition which the Respondents had put in, contesting the allegations in point of law that the Respondents had made. In that state of things, both parties having placed their view of their respective cases upon record, on the 4th of March, 1862, the Principal Sudder Ameen ordered that on the last petition, if there were no objection, the notice of sale should be drawn up in due order; and it appears that, following upon this, on the 29th of November, 1862, a species of hearing was brought on before the Principal Sudder Ameen, for the purpose of discussing all or some of the allegations which had been made in these petitions, and it was then, upon that day, the 29th of November, 1862, that the Principal Sudder Ameen pronounced his opinion as follows: "Whereas the heir of the Judgment-debtor is a respectable woman, the final process cannot be issued against her. Let the number of the suit be struck off from this record, at present."

Now, I pass by the question, whether that was meant to be a final judgment, or only a temporary delay interposed in the proceeding of the suit, and I will suppose, for the purpose of argument, that it was meant to be a final judgment. It was at this point, and at this point for the first time, that the suit, which up to that time had been pending, was disposed of by any Order of the Court, and up to that time there appears certainly to have been no delay on the part of either side. It was prosecuted *bona fide*, and defended *bona fide*; and it appears to their Lordships, that so long as that process was going on, so long as there were these allegations and counter-allegations, [488] as to the right to revive and prosecute the decree, there was a pending proceeding, and it would have been out of the power of the Appellant to have done anything but wait for the result and the Order of the Court upon that pending proceeding.

Their Lordships, therefore, were the case not affected by any authority, or by any prevalent course of practice in India, would have no hesitation whatever in holding, that there was here a proceeding to keep in force a judgment, decree, or order originally made; that that proceeding was pending every day of the time until it was disposed of on the 29th of November, 1862, by the Order to which I have referred.

But it has been suggested in the judgment of the Court, in the present case, that the matter is affected by a former decision of the Court in India, *Gooroo Doss Auckholee v. Modhoo Koondoo* (6 W.R. Mis. 98), which had led to a conclusion different from the one which we have expressed. Their Lordships have referred to the case relied upon, and they desire to say, that they see no reason whatever to find fault with the decision in that case. That case appears to have laid down this rule, that all acts done either by the Court, or by an Officer of the Court, or *bona fide* by the Applicant for enforcing the decree, or keeping it in force, would satisfy the term "some proceeding" in the 20th section; but then the Court go on to qualify that by saying, that there might be things done by the Court, or there might be things done by the party which might appear at first sight to be steps taken in execution and prosecution of his right, but which really might be done in such a way as, so far from showing diligence or [489] vigilance on his part, might be so tainted with want of good faith that they would lead to a totally opposite conclusion; and in the particular case before the Court, they found that there had been an application made to execute the decree, that that had been pending for a considerable time before the Court, and had ultimately

been dismissed by the Court itself by an act of the Court for want of prosecution; and applying other general observations to that case, they appear to have arrived at the conclusion, that the circumstance that there had been a want of diligence which obliged the Court to dismiss the suit for want of prosecution, made the act of the Court there not to be an act which could satisfy the expression "some proceeding" within the 20th section.

Their Lordships see no reason whatever to disapprove of that decision. It would, as it has been pointed out, be a very strange result should the mere chronicling or recording by the Court of the fact that there had been delay and laches on the part of the litigant, such as obliged them to strike the suit off the file, if that act of the Court done under such circumstances were to redound to the benefit of the Litigant, and to enable him to say that he had been using due diligence within the period of three years. Not in any way disapproving, therefore, of the decision to which we have been referred, their Lordships are of opinion that in the present case the proceeding which has been taken were within three years after the Order of the Principal Sudder Ameen of the 29th of November, 1862, was made. We, therefore, will humbly recommend to Her Majesty that the Order should be reversed, and that the Appellant should have his costs of this appeal.

[Followed *Kristo Kinkur Roy v. Rajah Burrodacant Roy*, 1872, 14 Moo. Ind. App. 465.]

[490] RAJAH LELANUND SINGH,—Appellant; MAHARAJAH LUCKMISSUR SINGH, BAHADOOR,—Respondent * [July 14, 1870].

In appeal from the High Court of Judicature at Fort William, in Bengal.

A Plaintiff sued for possession of lands and mesne profits. By an Order in Council made on the appeal, the suit was remitted to India, and it was ordered, that the Court below should direct possession to be given the Plaintiff. On petition to the High Court for execution, and to carry out the Order in Council, the petition prayed for possession of the lands and also mesne profits. The Judge ordered possession to be given, but refused to order mesne profits, on the ground, that in the Order in Council there was no direction with respect to mesne profits. Held (reversing so much of the Order of the High Court as refused mesne profits), that the Order in Council decreeing possession carried by its own force the right to the mesne profits.

This appeal was brought from an Order made by a single Judge of the High Court at Calcutta, by which the Appellant's application for possession and wasilat, or mesne profits, of certain lands, which had been decreed to him by an Order in Council, dated the 29th of June, 1865, was, so far as related to mesne profits, refused, on the ground that in the Order in Council decreeing possession, of which execution and mesne profits were sought, there was no direction contained as to mesne profits (see case, 10 Moore's Ind. App. Cases, pp. 81, 112).

[491] By the Order in Council made on the appeal, it was declared, that the Appellant was "entitled to the mouzahs Gourmahee and Goruckpore, and the lands comprised therein and belonging thereto, and to all such other parts of any of the lands in question in the suit as are not comprised in the settlement of Havalee, and to declare that the settlement comprises only the measured area of 123,207 beegahs, and to so much of any of the land in dispute as upon the inquiries after directed may appear to belong, or be properly attributable, to the Bunker and Boondee Mehals in the pleadings mentioned, or to the Ghauts of which the same in part consist, and that the rights of Havalee in respect of Bakum do not extend beyond the 129 beegahs and 19 biswahs mentioned in Beadon's settlement, and which are included in the 123,207 beegahs, and that the High Court of Judicature do inquire what is the nature

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and character of the Bunkur and Boondee Mehals, and of the Ghauts comprised therein respectively which are included in Piron's settlement, and are therein estimated S. Rs. 1116; and whether the same, or any, and which of them, included any, and what part of or any, and what right or interest, in the land in question in this suit; and to declare that so much of the land in question in this suit as may upon such inquiry appear to be comprised in the said Bunkur and Boondee Mehals, or Ghauts, belongs to Havalee, and that the Appellant is entitled to recover the residue of the lands in question, and to direct the Court to proceed in the suit as upon the result of such inquiry may appear to be just, and to direct any costs of the suit already paid to be refunded, and the Court to deal with such costs, and all other costs of the suit, including this appeal, having regard to the declarat[492]-tions aforesaid, and to the result of the said inquiry; but that this Order is to be without prejudice to any proceedings which may hereafter be taken for the settlement of Havalee."

In the plaint, the Appellant (the Plaintiff) prayed for possession of the lands, and Rs. 25,000, the amount of mesne profits, and for further mesne profits to the day of getting possession, and interest to day of payment, and one of the issues tried in the suit was, whether his claim for wasilat was proper or not. Both Courts in India dismissed the suit. On appeal the Judicial Committee reversed these decrees (see 10 Moore's Ind. App. Cases, 81), and remitted the suit to India, subject to the directions embodied in the before-mentioned Order in Council.

On the 13th of March, 1865, the Appellant presented a petition to the High Court at Calcutta, praying for execution of the above Order in Council, and that the High Court would pass an Order for delivery of possession of the two mouzahs, so decreed to him, and for payment of wasilat in respect thereof as claimed and estimated in his plaint.

The hearing of the petition came before Mr. Justice L. S. Jackson, one of the Puisne Judges of the High Court, who made the following Order: "Let the directions of the Order in Council of the Privy Council be carried out, possession of the mouzahs specified, to be given to the Petitioners, and the several matters specified to be inquired into by the Principal Sudder Ameen of Bhaugulpore. The Petitioner asks for wasilat, but it appears to me that this Court cannot give anything beyond what the Privy Council in its decree has given."

[493] Against this Order refusing mesne profits the present appeal was brought.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—The original suit was brought not only to recover possession of the lands, but also mesne profits in respect thereof from the time the Appellant was deprived of possession up to the time when such possession should be restored to him. By the Order in Council made on appeal, it was declared, that the Appellant was entitled to the two mouzahs, and all other the lands sued for as were not included in the settlement of Pergunnah Havalee, and decreed possession: therefore, the Appellant is entitled, as a consequence, to mesne profits, and the Judge was wrong in refusing to award the same. In carrying into execution the Order in Council, under the special directions therein contained, it is apparent that the High Court should have proceeded in the suit as might, upon the result of the inquiry therein ordered, appear just. The High Court was competent to order, and ought to have awarded, as just to the Appellant, mesne profits in respect of such portions of the lands as he should be found entitled to under the Order in Council.

Mr. Doyne, for the Respondent.—The first objection is, that the Appellant has not, under the Letters Patent creating the High Court, or the Orders made by that Court, a right of appeal against an Order made by a single Judge; but secondly, assuming that the Appellant has such right of appeal, the Order of the High Court [494] was correct, as it was not competent to that Court to add to the Order in Council a supplemental Order for mesne profits. In the case of *Doorgapersaud Roy Chowdry v. Tarapersaud Roy Chowdry* (8 Moore's Ind. App. Cases, 308), it was decided by Lord Kingsdown that a single Judge of the Sudder Court was not competent to make a supplemental Order for wasilat, upon a decretal Order of the Sudder Court merely decreeing possession. That was according to the Circular Order of September 11th, 1829 (*ib.*, 315). The Courts in India have held that the Court cannot add to or depart from an Order in Council, or decree of the Superior Court, nor can an

Order for mesne profits be imported into a decree, *Jugdeb Narain Singh v. The Court of Wards* (3 W. R. Mis. 9).

The consideration of their Lordships' judgment was reserved, and now pronounced by

The Right Hon. Lord Cairns (July 15, 1870).—The Appellant in this case originally sued to recover from the Respondent certain villages and lands, alleging that on a true adjustment of the boundaries they belonged to the Nizamut Mehals, and not to Havalee. He claimed also mesne profits. The suit was dismissed by the Court of First Instance, and that dismissal was confirmed by the Sudder Dewanny Adawlut.

Their Lordships, on whose recommendation the Order in question was made, thought that this dismissal was wrong, and in an ordinary case they would have made the final decree which the appellate Court [495] in India ought to have made. Not having materials for doing this, they recommended the Order in Council in question, which declared the Appellant absolutely entitled to the villages of Gourmahee and Goruckpore, and to all the rest of the land in dispute which was not comprised in the settlement of Havalee. By the declaration in the Order in Council it limited Havalee to 123,207 beegahs, including 129 beegahs and 19 biswahs, part of the Beadon settlement, and so much of the land in dispute as belonged to or was attributable to the Bunkur and Boondee Mehals. It then directed the High Court of Calcutta to make the inquiry necessary to understand what this last-mentioned land was, and to proceed in the suit as upon the result of such inquiry might seem just,—dealing with the whole question of costs, including the taxed costs of the appeal.

Now, in this state of things, their Lordships are of opinion, that the Appellant might well have waited the result of those inquiries and accounts before applying to the High Court in Calcutta for the execution of the earlier part of the decree with reference to those villages to which he was declared entitled; and their Lordships also are of opinion, that the High Court at Calcutta might well have declined, if they had been so minded, to execute the earlier part of the decree until they had completed the whole of the inquiries and accounts. However, the Appellant did apply to the Court for the execution of the part of the decree which related to the two villages of Gourmahee and Goruckpore, to which his title had been declared, and the single Judge of the High Court, on whom appears to have devolved the duty of answering the application, was willing to execute, [496] and proceeded to execute the decree, so far as regards possession of these two villages. He stated his opinion to be, that with regard to mesne profits, inasmuch as the Order of Her Majesty in Council had not specifically mentioned anything about mesne profits, it would not be proper for the Court in India, in executing a decree, to make any Order with regard to the mesne profits.

That Order standing would of course be an impediment hereafter, even after the inquiries directed by the other part of the decree were completed, in the way of any application by the Appellant on the subject of mesne profits from those two villages; and, inasmuch as their Lordships are of opinion, that had the first part of the Order in Council stood alone, it would have been one of the consequential directions proper to be given, to ascertain the amount of mesne profits at the time that possession of the villages was given, they think that, inasmuch as one part of the Order, namely, that with regard to possession, has been executed by the High Court, everything connected with that possession should be executed at the same time.

Their Lordships are of opinion, that the right to mesne profits is consequential on the declaration in the Order in Council, and upon possession. They, therefore, think that the High Court should proceed to ascertain, either itself or by an issue properly framed, to be ascertained by the local Court, what the amount due to the Appellant for mesne profits upon these two villages is. They will, therefore, humbly recommend to Her Majesty that an Order should be made to that effect; but, inasmuch as the difficulty [497] has arisen, partly by the application of the Appellant to execute the decree piecemeal, and partly by the erroneous apprehension which the Court appears to have entertained of the effect of the judgment of their Lordships, their Lordships think it a case in which there ought to be no costs of the appeal (see *Rodger v. The Comptoir D'Escompte de Paris*, 7 Moore's P.C. Cases (N.S.). 314, as to the effect of an Order in Council carrying by its own force interest).

SRI GAJAPATHI RADHIKA PATTA MAHA DEVI GARU,—*Appellant*. SRI GAJAPATHI NILAMANI PATTA MAHA DEVI GARU,—*Respondent*; and SRI GAJAPATHI RADHIKA PATTA MAHA DEVI GARU,—*Appellant*. SRI GAJAPATHI HARI KRISHNA DEVI GARU,—*Respondent* * [July 15, 1870].

On appeal from the High Court of Judicature, Madras.

Disputes having arisen respecting the validity of the marriage of A., a Hindoo, either without caste or of the Soodra class; the two Sons of A. each claiming to be legitimate, the one against the other as illegitimate, to avoid litigation, they entered, with the surviving Widow of A., into a family arrangement and compromise to the effect, that the Sons were to be equally entitled in moieties of A.'s estate, provision being made for maintenance to the Widow, but the division was not to take effect until the youngest Son was of age. No actual partition took place, and the youngest Son pre-deceased his Brother, who died in possession. Both Sons left Widows, but no male issue. Held, that the compromise was binding on the Sons and the Widows claiming under them.

Held further, that the effect of the agreement and compromise was to constitute the two Brothers a divided family, and the succession to their divided estate was governed by the law of succession in respect to separate estate, and that the Widows were entitled, on the death of their Husbands, each to a moiety of the estate.

These were consolidated appeals from a decree of the High Court at Madras, dated the 22nd of April, [498] 1865, overruling the decrees of the Civil Court of Chicacole made in two suits, numbered respectively 62 and 72 of 1861. The decree of the High Court in both suits declared, that the Tekaly Talook should be equally divided between the Appellant and the Respondent, and remanded the suits, to be treated as suits for the administration of the estate, and directed that the Civil Judge should inquire who were the persons entitled thereto according to such declaration, and that he should make all the Claimants parties to that inquiry.

The question at issue in both appeals was the same, namely, the right to the Tekaly Talook, which at the time of the institution of the suits was in the possession of the Appellant; the entirety thereof was claimed by the Plaintiff in the suit, No. 62 of 1861, and as to one moiety thereof was claimed by the Plaintiff in the suit No. 72 of 1861.

Suit, No. 62 of 1861, was instituted by the Respondent, Sri Gajapathi Hari Krishna Devi Garu, against the Appellant, to recover possession, with mesne profits, of the Talook, which had been placed by the Revenue authorities in the possession of the Appellant, upon the supposition that she was the lawful Widow (which was denied by the Respondent), and [499] as such sole heir, of the late Zemindar Gopinadha Devu, the Father of the Respondent by another Mother. He claimed to be entitled to the entirety of the Talook as the only legitimate Son, and as such sole heir-at-law of his Father, who had died in possession of the Talook; and contended that even if he was not a legitimate Son, as alleged by the Appellant, yet that he was still entitled to succeed as heir-at-law, being the illegitimate Son of an illegitimate Father, who was either a Soodra, or of no caste. He further pleaded, in support of his right to succeed as an illegitimate Son, Koolachar (family custom) of the Gauga tribe, of which the Respondent was a member, and also the custom in the Vodia Zemindaries, his Father not having had any legitimate Son to claim in preference the right of succession. The Respondent also claimed to be solely entitled to succeed as heir to the Talook under a deed of gift made in favour of his Father and the latter's Brother, Sri Gajapathi Krishna Chendra Devi Garu deceased, and a subsequent agreement and Razinamah, the substance of which is referred to and set out in their Lordships' judgment, made by the two last-mentioned persons. He also contended,

* Present: Members of the Judicial Committee,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colville, and the Right Hon. Joseph Napier, Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

that the Appellant was not the lawful Wife of the Respondent's Father, being a woman of the Khetery or Kshatriya caste, and, therefore, being such, could not contract a legal and valid marriage, according to Hindoo Law, with a man who was an outcaste, or at best of the Soodra caste, such as the Respondent's Father, Gopinadha Devu, was, being as alleged the illegitimate Son of a low caste concubine by a Kshatriya Father.

On the other hand, it was contended by the Appel-[500]-lant, that the Respondent was not the legitimate Son of his father, and that neither by law, nor by family or local custom, could he succeed to the Talook as the illegitimate Son of his Father, even if the latter had been also illegitimate, which the Defendant denied. She also alleged that she was the lawful Wife of the late Zemindar, whom she stated was of the same caste as herself, viz., Kshatriya, and that, therefore, she was, failing a legitimate Son, solely entitled to succeed as his Widow and heir according to Hindoo Law. It was further contended by her, that while she rested her Husband's right to the Talook on the gift of the step-mother, and the agreement of her step-sons—that the Razinamah, although admitted to have been executed by the two Brothers, was not binding upon her, so as to deprive her of her right to succeed him as Widow and heir.

The Court (Mr. T. J. Knox presiding) gave judgment on the 13th of March, 1862, dismissing the suit with costs; the Judge being of opinion that, for all purposes of caste, Gopinadha was of sufficiently pure blood as to be deemed a Chetrya, and that the Defendant, as his lawful Widow, was his heir, before the Plaintiff, even if he was the Son of an inferior Wife. In the Civil Judge's opinion, his Mother's marriage form was not the Gandharva form of the Country, and the Plaintiff's claim was dismissed, with costs.

Suit, No. 72, of 1861, was instituted by the Respondent, Sri Gajapathi Nilamani Patti Maha Devi Garu in the same Court, in which she described herself as the sole Widow and heiress-at-law of Sri Gajapathi Krishnachendra Devi Garu, against the Appellant, and the Respondent, Sri Gajapathi Hari [501], Krishna Devi Garu, as supplemental Defendant, claiming to be entitled to a moiety of the Talook, with mesne profits, as having been apportioned to and enjoyed by her late Husband during his lifetime, under the Razinamah admitted to have been made between her late Husband and Gopinadha his Brother; and the plaintiff alleged that a division had been made by them of the family jewels, and that they continued to live separately; and further, that they were never constituted a joint and undivided Hindoo family.

The Respondent, in defence, stated that both the Plaintiff's late Husband and the Respondent's Father were Sons of the deceased proprietor, Padmanaha Devu Garu, by concubines, women to whom he was not lawfully married, and charged and submitted that under the terms of the Razinamah, the Respondent's late Father was solely entitled to the entirety of the Talook on the death of his Uncle Krishna Chundra Devi Garu, the Plaintiff's late Husband, and that under the same instrument and the usage prevailing in the Odra Zamin, he was entitled to succeed his Father in the possession of the entirety of the Talook.

The other Defendant, the Appellant, also rested his defence on the Razinamah, and alleged the jointers of the Brothers; the survivorship of her Husband, and contended that she alone was entitled to succeed as his heir to the entirety of the Talook.

By the decree of the Civil Judge (Mr. T. J. Knox) he held, in this suit, that as the Plaintiff's Husband was one of an undivided family, it was unnecessary to go further into the questions which might arise as to [502] whether the Plaintiff's Husband ever adopted a Son, whether the Plaintiff was a legal Wife, or what property her Husband left, or whether her Husband and his Brother, one or both being of no caste, did form an undivided family, as the Plaintiff had assumed they were men of caste, and was beaten on her own grounds; and dismissed the suit with costs.

Each of the Plaintiffs in the two suits respectively appealed against the decree dismissing the Plaintiff's suit, and the two appeals were heard together by Mr. Justice Frere and Mr. Justice Holloway, two of the Judges of the High Court at Madras, when judgment was, on the 22nd of April, 1865, pronounced in both appeals, the Judges deciding that the two Brothers, Gopinadha and Krishnachendra, had each possessed a vested interest in a half share of the Talook, but that they had

chosen to provide for the right of survivorship by their agreement contained in the Razinamah, and that, therefore, the decree of the Civil Judge was wrong, and on that point must be reversed. The material part of this judgment was in these terms:—

“Is it not the most natural construction of the terms of the Razinamah, that the property shall, in case of the failure of male issue, be divided between the regularly married Wives and the illegitimate children? In favour of the illegitimate Sons taking something, is the fact of their mention in this place at all. It is necessary, however, to observe that this argument is not so strong as to a sentence in the Peninsular languages, as it would be in one couched in any of the European forms of speech. It would not be at all contrary to Telegu idiom to insert this [503] phrase, merely to point the distinction between the provision to be made for the Widows in case of the existence of offspring born in matrimony, and the case of the existence of the mere offspring of concubinage or casual connection. We are of opinion, however, that this is the better construction, and we think that, so reading it, the document best meets the combined requirements of grammar and logic. In the sentence there are two nouns in dependent clauses. There is no reason for preferring either of them as antecedents of the pronoun to be supplied. Putting this construction upon it, the whole document reads reasonably. If legitimate Sons, they will take, and the excluded Wife and family will receive maintenance. If, as male offspring born in wedlock, then the Wives and illegitimate children will divide. It is to be observed that the settlers were themselves illegitimate, and there is nothing unnatural in the provision so made. Then comes the question, whether Gopinadha's Wife being a Kshatriya, can be entitled to share, because the marriage is, as is contended, illegal. We do not think that, even if the marriage were illegal, the argument could prevail, because, in our view of the matter, Gopinadha's Wife would take as *persona designata*. The meaning is, the women to whom we are united by a regular marriage ceremony, in contradistinction to those with whom they had casually or more permanently, but still irregularly, connected themselves. Even if, therefore, the ceremony of marriage did not really constitute a valid marriage, we should consider this woman entitled to share, because united to Gopinadha Davu by a regular marriage ceremony. That she was so united, lived, and was treated as his Wife, has been admitted on [504] all hands, and we are perfectly satisfied that she comes both within the words and the meaning of the settlement. We think also, that there can be no doubt of the right to sue of the persons whom the settlers intended to benefit. They would have that right if the settlement had been by Will, and Wills have been introduced by analogy to deeds of gift. The decrees, therefore, in both these suits must be reversed, and a declaration made, that in the true construction of the agreement, the estate is to be equally divided between the Wives and the Sons born in concubinage; the Defendant must pay the mesne profits upon the share finally found to belong to each Plaintiff, from the date of filing the suit, and the costs, both original and on appeal, in suit 52 of 1863. In suit 26 of 1862, there will be no costs. The Civil Judge will inquire who are the parties entitled on this construction, and will make the present parties and all other Claimants parties to that inquiry. This direction becomes necessary, because in the course of the argument it was alleged that Krishnachendra also left a Son not born in wedlock. The suit will be treated as a suit for the administration of an estate.”

The appeals were from this decree.

Sir R. Palmer, Q.C., and Mr. Pontifex, for the Appellant, Sri Gajapathi Radhika Patta Maha Devi Garu; Serjeant O'Brian and Mr. S. G. Grady, for the Respondent in the first appeal, Sri Gajapathi Nilamani Patta Maha Devi Garu; and Mr. Leith, for the Respondent, Sri Gajapathi Hari Krishna Devi Garu, the Respondent in both appeals.

[505] It was contended by the Appellant, first, that she was the lawful wife of the late Zemindar, and as his Widow, she was, failing legitimate Sons, entitled to succeed by the Western School of Hindoo law; and secondly, that she was not bound by the Razinamah, to which she was no party.

Upon the question of legitimacy, and the right of succession to the Talook, or, in the event of the marriage being void, the right of illegitimate Sons to succeed.

the following cases were cited: *Chuoturya Run Murdun Syn v. Sahub Purhulad Syn* (7 Moore's Ind. App. Cases, 18, 45); *Mahomed Bauker Hoossain Khan v. Sharfoon Nissa Begum* (8 Moore's Ind. App. Cases, 136); *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver* (*ante* [13 Moo. Ind. App.], p. 141).

Their Lordships' judgment having been reserved, was now delivered by

The Right Hon. Lord Cairns (July 29, 1870).—These are appeals from a decree of the High Court of Judicature at Madras.

The property which is the subject of litigation is called the Tekaly Talook. This property was acquired by purchase by one Pathmanaha, described hereafter as the common ancestor. A Lady, described as his principal Wife, by whom he had no issue, survived him. He left also two Sons by different Mothers. Between the elder of these Sons, named Gopinadha Davu, and his Father a quarrel of long standing existed, which continued to the time of [506] the death of the latter. Gopinadha Davu was at that time thirty-six years old; he did not live with his Father, and was absent at the time of his death.

The common ancestor left also a younger Son named Khrishna, who, at the death of his Father, was a child about seven years of age. This boy appears to have been treated by his Father as legitimate. The legitimacy of both Sons was doubted by the Collector of the District, who, at the death of their Father, placed the above-described Widow in possession of the Talook by way of a temporary arrangement for the management and protection of the family estate, and with a view to the interests of the Government, in the collection of the revenue.

The doubts about the legitimacy of these Sons, which the Collector entertained, may have had their origin in the nature of the marriages contracted by the common ancestor with their respective Mothers, which were in the Gandharva form, and in the alleged difference of caste between the common ancestor and his Wives, the Mothers of these Sons. This irregularity was supposed by some persons to render the progeny of such marriages illegitimate.

Whatever was the origin, and whatever the weight of these doubts concerning the legitimacy of the Sons, or of either of them, it is at least certain that they were grave enough to lead to the family arrangement about to be stated.

Supposing the Sons, or either of them, to have been legitimate, the Widow would have been entitled to maintenance only. Had both the Sons been illegitimate, their claim, unless some special custom governed the case (which is not in proof), would have been to maintenance only. In this last-named [507] case, the Widow would have had the ordinary estate of a Hindoo Widow.

As each Son asserted his own legitimacy, and denied that of the other, the dispute, unless adjusted and settled amicably, would probably have led to litigation, and as the estate was already an embarrassed one, the Collector, not without reason, represented such litigation as likely to involve the ruin of the family.

The management of the estate under the Widow was not prosperous. The Collector proposed to her to place the estate under the management of the elder Son, of whom he appears to have entertained a favourable opinion. The Widow is described as at enmity with the elder, and favourable to the younger Son. The Collector's advice, which was undoubtedly directed to the preservation of the family property, was adopted, and if reluctantly adopted, it was nevertheless acted on by the members of the family. The Collector had advised a compromise, and in consequence of this advice and suggestion, the Lady addressed a petition to the Collector, dated the 26th of November, 1838. In her petition she stated, that she had that day made a settlement, reconciled both her Sons, and caused an interchange of agreement between them to the effect that they were equally entitled to the Talook which belonged to her Husband. Her petition then proceeded to state further terms of this arrangement, to the effect that the management should be held by Gopinadha until Krishna attained his majority; that on the younger attaining his majority, the elder should give up a moiety to the younger as his own, and retain a moiety for himself. It prayed that the sale of the zemindary might [508] be stayed, and possession given to Gopinadha of the Talook. The petition also contained a statement of the allowances to be made to herself and the Sons, and of some minor matters not material to the decision of this appeal.

This agreement constituted the basis of the compromise suggested, it amounted to a family arrangement entered into for the preservation of the estate: and though the younger Son was a minor at the time, he ratified it at full age, and became bound from its date by all its terms.

The construction and effect of this agreement will be afterwards considered.

The agreement was acted upon until the younger Son reached his majority. That was the period originally fixed for the actual division of the estate, and its separate possession in moieties. At that time, the actual division of the estate was judged by the Sons to be inexpedient, and it was further postponed. Another document was at this time executed between the two Sons, bearing date the 24th July, 1844. This document stated that disputes existed between them respecting the ancestral property in cash, the division of the Talook, and the accounts of receipts and disbursements of the Talook. It stated that they had addressed several Arzees (petitions) to the Collector, that he had explained to them the circumstances, and then it proceeded to state "the terms for our future guidance."

This document does not state any new compact or agreement to have been formed to vary the essential terms of the original compromise, but seems rather to have been designed as supplemental to it, and made with a view to carry out its provisions conformably to the Collector's explanations with such variations of detail as the convenience of the parties required. After stating certain inconveniences, which would result from an immediate division of the Talook, it provides "that the division should be postponed at present," but the reason assigned is to avoid the probability of loss from a present division. Consequent on that postponement it contains some provisions as to equality of rank and dignity between the Sons, whilst the elder retained the ostensible headship, but it provides that the affairs of the Talook, or zemindary, should be managed by both unanimously.

A document of this character between natives should not be construed narrowly, by a strict interpretation of the literal meaning of the words. Its object and general spirit are the best keys to the interpretation of language probably not very carefully studied.

The second clause of this document, if it were construed literally, would appear to give the Talook, in the event of the death of the younger Son, to such of the lawful Widows as shall have male issue: but as such a disposition would at once contravene the ordinary rules of devolution of Hindoo property, and not be in accordance with the usages of Hindoos, and as there is no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers, is obviously inadmissible.

The document provides also that Khrishna, after the death of his elder Brother, shall be recognized as the Zemindar of the whole Talook.

This provision might take effect without any [510] substantial alteration of the terms of the first agreement. It is consistent in its terms with a custom prevalent in some properties in this part of the country. The headship in such cases is constituted in one member of a family, whilst the beneficial enjoyment of the proceeds may be shared with the other members. It by no means follows, even from the literal terms of that section, that either Brother deliberately agreed to exclude his own male issue if he had any, as sharers, during the survivorship of the other Brother. This clause contains a further provision, about which considerable doubt has been entertained, both as to the true translation of the words and its legal effect. This clause states an alternate contingent provision consequent on the failure of legitimate male issue by the Widows of both Sons: it provides that the Talook shall be divided in equal shares, if there be Sons born out of wedlock. This agreement further provides, that Rs. 100 a month shall be paid of the zemindary to the family which shall have no title to the Talook: but it contains no declaration of the cause of cessor of interest, so as to show in what event they thought such exclusion might arise. It is to be observed, further, that there is no express gift to illegitimate issue, and that the time of the division of the Talook on that contingency is not defined.

The younger predeceased the elder Son. The elder retained the headship and property of the family: there was no one entitled to dispute it with him, as Khrishna left no male issue, unless the family had been a divided one, in which case

the Widow of the latter would have been entitled to her Husband's share. She does not appear to have preferred any [511] claim to it during the elder Son's lifetime; but no inference unfavourable to her subsequent claim should be drawn from that circumstance alone, as Hindoo females are often ignorant of and unable to assert their rights.

On the death of the elder Son, a dispute arose as to the possession. His Widow was placed or preserved in possession of the estate. This step decided nothing as to her proprietary right. As the Widow of the surviving Brother, apparently the sole proprietor, she was rightly placed in possession.

Her title to retain and enjoy the sole possession and usufruct was disputed by the Widow of Khrishna, who claimed a moiety as the Widow of a deceased Brother in a divided family. She preferred her suit numbered 72 of 1861, against the present Appellant, the Widow of the elder Son.

Another suit was brought about the same time by Hera Khrishna against the same Defendant, which suit is numbered 62 of 1861. The title was stated to be as Son of the last Owner, the elder Son. He claimed the whole property, stating his title either as a legitimate or as an illegitimate Son, to be preferable to the alleged title of either Widow.

In suit, No. 72, the Plaintiff stated the property to be divided, and that allegation was one necessary to her recovery.

In suit, No. 62, the Plaintiff declared the property to be joint, and to have become solely owned by his Father by survivorship.

The Judge dismissed both suits.

Both Plaintiffs appealed to the High Court. The present Appellant, the original Defendant in both suits, was Respondent in both appeals.

[512] The appeals were allowed by the High Court, which reversed both decrees below, and made a decree declaring each Widow and the Son, Hera Khrishna, whom it found to be illegitimate, to be entitled in equal shares, together with any other illegitimate Sons of either Brother. It directed the suits to proceed as an administration suit, and directed inquiries as to the illegitimate issue. The result of this inquiry has been that, two other illegitimate Sons having been reported to exist, the estate has been decreed to be divided into five shares, to be enjoyed equally by the two Widows and three illegitimate Sons respectively.

From this decree the Widow of the elder Son, the original Respondent in each suit, has alone appealed.

Much of the evidence which engaged the attention of both Courts below, may be dismissed from the consideration of their Lordships.

The evidence as to the nature of the marriages, and the rules or laws of caste, together with the consideration of the effect or legitimacy of irregular marriages between persons of unequal caste, is in the view which their Lordships take of this case unnecessary to be stated, or observed upon.

The litigation was confined to persons, all of whom claimed under the Sons respectively. The estate was taken possession of, and enjoyed by these Sons, under the compromise or family arrangement before stated. That compromise proceeded on the basis of legitimacy.

Whether both Sons were legitimate, or only one legitimate, and to whichever of the two that *status* might really attach, was a question no longer material to the consideration of the rights devolving to persons [513] taking under that compromise and family settlement, by which the *status* assumed was to be taken as the real state of the family.

The case of *Abraham v. Abraham* (9 Moore's Ind. App. Cases, 199), shows that a family ceasing to be Hindoos in religion, may still enjoy their property under the Hindoo law; and the same principle is applicable, *inter se*, to the members of a Hindoo family entering into possession of an estate under such a compromise as that which took place in this family.

The Widow, though in one passage she terms the Talook her zemindary, as in a certain sense it was, did not intend to convey, and did not in fact convey, the property to the Sons; she executed no deed nor instrument of gift whatever. Neither Son admitted his illegitimacy, nor consented to take a gift on that admission. The Widow accepted maintenance, and surrendered possession. Pos-

session was taken by her Sons, upon her abandonment of the estate; and this possession was taken also under their own agreement, which, as well as her petition which referred to it, proceeded on an acknowledgment common to all three of an antecedent right in both the Sons whom she describes as "her Sons." She had no estate entitling her to be an absolute Donor, in any view of her position. Whatever effect this transaction might have as against heirs of the common ancestor, after the death of the Widow, it bound her and the Sons, and all claiming under them.

These instruments do not purport to give any new quality of descent to the Talook, even if such quality were capable of being derived from the agreement of two or more Owners. There is no evidence to show [514] that the nature of the estate and its descendible character were meant to be affected by this transaction.

The case depends entirely on the construction of the petition and the agreements before referred to. The Talook itself is not the sole subject of the arrangement. A reference is made to one item—ancestral cash, as forming an element of dispute, and to other articles of property. The decision appealed against has given neither Widow a preference over the other. In the opinion of their Lordships, the High Court erred in making the illegitimate Sons sharers with the Widows, and their Lordships have now to consider the more difficult part of this case, whether the Widow of the elder and surviving Son has a title by survivorship to the whole Talook.

If this case could rightly be viewed as it was viewed in the Court of First Instance, as one governed by the ordinary presumption in Hindoo Law, that family property is joint, and by the ordinary law of the place where this Talook was situate, as to the devolution by survivorship under such failure of male issue as occurred in this case, the decision of it would be attended with no difficulty, and the decree of the Court below dismissing the Widow's suit would have to be restored; but, upon this subject, though not for the reasons assigned by the Judges of the High Court, their Lordships think such conclusion inadmissible.

The property was held under a family arrangement which silenced disputes, but contained no admission that such disputes were without foundation.

Neither Son admitted that they were, *inter se*, antecedently heirs to each other in the then state of [515] the family, nor admitted a right of succession of either to the other beyond that which this arrangement itself specifies.

It is not stipulated in terms that the property shall be enjoyed as that of a joint undivided Hindoo family; nor is any succession by Widows on the true construction of the instruments provided for. The documents in question contain terms some of which are consistent, and others inconsistent, with the rights to the possession, use, and enjoyment of an undivided estate.

The first agreement contains in the first condition words that impart division and consequent management. This division is not in terms referred to a time subsequent to the commencement of the management spoken of. The next sentence clearly points, on the majority of the younger Son, to an actual division and a possession in moieties. It provides for each Son (the younger being a mere child) an equal present income by way of maintenance, and further, that each should pay out of his own income his own expenses for maintaining his own servants and relations; and by the last article it provides for an equal division, from that time, of such surplus as might exist after defraying all the outgoings spoken of, which are to fall on the common money. These provisions are not such as would be applicable to a joint Hindoo family property. On the other hand, it seems to have been supposed by both Sons, that a survivorship by one would or might exclude the family of the other, and there are several other provisions which, though not absolutely inconsistent with mere managership, more resemble that of the constituted Manager of a joint Hindoo family.

[516] The second agreement recites that disputes had arisen concerning the ancestral property in cash, the division of the Talook, and the accounts of the receipts and disbursements of the Talook: it proceeds to state that "the Collector having sent for both of us to the Nuzar, and communicated the circumstances to us, we understand the same; and the terms for our future guidance are hereunder specified." This language is certainly more consistent with disputes arising out of the existing arrangement than with a substitution for it by the Sons alone, of their

own authority, of some new terms of compromise. The disputes seem also to imply some precedent division of property constituting rights in a surplus after receipts and disbursements are accounted for. So far they are consistent with the provisions of the first agreement as to the division of any surplus. Again, the fifth article, which relates to future debts; the sixth, which provides for the division of future surplus profits of the Talook; and the seventh, which refers to a settlement in respect to the ancestral money and the money already acquired from the Talook, and implies a division of these funds, are all inconsistent with the hypothesis that the Brothers were, or considered themselves to be, members of an undivided Hindoo family.

Nothing is stated to show that the Talook must be regulated by one law of succession and the rest of the property by another. It seems, therefore, to their Lordships, more proper to consider the provisions, as to the Talook, as regulated by its peculiar nature, and influenced by the necessities of its proper management, and the maintenance of the dignity attached to it, rather than as furnishing alone the rule for the [517] solution of the difficult question to be determined between the two Widows.

The construction of these documents is beset with considerable doubt and difficulty, but their Lordships are on the whole of opinion, that although they postpone indefinitely the actual division of the Talook by metes and bounds, and provide for its joint management, and, in certain events which have not happened, for its devolution otherwise than by the law which regulates the succession to separate property, they nevertheless contemplate its enjoyment in other respects by the two Brothers as by members of a divided family, and the actual division of other family property. Their Lordships accordingly think, that the finding of the High Court that the Brothers were not members of a joint and undivided Hindoo family must be taken to be correct. It follows that, at least wherever the agreements have not specifically provided for the contrary—even assuming that they could so provide—the succession to this property must be governed by the law which governs the succession to separate estate. How, then, is the law which makes each Widow succeed to her Husband's share affected by the terms of the particular instruments?

Equality between the two Widows is consonant to the expressed desire to maintain, as far as possible, equality between their respective Husbands. The exclusion of Widows by male legitimate issue, is an exclusion which would prevail equally in a divided, or undivided family. The agreement provides, by language not apt nor correct, for the devolution on Sons of lawful Widows: in case one has male issue, and the others none, a preference is declared; but [518] where each is childless, the agreements prefer neither. In such a case, then, the law alone can regulate the succession. The instruments do not support by any clear expression of intention, the claim of the Widow of the elder Son to exclude the other. There is no ground for confining the estates of the Sons to life estates. The mortgage is inconsistent with that view. The provisions as to the possession of the Talook alone may refer merely to the titular dignity, and ceremonial usage. The equal division between Widows and illegitimate Sons is not likely to have been conceived by the framers or advisers of this compromise.

Their Lordships will, therefore, recommend to Her Majesty that the decree (or decrees, if separate decrees have been made in the two suits) of the High Court of the 22nd of April, 1865, be reversed, and that in lieu thereof a decree be made in suit, No. 62, of 1861, affirming the decree of the Zillah Judge of the 13th of March, 1862, and dismissing the appeal therefrom to the High Court with costs; and that in suit, No. 72, of 1861, a decree be made declaring that, according to the true construction of the agreements of the 26th of November, 1838, and the 29th of July, 1844, the Widow of Gopinadha, the Appellant, and the Respondent, the Widow of Khrishna, upon the deaths of Gopinadha and Khrishna without male issue, became entitled from and after the deaths of Gopinadha, as Hindoo Widows, each to one moiety of the estate; and decreeing possession of the moiety claimed to the Respondent, Nilamani Patti, but without costs. The High Court, in executing Her Majesty's Order, must take all necessary steps to undo whatever may have been done under the [519] decree reversed inconsistent with the rights thus declared. Adverting to the difficulties occasioned by the instruments executed by the Brothers,

their Lordships think there should be no costs, as between the Widows either in the Courts below, or here on appeal.

BABOO BODHNARAIN SINGH, and Others.—*Appellants*: BABOO OMRAO SINGH, and Others.—*Respondents*.* By revivor, AJOODHYA PROSHAD SINGH, and Others, representatives of BABOO BODHNARAIN SINGH.—*Appellants*: BABOO OMRAO SINGH, and Others.—*Respondents** [Dec. 1 and 2, 1870].

Insanity by Hindoo Law is a bar to inheritance [13 Moo. Ind. App. 523].

The heir of a lunatic is, on the establishment of the lunacy, the substituted owner of the estate [13 Moo. Ind. App. 523].

Where evidence of a doubtful admissibility has, under the loose practice of the native Courts, been received, the Judicial Committee, as the Court of last resort, will deal with the case, as it appears to them, substantial justice requires, and will not allow any mere technical objection to prevail as to its admissibility [13 Moo. Ind. App. 529].

This suit, in the nature of an action of ejectment, was instituted by the Respondent, Baboo Omrao [520] Singh, as Subarakar (Manager) of and for his Wife Mussumat Sreebuttee, a lunatic, against the Appellant, Baboo Bodhnarain Singh, on his own behalf, and also as guardian of his Nephews, Hurnarain Singh, Budreenarain Singh, and the Respondent, Roodurnarain Singh, in the Court of Zillah Bhaugulpore, to oust the Appellants from possession of a moiety of certain lands situate in Sircar Tirhoot and Province of Behar, which by a deed of partition, dated the 30th of April, 1802, had been allotted to one Teijnarain Singh, deceased, the Father of the lunatic, as his one-third share of the family ancestral estate; and mesne profits, and one moiety of certain cattle left by one Mussumat Indrabuttee, who was the Mother of the lunatic, and the survivor of two Widows of Teijnarain Singh.

The suit was founded upon the allegation in the plaint that the lunatic was entitled to the whole of such moiety as heiress, according to Hindoo law, of her Father dying without leaving male issue, in succession to his two Widows, and that the Appellants had dispossessed her of a moiety thereof. The Appellants, in their defence, claimed to be entitled to the property, and of which they were then in actual possession, under an Ikarnamah (agreement) dated 12th Pous 1267 Fuslee (22nd December, 1859), made by them and the Respondents, Roodurnarain Singh, Pursorain Singh, and Bholonanth Singh, the three Sons of the lunatic, as being the joint heirs of their Grandfather, Teijnarain Singh, and also of their Grandmother, Mussumat Indrabuttee (both then deceased), their Mother having been by reason of her insanity at the time of the death of her Father, Teijnarain Singh, incompetent by the Hindoo law, to succeed as heir to [521] the property of either of her parents. The agreement was entered into with the object of carrying out a family settlement and compromise of disputes which had been previously going on for some time respecting the several alleged rights of the members thereof in the property left by Teijnarain Singh, which disputes were between his Widows and Grandsons, and the Appellants.

The chief question raised in the Zillah and High Courts was, whether, previous to or at the time of the death of Mussumat Indrabuttee, the surviving Widow and heiress-at-law of Teijnarain Singh, Mussumat Sreebuttee, his Daughter and only child, was a lunatic, and insane, in which case she would have been incompetent and incapable of inheriting and succeeding as heir, according to Hindoo law, to the property; and, in consequence, her three Sons would be entitled, *ipso facto*, to be substituted heirs of their Grandfather, Teijnarain Singh, and of their Grand-

Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colville, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

mother, his surviving Widow : and as such heirs, entitled to succeed on the death of his Widow to the property.

The Sudder Ameen of Zillah Bhauulpore (Syud Mahomed Wahadeen) dismissed the suit, on the ground, that on the question of insanity the evidence established the fact that Mussumat Sreebuttee was at the time of the death of her Mother, and long previously, insane and a confirmed lunatic.

On appeal the High Court reversed the decree of the Sudder Ameen.

The effect of the Judgment of the High Court, delivered by Mr. Justice Steer and Mr. Justice Jackson, on the 10th of December, 1863, was to hold, that the only question for the Court to decide was, whether Mussumat Sreebuttee was at the time of her [522] Mother's death insane, so as to be incapable under the Hindoo law of succeeding to the estate : and that the burden of proof being on the Defendants, they had failed to prove that fact, and the High Court decided that Mussumat Sreebuttee succeeded on her mother's death to the estate of Teijnarain Singh.

From this decree the present appeal was brought.

The appeal, which was confined to an examination of the evidence, was argued by Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants, and Mr. Forsyth, Q.C., and Mr. J. D Bell, for the Respondents.

Upon the effect of evidence, of a character not admissible as strict proof in English Courts, the case of *Unide Rajaha Raja Bommarauze Bahadoor v. Pemmasamy Venetadry Naidoo* (7 Moore's Ind. App. Cases, pp. 128, 137) was referred to.

Their Lordships' judgment was pronounced by

The Right Hon. Sir James W. Colvile.—In this case an action in the nature of an ejectment was brought by the Respondent, Baboo Omrao Singh, as the Committee, and in right of his Wife (a lunatic), for the recovery of certain parcels of land which were admitted to be in the possession of the Appellants. The plaintiff also asked that a certain Ikramniali should be set aside. Their Lordships may at once dispose of the latter question by saying that it appears to them, as it appeared to the High Court of Bengal, to be [523] one which cannot be disposed of in this suit : that it is a question which can only be determined between the Appellants and the persons who are named as their co-Defendants on the record. Their Lordships, therefore, will deal with the case, as being nothing but an action in the nature of an ejectment for the recovery of the lands in question from the Appellants.

The title upon which the Plaintiff sued, is based upon the fact that his Wife, as the Daughter of Mussumat Indrabuttee, the last surviving Widow of one Teijnarain Singh, became on the death of her Mother entitled to the property as the next heir of her Father, Teijnarain Singh : and the principal issue raised in the cause is, whether that Lady had not lost her right to inherit, by reason of her lunacy. It seems to be admitted on both sides (the point has not been argued here, nor was it argued in the Court below) that by the Hindoo law, if she was, when the succession opened to her, that is to say, on the death of her Mother, insane, she did lose her right, and that it passed to the three persons who are mentioned in the record to be her Sons.

The sole question, therefore, for their Lordships' determination, is a question of fact, whether the Lady was or was not insane at the time of her Mother's death, or whether, as alleged by the Plaintiff, she became insane within two months after that event. This issue of fact was found in favour of the Appellants by the Court of First Instance, the Principal Sudder Ameen. His judgment was reversed by the High Court upon certain grounds, and it has been contended before their Lordships that those grounds are unsatisfactory, inasmuch as the appellate Court has given undue weight to a certain document which had been admitted in evidence in the cause. Hence, there [524] being two conflicting judgments, and a grave question touching the weight which ought to be given to a particular document, it has fallen to their Lordships to deal with this case according to their own view of the evidence taken in the cause, and to form their own conclusions upon it.

It seems to their Lordships desirable in the first instance to consider whether, by reason of the undue weight which the High Court gave to the document in question, the value of its judgment is destroyed. That document is the report of the Moonsiff made upon the application for the appointment of the Husband as Committee. It

appears that within two months after the death of Mussumat Indrabuttee, Baboo Omrao Singh applied to the Zillah Judge, under Act, No. XXXV. of 1858 of the Indian Legislature, to be appointed Committee of his Wife, alleging her lunacy. The Act directs that in case the party lives at a certain distance from the Sudder station, the Judge shall delegate the inquiry to a local Officer; who in this case was the Moonsiff. The local Officer has to report to the Judge, who passes the final Order in the case. The Act, however, contemplates only the question of lunacy or sanity at the time of the inquiry; there is no provision in the Act that the inquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind.

In these circumstances the Appellants, who had long been pressing their claims in respect of this property against the other branch of the family, thought it expedient to appear as Objectors on this proceeding. It is not clear that the Judge passed any Order allowing them to go before the Moonsiff, but in some way or other they appear to have been [525] admitted before the Moonsiff. They did not attend throughout the inquiry, and they failed to produce Witnesses to prove that the Lady had been a lunatic from the time at which they alleged she became so, or at any time before the death of Mussumat Indrabuttee. The result, therefore, was, that they did not go into their case before the Moonsiff. The Moonsiff, on the other hand, took evidence on the part of the Respondent, who was seeking to be appointed Committee, and came to the conclusion that the Lady was of unsound mind. His report states what has just been said about his having taken the evidence, and then contains this passage:—"In this case both parties acknowledge the lunacy of Mussumat Sreebuttee; but the dispute between them is on this subject. The Applicant writes that Mussumat Sreebuttee became insane in the month of Maugh, 1267, Fuslee, subsequent to the death of her Mother, Mussumat Indrabuttee, and the Interveners state contrary to this, that she has been a lunatic for a very long time, that is to say from anterior to the death of Mussumat Indrabuttee, her Mother. From the evidence of the Witnesses which have been produced on the part of Applicant (from No. 1 to 29), it has become known that Mussumat Sreebuttee, Daughter of Mussumat Indrabuttee, deceased, after her death, became insane, in the month of Maugh, 1267, Fusly, at Mouzah Dinnaree, Pergunnah Kundlour, in the house of her Husband, and that she continues in the same state up to this time. From the evidence as to the lunacy taken by me before the Interveners, it has been ascertained that the Mussumat aforesaid, is quite insane. The Interveners have produced no proofs before me from which it may be learnt that the Mussumat aforesaid has been insane for a greater [526] length of time." This report having been made to the Judge, the Appellants again objected before the Judge, but the Judge very properly held that he had no jurisdiction to decide the question between the parties; that the simple issue was whether Mussumat Indrabuttee was a person possessed of any property, and if so, whether she was sane or insane, and required the protection of a Committee; and accordingly he appointed the Husband Committee. The learned Judge who delivered the judgment of the High Court seems to have thought that the evidence before him being conflicting, the scale was turned by the document to which I have just referred. He says, "The evidence adduced by them (the Appellants) is not only very far from satisfactory, but it is directly opposed to the recorded opinion of the Moonsiff deputed by the Zillah Judge, in 1860, to investigate the matter of Mussumat Sreebuttee's lunacy." It appears to their Lordships that if he meant to give to this finding, what we do not think he did mean to give, the effect of *res judicata* between the parties, he was clearly wrong. There was no adjudication by any competent Tribunal upon the point in issue in this suit. The Moonsiff had no jurisdiction to decide it; nor had the Appellants in strictness any *locus standi* before him. If, on the other hand, he meant to say, that the conduct of the Appellants, as evidenced by that proceeding, had been such as to lead to an inference that the case they afterwards made was untrue, he seems also to their Lordships to have given an effect to their conduct which it does not fairly bear. All that appears is, that they went unnecessarily before a Tribunal which could not have decided the question between them and the opposite party, and that being there [527] they failed to produce their evidence. Their Lordships are of opinion that it is neither a necessary nor a legitimate inference from that fact that the evidence which the Appellants have produced in this

suit ought not to be delivered. That being so, their Lordships think that the judgment of the High Court, whether the Judges came to a right conclusion or to a wrong conclusion, has been put upon grounds which do not justify that conclusion.

Their Lordships have then to consider the effect of the whole evidence. The issue is a remarkably simple one: it is whether this Lady, admitted on both sides to be a lunatic, became a lunatic between the death of her Mother and the period at which the Husband applied to be appointed Committee;—that is to say, two months afterwards,—or whether she had been a lunatic for some considerable period before the death of Mussumat Indrabuttee. Now, their Lordships will concede that the burden of proof may be on the side of the Appellants,—that it may be sufficient for the other party, in proving his title, to prove that this Lady, now a lunatic, but who certainly had not always been a lunatic, was the nearest heiress to Teijnarain Singh; but it is evidently a burden which becomes of a much lighter character when the lunacy is admitted to have supervened within two months of the critical time, the death of Mussumat Indrabuttee.

Then, again, the case of the Respondents is open to the observation which has been made at the Bar, that if it is true, far better evidence of it might have been produced than has been produced by the Respondents. For instance, if the woman became mad within two months of her Mother's death, one would suppose that that madness must have been caused by some disorder [528] which would require and receive medical treatment. We have, however, no medical evidence whatever. We have nothing to show, that, having been sane up to a certain period, she became suddenly ill. Again, we have none of the near relations of the family produced. The mere fact that the Husband verifies in the ordinary way the truth of the allegation in the plaint, is no answer to the suggestion that, if he had a true case, he, the nearest relation of this party, might have come forward and shown how the madness came on and all the circumstances relating to it. He, again, has within his power all her family and female domestics; but there is not a single Witness produced on that side, except the Witnesses of the character so common in the Indian Courts, viz., male menial servants, dependants, and Ryots living in the neighbourhood, who are all obviously persons less likely to have the circumstances deposed to within their knowledge, and to be far less trustworthy, than the members of the family who might have been produced. On the other hand, it is said that the evidence produced by the Appellants is of no better character. It does not seem to their Lordships that this observation is altogether just. There is certainly, at least, one person produced by the Appellants who does stand to the parties in near relationship. No doubt his testimony is open to the observation that though the Uncle of the lunatic, he is also the Father-in-law of one of the Appellants, but still he is a man of position; he is a man who from his relationship must have had the means of knowing what he deposes to, and he seems upon the whole to be the most trustworthy Witness that has been produced to give direct evidence as to the date of the lunacy on either side. Again, there [529] are the other Witnesses referred to by Sir Roundell Palmer, viz., the two servants, one of whom was employed to take care of her, and they seem to have had more peculiar means of knowledge than those possessed by most of the Witnesses on the other side. Then a great deal has been said touching the evidence of the Witness upon whom the Principal Sudder Ameen seems, from the expressions in his judgment, to have placed the greatest reliance,—I mean the evidence of Mr. Duff. It has been argued that Mr. Duff's evidence, being mere hearsay, was not admissible at all. Their Lordships are not prepared to admit that this evidence is properly described as mere hearsay. The Witness speaks of his own knowledge to the fact, that at a particular period the insanity of Mussumat Sreebuttee was rumoured and generally believed in the District with which he was conversant. Their Lordships do not feel it necessary to decide whether that testimony, if objected to, would have been receivable on the trial of such an issue as this in an English Court of Justice. It has been received in India; and their Lordships conceive that they ought to deal with it according to the principles enunciated by Dr. Lushington in *Unide Rajaha Raje Bommarauze, Bahadoor v. Pemmasamy Venkatadry Naidoo*, the case mentioned in the course of the argument (7 Moore's Ind. App. Cases, 137), as those which govern this Board, viz., that when evidence of doubtful admissibility has, under the looser practice of the Indian Courts, been received in a cause, their Lordships, sitting as an appellate Court, will deal with

the case as they think substantial justice requires, and will not allow any merely technical objections to prevail. In the present case their Lordships think, that they ought [530] not wholly to reject Mr. Duff's testimony. The next question is, what effect can legitimately be given to it. If we had to deal here with the broad question of sanity or insanity,—whether Mussumat Sreebuttee were now sane or insane,—Mr. Duff's evidence would be of little or no value. But when it is an admitted fact that the woman is insane, and the question is, whether she first became so before or after the date of the death of Mussumat Indrabuttee, the testimony of a trustworthy Witness, that long before that period she was, to his knowledge, reputed insane, is an important corroboration of the direct testimony given in the cause to the fact of her insanity at that time.

Their Lordships, moreover, deem it right to observe, that if Mr. Duff's deposition was struck out of the record they would, nevertheless, be of opinion that the preponderance of the evidence is in favour of the conclusion that the Lady was insane at the time of Mussumat Indrabuttee's death. And they are confirmed in that opinion when they come to consider the *res gestae* of the case. This family was originally a joint family, and there was an attempt at a partition as early as 1802. From that time forth, however, the two branches of the family represented by the Appellants seem to have contended that the estates were to a certain extent joint, and that the descent of them was to be governed by the rules regulating the descent of joint property. Their Lordships do not say whether they were right or wrong. In the lifetime of the two Widows there seems to have been an arrangement by which the Widows were left in possession of the property, but it is said on some understanding that on their death it was to go as if it were joint estate to the male heirs. Whatever may be the [531] merits of that contention, it seems to their Lordships impossible to resist the conclusion that the Panchayat which is alleged to have been held was held. Possibly the circumstances which led to it may have been circumstances of violence tending to a breach of the peace, but with that we have nothing to do. In point of fact their Lordships believe, that the Panchayat was held, that the Ikrarnamah was executed in pursuance of the Panchayat, and that the possession of the lands, which is now admitted to be in the Appellants, followed upon the execution of that instrument. It is unnecessary to consider, whether that document was obtained by duress or fraud, or anything of that kind, for that is a question which can only arise between the Sons of this Lady, who executed it, and the Appellants; but if the transactions above mentioned did take place then, then it follows, that at that time, which was immediately after the death of Mussumat Indrabuttee, the Sons, and not the Mother, were held out to be, and were dealt with as, the heirs. If the Lady had not then been insane, it seems most improbable that some person would not have put forward her interest, or that the Appellants would have dealt with those as heirs, who really did not possess that character.

Therefore, weighing all the circumstances, their Lordships have come to the conclusion, that the Principal Sudder Ameen was right in the view which he took of the evidence, that Mussumat Sreebuttee was of unsound mind at the time of her Mother Mussumat Indrabuttee's death, and that consequently the Plaintiff in the action has failed to make out his title. Their Lordships must, therefore, recommend Her Majesty to reverse the decision of the High Court, [532] and to order that in lieu thereof the appeal to that Court against the decree of the Principal Sudder Ameen dismissing the Appellant's suit be dismissed with costs. The Appellants must also have their costs of this appeal.

IN THE MATTER OF VICTORIA SKINNER, *alias* NAWSHABA BEGUM *

[Dec. 5, 1870].

On Petition from the High Court of Judicature for the North-Western Provinces.

Special leave to appeal allowed from an Order of the High Court of Judicature for the North-Western Provinces of India, by which Order, an infant Daughter was taken from the custody of her Mother, a Mahomedan, on the ground, that the Minor's deceased Father had been a professed Christian, and her Mother, who was, as the Court held, living in adultery, was inducing her Daughter to adopt the faith and habits of a Mahomedan [13 Moo. Ind. App. 541].

Liberty given, pending the hearing of the appeal, to the Petitioner to apply to the High Court, to have access at suitable times to her Daughter [13 Moo. Ind. App. 541].

This was a petition by Helen Skinner, otherwise known as Badshaw Begum, an inhabitant of Meerut, in the North-Western Provinces of India, the Widow of George Skinner, who was a professed Christian, and Mother of Victoria Skinner, his Daughter, a Minor, for special leave to appeal from Orders of the High Court of Judicature in that Province, affirming a previous Order of the Judge of the District Court at Meerut, whereby the Minor, Victoria Skinner, was removed from the custody of her Mother by reason, [533] as alleged, that the Petitioner was a professed Mahomedan, living, as the Court held, in adultery with a Mr. John (calling himself Mahomed Jan Allam), professing the Mahomedan religion, and alleging himself to have contracted a Mahomedan marriage with the Petitioner, notwithstanding that he had a Christian Wife living at the time. The Petitioner sought restoration of her Daughter to her custody.

The application was *ex parte*.

The petition stated, that the Petitioner's Husband, George Skinner, was murdered at Delhi in the early part of 1857, during the Mutiny, and left the Petitioner and a Daughter, Victoria, then of the age of between one and two years, surviving; that the Petitioner, who was the illegitimate Daughter of a Collector in the Civil Service, from the age of four months, when her Father died, was brought up in the Zenana, and observed all the ceremonies of the Mahomedan religion, such as fasts, prayers, etc., and was instructed in the Koran, up to the time of her marriage with George Skinner, and that she lived behind the purdah; that the Petitioner had not, nor had any of her relatives, ever been to a European entertainment, and that they always took their meals at the duster-khan (cloth spread on the ground), and ate in the native manner; that the Petitioner had never been in a Church, except on the occasion of her marriage with George Skinner, and had since that marriage continued to live as a Mahomedan, and behind the purdah, as she did before; that George Skinner's Mother was a native woman of Rajpootana, and had been a Hindoo, but was converted to Mahomedanism, and that George Skinner's family lived in the Mahomedan fashion; that George Skinner lived in his own [534] house like a Mahomedan, and never went to Church, except, as before mentioned, on his marriage with the Petitioner; that, although nominally a Christian, George Skinner never associated with Christians, but only with the native gentry of the Town of Delhi, and that she, the Petitioner, could only read and write English very imperfectly; and that after the death of George Skinner the Petitioner lived for about ten years with different members of his family, and during all that time both the Petitioner and her Daughter lived in the Mahomed fashion; that after leaving the Skinner family the Petitioner and her Daughter lived with the Petitioner's Brother, Nawab Mirza, in the Mahomedan style; that about four years ago Mr. James Skinner, the Brother of George Skinner, deceased, introduced John Thomas John to the Petitioner's Brother, with whom Mr. John Thomas John became very intimate; that John Thomas John was formerly a Christian, but became a convert to

* Present: Sir Robert Phillimore (Judge of the High Court of Admiralty), the Lord Justice James, and the Lord Justice Mellish.

Mahomedanism, and shortly afterwards, namely, on the 24th of October, 1867, the Petitioner was married to Mr. John according to the rites of the Mahomedan religion; that at that time Mr. John had another Wife living, whom he had married some years before according to the rites of the Christian religion, which he professed at the time of such first marriage; that after the Petitioner's marriage with Mr. John, the Petitioner resided next door to Mrs. James Skinner and her Daughter and Son-in-law, Mr. and Mrs. James Orde; Mrs. James Skinner was the Widow of the Uncle of George Skinner, the Petitioner's former Husband, was the Sister of Colonel Barlow hereinafter mentioned; and that for some years, Mrs. James Skinner had professed, and still continued to [535] profess, the Mahomedan religion, and lived entirely in the Mahomedan fashion; that Mrs. Orde professed Christianity, but never attended Church, wore the native costume, and, to a considerable extent, observed the Mahomedan custom of the purdah (rules of seclusion); that after the marriage between the Petitioner and Mr. John, the Petitioner's Daughter, Victoria, continued, as she had always done, to reside with the Petitioner, and both the Petitioner and her Daughter, Victoria, were in the habit of visiting Mrs. James Skinner and Mrs. Orde, and were on terms of intimacy with them down to the commencement of the institution of the suit; that Mrs. James Skinner and Mrs. Orde were both aware that the Petitioner had embraced the Mahomedan religion, and was married to Mr. John, and never raised any question as to the validity of the marriage up to the date of the correspondence thereafter mentioned; that the Petitioner's Daughter had never been brought up in any other manner or style than according to the habits and manner of the natives of India; that in the early part of this year Mr. John became aware that Mrs. James Skinner had spread some reports reflecting upon his character, and had also spoken ill of him in the presence of the Petitioner's Daughter, and in consequence of this a correspondence ensued between Mrs. James Skinner and Mr. John, and ultimately, on the 14th of March, 1870, Mr. John wrote a Letter to Mrs. James Skinner in which he threatened to take criminal proceedings against her; that on the 21st of March, 1870, Colonel Barlow, Mr. and Mrs. Orde, and Mrs. James Skinner, presented a joint petition to the Judge at Meerut, alleging, in effect, that the Petitioner was living in adultery with Mr. John, and that the [536] Petitioner's Daughter had been withdrawn from school and all Christian association, and was receiving no education, but that, on the contrary, her religious and moral principles were being systematically corrupted, and she was being seduced into the faith and habits of Mahomedans; that the above petition also alleged that large sums of money had been received on account of her Daughter by the Petitioner, and had been misappropriated, and prayed that Guardians might be appointed to the person and property of the Petitioner's Daughter, and that an account might be taken of the moneys received and expended on her behalf; that this petition was supported by the depositions of Mr. Orde and Colonel Barlow made on the 22nd of March, 1870, and on the same day, by the Order of the Court, the Petitioner's Daughter was placed in the charge of Mr. James Skinner; that on the 31st of March, the Petitioner and Mr. John filed a written statement in answer to the petition, and therein set forth the facts above stated, and prayed that the Court would consult the Minor's wishes, both as to her guardianship and as to the religion she wished to embrace; that evidence was adduced before the Judge, and in particular the Petitioner's Daughter, who was then of the age of fourteen years, but who appeared to be much older, was examined, and deposed that no one had ever persuaded her to be a Mahomedan, but that her own feelings alone prompted her to become, and that she wished to be, a Mahomedan; she also stated, that she wished to return to the Petitioner (she being at that time in the custody of Mrs. James Skinner by Order of the Court). That the charge of misappropriating the Minor's money was withdrawn, and it was stated that no proof whatever was given that [537] the Petitioner's Daughter had been withdrawn from Christian association, or that her moral principles were being corrupted or attacked in any way, or that any attempt had been made to convert her to Mahomedanism, it being simply proved, and, indeed, admitted by the Petitioner, that her Daughter had left school about a year before, and since that time had professed Mahomedanism, and lived as a purdahnashen; that on the 19th of May, 1870, the Judge of the District Court at Meerut ordered, that the Minor should be for the present removed from the

Mother's care, that the charge of her property be placed under the Collector of the District, and that another Guardian be appointed for her person, the selection of such Guardian to be left for further consideration, and made either by the Court, when, on the suggestion of either party, or otherwise, it can find a person fitted for the charge (probably a respectable Lady mistress of some School on the Hills might be found willing and capable of undertaking it), or by consent of the parties themselves; that in the meanwhile the Minor should remain as at present, until such Guardian be appointed, or till further orders, with and under the care of Mrs. James Skinner, with whom she was placed by the Order of the 22nd of March last, with permission to the Mother to visit and see her at Mrs. James Skinner's House (unaccompanied otherwise than by her necessary and usual attendants) daily, if so disposed, and for a reasonable period of time during each visit.

That from this Order the Petitioner and Mr. John appealed to the High Court of Judicature for the North-Western Provinces, and the appeal was heard on the 7th of July, 1870, when the High Court [538] confirmed so much of the Order of the Judge of Meerut as directed the removal of the Minor from the custody of her Mother, but cancelled the rest of the Order, and postponed passing a final Order on the appeal for a fortnight, to enable the parties to nominate to the Court a fit and proper person to receive a certificate of administration to the estate of the Minor, and also to nominate a fit and proper person to be appointed Guardian of the person of the Minor. That on the 4th of July, 1870, the Petitioner's Daughter was examined by the Officiating Chief Justice and one of the Judges of the High Court, and, as alleged by the Petitioner, expressed a strong desire to return to the Petitioner, and seemed much distressed at the idea of being separated from her; that on the 16th of July, 1870, the High Court made a further Order, appointing Miss Scanlan Guardian of the person of the Petitioner's Daughter, and directing that she should be taken by the Petitioner, Mrs. James Skinner, and delivered into the charge of Miss Scanlan: that on the same day the High Court made a further Order, appointing Mr. Bailey, of the Agra Bank, Guardian of the property of the Petitioner's Daughter. That pursuant to the first of these Orders of the 16th of July, the Petitioner's Daughter had been taken to and placed in charge of Miss Scanlan: that before the Petitioner's Daughter was placed in the care of Mrs. James Skinner, by the Order of the 22nd of March, the Petitioner and her Daughter had always lived together, and had never been separated for more than a few hours, the Petitioner and her Daughter entertaining a very strong affection for one another, and that the separation which had taken place had caused, and was [539] still causing, a very great mental pain, and even physical illness, to the Petitioner's Daughter; that, being dissatisfied with the three last-mentioned Orders of the High Court, the Petitioner and Mr. John applied to the High Court for leave to appeal to Her Majesty in Council; but the High Court by an Order of the 29th of August, 1870, dismissed the application, on the ground that, Mr. John had no *locus standi*, and that the Petitioner was not entitled to appeal as a matter of right, as the Orders did not involve property of the value of £1000, and declined to certify that the case was a fit one for appeal to the Privy Council. That the Petitioner felt aggrieved by the above Orders of the High Court of the 7th and 16th of July, which affected the civil rights of the Petitioner and her Daughter, which she submitted could not be measured by a money standard, and involved important questions of law; and also by the Order of the 29th of August, refusing the Petitioner leave to appeal, and, in consequence of such last-mentioned Order, it was necessary to apply for special leave to appeal against the Orders; that should the Petitioner obtain such leave to appeal, it would necessarily be some considerable time before such appeal could be heard, and that in the meantime, unless execution of the Orders of the High Court was stayed, the Petitioner would for a long time be deprived of the society of her Daughter and only child, and her Daughter would remain among strangers, and be alienated from the Petitioner: the Petitioner, therefore, prayed for special leave to appeal from the Orders of the High Court of Judicature for the North-Western Provinces of the 7th and 16th of July, and that execution of such Orders might be stayed, and that the [540] Petitioner's Daughter might be permitted to return to and live with her pending such appeal, or for further relief in the premises.

The petition was supported by the joint declaration of the Petitioner and John Thomas John, her alleged Husband, and was accompanied by translations of the correspondence between the parties relative to the custody of the person and property of the Minor, and the proceedings, petition, and depositions had thereon, with the judgment of the Judge of the District Court of Meerut, and of the High Court of Judicature for the North-Western Provinces, both of which detailed very fully the grounds of their decision, and the Orders thereon, which were now sought to be appealed from.

Sir R. Palmer, Q.C. (Mr. Cave, with him), for the Petitioner.—This is an application under the special powers reserved to the Crown by the Statute, 3rd and 4th Will. IV. ch. 41, sec. 4. There is no right of appeal under the Letters Patent establishing the High Court of Judicature in the North-Western Provinces. The Order of the Court below removes the Minor from the custody of the Petitioner, her Mother, on the ground that, she being a Mahomedan, the Minor is being induced to embrace the Mahomedan faith. In a similar case before this Tribunal, *Camilleri v. Fleri* (5 Moore's P.C. Cases, 161) from Malta, leave to appeal was given against an Order for the removal of children from the custody of their parent. Although not an appealable grievance by the Letters Patent establish[541]-ing the High Court, leave to appeal has in analogous cases been allowed under the general power of the Statute, 3rd and 4th Will. IV., ch. 41, sec: *Shire v. Shire* (5 Moore's P.C. Cases, 81); *D'Orlaic v. D'Orlaic* (4 Moore's P.C. Cases, 374).

The Lord Justice James.—Enough appears from the petition to induce their Lordships to grant special leave to appeal. Such leave, however, must be without prejudice to any application to the Court below by the petitioner as she may be advised to make, to have access, at suitable times, to her Daughter.

By an Order in Council made on the petition, leave was given to the Petitioner to prosecute her appeal against the Orders of the High Court of Judicature for the North-Western Provinces of the 7th of July and the 16th of July, 1870, on giving the usual security; with liberty, pending the appeal, to make application to the High Court of Judicature for the North-Western Provinces for leave for the Petitioner, the Mother, to have access at suitable times to her Daughter.

[Mews' Dig. tit. COLONY; III. APPEALS TO PRIVY COUNCIL; 3. *Leave to Appeal*. S.C. 7 Moo. P.C. (N.S.) 296; L.R. 3 P.C. 451. See note to *Retemeyer v. Obermuller*, 1837, 2 Moo. P.C. 125. For subsequent proceedings, see *Skinner v. Orde*, 1871, 14 Moo. Ind. App. 309; 8 Moo. P.C. N.S. 261; L.R. 4 P.C. 60.]

[542] UMRITHNATH CHOWDHRY.—*Appellant*; GOUREENATH CHOWDHRY, PARUSNATH CHOWDHRY, and MUSSUMUT MYNAPUTTY CHOWDHRAIN,—*Respondents* * [Dec. 6, 7, 1870].

On appeal from the High Court of Judicature at Bengal.

According to Hindoo Law, in a joint family, the ancestral estate, in the absence of a family custom, or right of primogeniture, descends in coparcenary. Acquisitions made from the profits of the family estate, form part of the ancestral estate.

It is immaterial, so far as relates to joint possession, that only one member of the family is registered as Owner, if it be established that the actual enjoyment of the estate was in coparcenary.

The Plaintiffs, the two first Respondents, brought this suit as joint heirs-at-law

* Present:—Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

of one Sheeblohl Chowdhry against the Appellant and Dheernath Chowdhry, his Brother, Sons of Bacharam Chowdhry, deceased, and others, to obtain a confirmation of their title and possession of (with a registration of their names in the Government collectorate Books) an undivided moiety of an estate called Talook Majhoulée, Tuppah Jittore, with its dependencies, situate in the Forest and Hill District of Zillah Bhaugulpore; and also to an undivided moiety of certain shares in mouzahs and lands, purchased out of the rents and profits of the estate.

[543] The material allegations in the plaint were, that the Talook was an ancestral hereditary estate, which descended to joint heirs, according to the ordinary rule of the Hindoo law, and that the mouzahs and lands and the remainder of the property had been acquired while the family continued to be, in all respects, joint and undivided, and by means of the rents, profits, and joint family funds.

The principal points in dispute between the parties respecting the Talook, were whether, as contended by the Plaintiffs, the Talook Mujoulée, in Tuppah Jittore, was an ancestral estate, and if such, whether it descended on the late Bacharam Chowdhry, the Father of the Appellant, and the late Sheeblohl, the younger Brother of Bacharam Chowdhry, and through whom the Plaintiff claimed title, as joint heirs, according to the ordinary Hindoo law; or whether, with reference to the custom relied on by Regulations XI. of 1793, sec. 5, and X. of 1800, the Talook did not devolve entire on Bacharam Chowdhry, as the elder Brother, under the rule of primogeniture and sole succession, which governed the descent of Jungle Mehals (Hill and Forest estates), according to the custom of the District of Bhaugulpore, or according to the custom of the family; and whether the Talook was not self-acquired, as contended for by the Appellant, by Bacharam Chowdhry, under a Pottah, or grant in perpetual settlement, made by the Government to him, and in his name only; and if such was the fact, as contended by the Appellant, whether Bacharam Chowdhry had continued thereafter in sole possession and enjoyment of the rents and profits of the Talook, as his own separate estate and property, to the exclusion of Sheeblohl, his younger Brother [544] during his lifetime; and lastly, as a fact, whether Bacharam Chowdhry and Sheeblohl were or not, during their lives, separate in estate and in business dealings.

The questions raised respecting the other property were, whether the same or any part thereof had been purchased by means of the rents and profits of the Talook Majoulée, and joint family funds, or by means of the separate moneys of either Bacharam Chowdhry, or of the Appellant, so as to constitute the property so purchased the self-acquired estate of Bacharam Chowdhry, or of the Appellant, even if the Talook was, as alleged by the Defendant, ancestral property, and even if such separation in estate, between Bacharam Chowdhry and Sheeblohl had not been proved.

By the decree of the Principal Sudder Ameen, (Hurrochlunder Chatterjee) dated the 14th of July, 1862, it was declared, that the property had been in the continual possession of Sheeblohl and the Plaintiffs in succession to him as joint proprietors with Bacharam Chowdhry, and after his death, as joint proprietors with the Defendants, the Appellant and Dheernath Chowdhry, his Brother, as members of a joint and undivided Hindoo family; also that it had not been proved that the Talook was Jungle Mehal within the meaning of the before-mentioned Regulations, and that, therefore, the Plaintiffs and the Defendants, the Appellant and his Brother, were jointly entitled to the same, and not Bacharam Chowdhry solely in his lifetime, nor the Appellant and his Brother since his death, as his Sons and heirs-at-law. The decree further decided that the property had been acquired by Hurjee Chowdhry, the paternal Grandfather of both parties, and went on to declare "that [545] the estate was increased by means of the proceeds of the ancestral property; for the parties had no such income as to contribute to the increase of the estate."

On appeal the High Court, the Judges of that Court, consisting of Mr. F. B. Kemp and Shumboo Nath, Pundit, by their judgment, dated the 5th of October, 1863, affirmed the Principal Sudder Ameen's decree, with costs, the High Court holding, that the mere fact of commensality was not sufficient evidence of their being joint in estate; and that it was necessary to trace the family as far back as possible, with the view of ascertaining whether the nucleus of the estate was, originally, joint or separate; and it was further declared, that the estate was inherited by

Bacharam Chowdhry and Sheebloll; that it was their joint estate, and not the self-acquired property of the former; that the subsequent acquisitions of property had been made with the profits of the estate, and with the joint funds of the whole family, which the decree declared to be joint and undivided.

The appeal was from this decree.

As the Respondents did not appear, the case was heard *ex parte*.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—The substance of their argument is mentioned and commented on in their Lordships' judgment, which was delivered by.

The Lord Justice James.—This case, which has occupied the greater part of two days, appears to their Lordships, when reduced [546] to its legitimate and reasonable dimensions, to be a very short case. The relevant and material facts are few and not substantially in dispute for any purpose which their Lordships have to decide.

The contention on the part of the Plaintiffs below—the Respondents here—is, that a certain estate, a Talook with accretions which, beyond all reasonable question, had been made by the investment of the profits of that estate, was an ancestral estate which descended to them and the Appellant, who was a Cousin, in coparceny. It is admitted that by the Common law of Hindostan, that is, the Hindoo law, the descent is in coparceny where no other custom or right is proved. The case of the Plaintiffs was, that this property was ancestral property, which had belonged to their Grandfather, one Hurjee, and descended from Hurjee upon the two Sons, Bacharam Chowdhry and Sheebloll, the Fathers of the respective parties.

The case mainly relied upon in the Court in India on the other side was, that there was no foundation whatever for this assertion, that the property was not ancestral property—that the Grandfather never had any property at all, but that it was an acquisition by Bacharam Chowdhry himself, under a grant made to him individually—or, as we should say in English law, an acquisition by him by purchase, so that he became a new root of descent, and so that the common title alleged to be derived from the Grandfather had no existence.

Now, it has been proved to the satisfaction of the Court below, and proved entirely to the satisfaction of their Lordships,—indeed was hardly disputed at last in the arguments at the Bar—that this property was originally a zemindary, of which Hurjee, the [547] Grandfather, was possessed. Document after document, and all the evidence in the cause, go to show that Bacharam in the first Settlement, then in the Decennial Settlement, and then in the perpetual Settlement, claimed to have it made with him by reason of his hereditary right to the zemindary as hereditary Zemindar. That being proved, that it was Hurjee's property, and that Bacharam was entitled by descent, of course the next proposition would equally follow, unless there is something to exclude it; that is, that he would not be entitled to it himself, but that he and his Brother would succeed to it as coparceners.

Well, has anything occurred to divest that right which in a case of ordinary property was certainly vested in the two jointly at the time when the history of this case begins? Their Lordships are unable to find anything to alter the right which existed at the time when the descent was cast. The fact, that the Settlement was made in the name of the elder Son, whether, originally, when he was a minor, or not,—the fact that he has continued to be solely registered from that time to this, affords no conclusive evidence against the title of the shareholder. There is documentary evidence, on the other side, of his being recognized as a shareholder, but not very strong, nor very conclusive evidence. The mere fact that one of the two Brothers was registered so as to be the proprietor to the outer world, does not seem to their Lordships to be of very great weight, any more than it did to the Court below, and in respect to the actual enjoyment of the property, there has been beyond all question a continuous enjoyment by both upon equal terms. The two lived together; the families lived [548] together, they messed together, and all the marriage and funeral ceremonies and other ceremonies of their religion were performed at the joint expense out of the income of the property, and apparently, as far as their Lordships can see, upon equal terms, and not as the bounty of an elder Brother to a mere dependant who had no right whatever to the property.

It appears to their Lordships, therefore, that the case as principally alleged in the Court below has entirely failed, and it becomes necessary to consider the other topics which have been very much relied upon at the Bar here, as they were at a late part of the case in the Court below. It is alleged that, admitting it to have been Hurjee's property, admitting it to have been ancestral property in that sense, it was property which descended to Bacharam as the eldest male heir, by reason of its being subject to a custom of primogeniture. The custom of primogeniture is stated in two ways, first as a custom of a District so as to bring it within the Regulation X. of 1800; that is to say, it is the custom of a District supposed to be a Jungle mehal, in Zillah Bhargulpore. Now, of the existence in any known District whatever of anything which can be predicated as a Jungle mehal in which this zemindary is situated there is neither pleading nor evidence. There is nothing at all to show any custom, except a Collector's Letter with respect to a custom extending to all the zemindaries throughout the whole Zillah of Bhargulpore; and certainly it would be very strong indeed to hold, merely upon that evidence, that there was a custom proved extending to the whole of the Zillah of Bhargulpore, or to the whole of any undefined [549] District within that Zillah, of which the Court below says it has never heard anything, it being, they say, perfectly notorious that no such custom exists within that District. Well, then, the evidence of that custom appears to their Lordships to be absolutely nothing. Then, there is the other custom,—supposed to be a family custom of this particular family,—under which custom it is alleged, that Bacharam succeeded at such a time; that is, before the year 1794, in such a way as to exclude the title of his younger Brother. Of that family custom there really is no sufficient allegation, if there be any allegation at all. Their Lordships find nothing on the pleadings to raise such a custom as that, in the manner in which it ought to have been raised, if it was intended to have been pleaded and proved in this case. It is, in fact, inconsistent with the case almost entirely relied on by the Defendant in the Court below; of the new acquisition made by him under the grant or Pottah from the Government. But if there be anything which is sufficient to raise it, which their Lordships do not see, there is an equal want of satisfactory evidence of any such custom. There is some trace in the Collector's Letter of a sort of general custom extending through the whole Zillah of Bhargulpore, all the zemindaries being held by that kind of title, but the genealogical tree, which is the only thing contrary which is in evidence, is certainly, in their Lordships' judgment, insufficient to found a family custom, which the Court below have held must be proved by something like what we should call in this Country immemorial usage. It is a thing which cannot be predicated [550] of a simple and single estate, the title to which dates from comparatively a short period of time back. Both these cases of family and local custom, the burden of which was entirely on the Defendant, have failed, and that brings it back to the case which the Plaintiffs below had to prove; that is the simple fact, that this was ancestral property of their common Grandfather.

That being so, and it being substantially admitted that there was no other source from which the acquisitions could be made, the decree of the Court below seems to their Lordships to be right, and they will, therefore, recommend Her Majesty that the decree be affirmed and the appeal dismissed.

[551] RAM SURUN SINGH and MOONSHEE SYED AMEER ALLY,—*Appellants*: MUSSAMUT PRAN PEARY, MUSSUMAT RAKABA, and LALLA IMRIT LALL,—*Respondents* * [Dec. 8, 1870].

On appeal from the High Court of Judicature at Fort William, in Bengal.

In a suit, two of the Defendants, in their answer, made a statement in respect

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

of an alleged mortgage transaction with the object of defeating the Plaintiff's claim, which was false. A foreclosure suit was afterwards brought by one of these Defendants against the other founded on such alleged mortgage. Held, that it was competent to the Defendant to plead that the statement in the joint answer in the former suit was false and intended as a fraud on the third party, and that the admission in the answer did not amount to an estoppel as between the parties to the second suit.

The Appellants instituted this suit against the two first Respondents, to recover possession of the lands mentioned in the plaint with mesne profits, on the ground that they had, on the 25th of November, 1837, in consideration of the sum of Rs. 55,000 advanced to them to pay ancestral debts and perform obsequies, executed in favour of the first Plaintiff a deed of conditional sale of the lands, whereby that sum was made repayable at the end of Joistee, 1251, F.S.; and it was alleged that the Defendants having failed to pay at the expiration of that term, [552] the first Plaintiff was about to apply for a foreclosure, but was then prevented by the Defendants obtaining possession of the Deed by means of practising with his servants, of which the first Plaintiff gave notice to the Police and Magistrate, and having obtained a copy of the Deed applied, on the 25th of August, 1851, to the Judge for foreclosure. The plaint contained no allegation that notice was issued by the Judge under Reg. XVII. of 1806, sec. 8, or served on the Defendants, as is required by that section, but simply submitted, that as the consideration was not repaid within the fixed period, the lands became foreclosed and the property of the first Plaintiff on the 25th of August, 1852, when, as the Plaintiff contended, the year of grace expired, and his cause of action accrued. The plaint proceeded to allege, that the Plaintiff was so much occupied as to be unable to obtain a copy of the foreclosure proceedings and institute a regular suit before those papers, with other records, were burnt during the Indian Mutiny; that he had on the 21st of August, 1861, and again the 10th of May, 1862, made applications to have the foreclosure proceedings furnished him, but that on the opposition of the Defendants, who set up an Ikrarnamah (or agreement) and an application to the Judge, both purporting to proceed from the Plaintiff, but which he denied, his applications were struck off, and he was referred to a regular suit. That, to find means to sue, he had given a half-share in the suit to the second Plaintiff, and they both now sued for possession in equal shares, with mesne profits to the second Plaintiff exclusively, and costs to both.

The first Respondent, by her written statement, or answer, alleged that the deed of conditional sale was [553] not formally executed, that no consideration whatever was given, nor had the Plaintiff any means to do so; that the deed was never delivered to him, but remained in her hands. That the reason of the execution of the deed nominally to the Plaintiff, who was her Brother, living under her roof in entire dependence on her and without any means, was that after her Husband's death she was threatened with litigation by her Husband's heirs, and to save the property from them she prepared the Deed, gave notice of it to the Court, and then got it back, but that no actual execution ever took place. That in the suit, *Arhat Singh v. Mussamat Pran Peary, Mussamat Rakaba, and Ram Surun Singh*, brought by her Husband's heirs, the Deed was held to be invalid, and that the Plaintiff did not appeal then against such ruling. That in the year 1851, when the Plaintiff applied for foreclosure, she met him by a statement of the facts, and that then the Plaintiff and the Defendants having arranged matters, such arrangement was embodied in an Ikrarnamah, dated the 30th of January, 1852, which the Plaintiff executed, and acknowledged in Court in the foreclosure suit, and that on the strength of that arrangement the foreclosure suit was struck off, and submitted that the Plaintiff could not now claim contrary to his Ikrarnamah; and the Defendant further submitted, that according to the terms of the Ikrarnamah, the Plaintiff had forfeited all claims even after her death, by his conduct, and referred to the long delay in suing, as corroborative of her case.

The second Respondent put in her written statement, which was, in substance, to the same effect, and asserted that the Plaintiff's allegation as to the foreclosure having been effected in 1852, was untrue.

[554] The Plaintiff, in his replication, asserted the *bona fides* of the conditional

sake, the payment of, and his competency to pay, the consideration money, and again denied his execution of the Ikrarnamah or presentation of the petition of 1852, and contended that Defendants ought not to be allowed to allege facts contrary to their statements in Arhut Singh's case.

Afterwards the Respondent, Inruti Lall, intervened, and was admitted to defend his interest as lessee of the female Defendants.

The Plaintiff called no witnesses, but gave his own deposition as to the execution of the mortgage Deed, the payment of the consideration money by him, and the former possession of the Deed, and he relied on the estoppel of the Defendants by reason of their having pleaded that the deed was *bona fide* executed.

The Plaintiff called no witnesses, but gave his own deposition as to the execution December, 1841, in the suit of *Arhut Singh v. Mussumat Pran Peary, Mussumat Rakaba, and Ram Surun Singh*, and the Plaintiff and others, for the purpose of establishing the estoppel on which he relied. That decision, in substance, so far as is material to state, was to the effect, that the Plaintiffs, Arhut Singh and others, sued for possession of the same lands on the ground that they had been ancestral joint property of their ancestral and the female Defendants' Husband; that the female Defendants, therefore, had no right to them after their Husband's death, and they charged that a conveyance to Ram Surun Singh, the now Appellant, was made to deprive them of their rights. That the female Defendants denied that the property in suit was ancestral, and asserted it came rightfully to them from their [555] Husband, and insisted that they had power to alienate to meet urgent requirements under the Hindoo law, and that they had accordingly executed a conditional sale to the Appellant, Ram Surun Singh, to pay debts and expenses of obsequies, and that Ram Surun Singh, was not so poor as the Plaintiffs alleged. Ram Surun Singh, also put in an answer to the same effect, in which he showed how the consideration was made up. The Principal Sudder Ameen tried the case as one depending on the question of whether the property in suit was joint, and decreed in favour of the Plaintiffs for certain of the properties in suit after the death of the female Defendants, and declared the right of the latter to alienate other portions, and held that the alienation to the Appellant was invalid, as being of ancestral property, and left him to pay his own costs. That from this decision the Plaintiffs in that suit appealed, the Appellant acquiescing therein, and the Sudder Dewanny Court, on the 27th of December, 1841, reversed the decree of the Lower Court, and dismissed the Plaintiff's suit on the ground, that they had failed to show the property in suit was joint, and could, therefore, have no right to claim during the lifetime of Sheodyal's Widows (the Defendants, the present Respondents), and the Judges of the Sudder Court expressly stated that they decided nothing else than the above.

The Plaintiffs' case was, that no such repayment was made him on or before the month of Jeyt, 1251, F.S., and that he made no application to foreclose until about seven years after the last-mentioned date, when, on the 25th of August, 1851, he filed a petition for foreclosure, in which he gave as a reason for not proceeding earlier, that his deed and receipt [556] were missing, having been either lost by him, or stolen from him by one Munnoo Singh, the Respondent's servant, of which he had given notice to the police. The Plaintiff offered no evidence from the police-office as to any such loss or notice, and the evidence given by the Respondents showed the falsehood of the statement as to either of those documents having been ever in his possession, and that they all along remained in that of the Respondents, who produced them. The evidence of the Vakeels employed by the Plaintiff and the Defendants during the foreclosure proceedings and compromise of them, as also that of several other Witnesses, showed that the documents were during the foreclosure proceedings in 1851-2 produced by the Respondents' servants, and were returned to them, and that the Appellant at that time gave no evidence as to having been robbed of them. The evidence of the Witnesses, Mphunt Gossain Sheo Churn Geer (the spiritual adviser of the family of the Respondent, Inruti Lall, then the female Respondent's legal adviser, and Writer of and attesting Witness to the Ikrarnamah of 1837), of Nurkoo Singh, the Respondent's Nephew, and an attesting Witness, and that of several others, was to the same effect as to the retention of the deed and receipt and Ikrarnamah by the female Respondent, and proved that no consideration whatever passed, and that at that time the Plaintiff was entirely

without means, and a dependant for support on the bounty of the first Respondent, his Sister, which was in part admitted by the Plaintiff himself in his deposition. As to the execution of the Ikrarnamah of the 30th of January, 1852, and the petition to the Judge to give effect to it, the evidence given by [557] the Defendants was conclusive, and beyond a simple denial by himself in his deposition, the Plaintiff offered no evidence in opposition, or to explain how that petition came to be presented; or why he, having petitioned for foreclosure in August, 1851, took no further action in that matter until the 5th of September, 1862.

The Principal Sudder Ameen (Moulvie Iradut Alby Khan) by his judgment, dated the 15th of February, 1864, found against the Plaintiff on all the issues, from which the Appellants on the 13th of May, 1864, preferred their petition of appeal to the High Court. The Plaintiff did not therein rely on his own evidence, or take exception to its rejection by the Court of First Instance, but relied on estoppel alone as to the character of the transaction of conditional sale and passing of the consideration. He to some extent admitted he had been unable to prove the foreclosure, but contended that it should be taken as proved. He also impugned the second Ikrarnamah and petition thereon as forgeries.

On the 21st of September, 1864, a Division Bench of the High Court, consisting of Messrs. C. Steer and E. P. Levinge, affirmed the judgment of the Principal Sudder Ameen and dismissed the appeal. The Division Bench dealt with no other question than that of the estoppel contended for by Appellant; and from the judgment of Mr. Justice Steer it appeared that the Appellant abandoned all other contention before the High Court. On the point of estoppel, the Division Bench held there was none, and that on the evidence they were quite satisfied that the alleged mortgage was fictitious and fraudulent.

[558] This appeal was from this decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants.—We submit that the decree is wrong, the High Court ought to have held that the Defendants (the two first Respondents) were estopped and concluded by their own pleading and admissions in record in their answer in the suit of *Ahrut Singh v. Mussumat Pran Peary and others*, in which they pleaded, and are in evidence, the two instruments, constituting a conditional mortgage, and cannot now deny or contest the validity and legal effect and operation of those instruments. They could not legally set up their own alleged fraud, as a defence to prevent the operation of their own Deed of conditional sale and conveyance of the Talooks and Mouzals executed in favour of the Appellants. Even if the Courts were right in deciding that the two first Respondents were not estopped from setting up such defence, yet the Courts were wrong in shifting the *onus* of proof on the Appellants, inasmuch as the making and execution of the Deed of conditional sale and the receipt for the consideration therein was admitted by them, the *onus* of proving the statements relied on by the latter, to establish the invalidity of the Deed lay on them. The Court ought, therefore, to have decided that the evidence adduced by them was insufficient to prove the statements, so far as the same were in contradiction of their admission in the answer, and decreed in favour of the validity of the deeds.

[559] Mr. Doyne, appeared for the two first Respondents, but was not called on to address their Lordships.

Judgment was delivered by

The Right Hon. the Lord Justice James.—In this case their Lordships are of opinion, that it is impossible to treat this Deed of conditional sale and mortgage as creating any estoppel. It is sought to be enforced by a person out of possession. It is in truth the case of a common mortgage in which the Defendants says there never was the money advanced. It is open to a Mortgagor in this Country to deny that the money, the receipt of which is formally acknowledged under his hand and seal, was advanced, and to cut it down to a nominal sum or nothing. That being so, and the instrument being relied upon by a person out of possession seeking to obtain possession through the medium of a foreclosure suit, it appears to their Lordships that there is nothing whatever to prevent the Defendant from showing the real truth of the transaction. Then with regard to the supposed estoppel by pleading, it is equally clear that a pleading by two Defendants against the suit of

another Plaintiff never can amount to an estoppel as between them. Their Lordships are satisfied that the decision of the High Court was quite right. Their Lordships will, therefore, advise Her Majesty that it be affirmed and the appeal dismissed with costs.

[560] PATTABHIRAMIER.—*Appellant*; VENCATAROW NAICKEN and NARASIMHA NAICKEN.—*Respondents* * [Dec. 9 and 10, 1870].

On appeal from the Sudder Dewanny Adawlut at Madras.

The doctrine of the English law with respect to the equity of redemption, after default of payment of the mortgage money, is unknown to the ancient law of India prevailing in Madras, which, in the absence of any Regulation, or Act of the Legislature, altering such law, determines the interest of a Mortgagor, in favour of the Mortgagee under a conditional sale made absolute by failure of the Mortgagor to redeem at the time specified in the Deed [13 Moo. Ind. App. 570].

The provisions of Ben. Reg. XVII. of 1806, allowing, in respect of Bye-bil-wuffa, the Mortgagor, or his representatives, to redeem at any time before foreclosure has not been extended to Madras [13 Moo. Ind. App. 569].

A Bye-bil-wuffa, or mortgage and conditional sale usufructory, was executed in 1808, and the Mortgagees were put in possession. The Deed contained a condition that if the Mortgagor failed to redeem, within five years, the conditional sale was to be absolute. The Mortgagor failed to redeem within the stipulated period, and the Mortgagee afterwards, without having foreclosed, sold the mortgaged premises. In 1853 the Mortgagor's representative brought a suit against the Purchaser, under Mad. Reg. XXXIV. of 1802, sec. 8, to redeem the estate. Held, that the interest of the Mortgagee, after the expiry of two years, became absolute.

Where there had been great and unexplained delay, after special leave to appeal had been granted, in bringing the appeal to a hearing, the Judicial Committee, in reversing the decree, refused the successful Appellant his costs [13 Moo. Ind. App. 572].

In this case the appeal was brought from the decree of the late Sudder Dewanny Adawlut at Madras, made in a special appeal, which reversed a previous decree of the Principal Sudder Ameen of [561] Combaconum, from whose decision there had been no regular appeal, and which affirmed a previous decree of the District Moonsiff of Nannilam, which had been reversed, both as to its finding on the facts, and the law, by the decree of the Principal Sudder Ameen.

The suit out of which the present appeal arose, was brought by the Respondents against the Appellant, the Purchaser, to eject him from the possession of lands appertaining to three villages in the Talook of Nannilam, in the Madras Presidency, which he held under a conveyance for valuable consideration, and partly under an equivalent exchange of other lands.

The suit, as alleged in the plaint, was brought under Mad. Reg. XXXIV. of 1802, sec. 8, to redeem the lands, mortgaged by the adoptive Father of one Plaintiff and the Uncle of the other, forty-five years before the institution of the suit; and in order to bring it within the provisions of that section, it was further alleged, that a mortgage Bond had been executed by the original parties, stipulating that the mortgagee should enjoy the lands in lieu of interest, and that if the principal should be paid "in the season of harvest of any year," the Mortgagee should receive it and give up the lands, of which possession was then given to the Mortgagee and it was also alleged that this mortgage debt had been liquidated from the usufruct of the lands. The period of limitation, it was admitted, had long previously elapsed,

* Present: Members of the Judicial Committee,—The Right Hon. Lord Chelmsford, the Right Hon. Sir James William Colville, and the Right Hon. the Lord Justice Mellish, Assessor,—The Right Hon. Sir Lawrence Peel.

but it was at the same time contended, that the Mortgagee was bound, under the express condition in the alleged mortgage Bond, to allow of redemption and re-possession of the lands by the [562] Mortgagor at any subsequent time, and whenever the Mortgagor thought fit to demand it.

The questions raised were, first, one of fact, whether such alleged mortgage Bond as set up by the plaint, had been executed by the parties in supercession of a deed of Mortgage and conditional sale, dated the 13th of June, 1808, put in evidence by the Defendants (marked as Exhibit No. 1), admitted to have been executed by the Mortgagor and Mortgagee. That deed providing that the Mortgagor might redeem the lands in question by a payment to the Mortgagee of the principal moneys within a fixed period of five years, and that, on default, the Mortgagee and his posterity were to enjoy the lands as if the transaction had been from the first "an absolute sale, with the right of alienating the same by gift or sale," etc. The second question was one of law, namely, as to the effect to be given to the condition in the above deed of Mortgage and conditional sale, both with reference to the original parties thereto, and to the Appellant, who had purchased after the default, and to whom the lands had been sold and conveyed by the heir of the Mortgagee under the special condition, and the express power of alienation thereby given; and also, whether the suit was barred by the Regulations of Limitation.

By the decrees of the District Moonsiff (Sundaraiyar), dated the 9th of November, 1857, it was declared, that the alleged Mortgage Bond set up by the Plaintiffs (as well as certain alleged Letters purporting to contain admissions by the Mortgagee or his heirs that the Mortgage was subsisting after the expiration of the five years), had been, in his opinion, proved by the Plaintiffs' evidence, and that, therefore, [563] he was entitled to redeem; further, that the suit of the Plaintiffs was not barred by the Regulations of limitation, and that on repayment to the first Defendant, an heir of the Mortgagee, by the Plaintiffs of the principal moneys lent on the mortgage, the first Defendant, and the Appellant, the third Defendant, and the fourth Defendant should deliver to the Plaintiffs the lands, and that the Defendants should pay all the costs, save of the second Defendant, who was ordered to bear her own costs.

On appeal, the Principal Sudder Ameen (Rangasawmy Pillay,) by his judgment, dated the 4th of December, 1858, reversed the decree of the Moonsiff, on the ground, that the alleged mortgage Bond, set up by the Plaintiffs, had not been proved; that the Letters were forgeries; and that the Deed of mortgage and conditional sale (Exhibit No. 1) was the only Deed executed relating to the lands in question; and further, that as the Deed stipulated that the lands should be redeemed within the five years, on payment of the principal, and on default by the Mortgagor, the same should be considered as absolutely sold, with full power to alienate by sale or gift, etc., that the lands became on such default absolutely sold, as the effect of the express condition to that effect.

A special appeal from this decree was instituted by the Plaintiffs, and such appeal was admitted by the late Sudder Dewanny Adawlut on a single point of law, whether the Exhibit No. 1 (the Deed of mortgage and conditional sale) conveyed to the Appellant an absolute right to the property in issue as his by deed of sale.

By the decree of the Sudder Dewanny Adawlut, [564] dated the 11th of April, 1860, on the special appeal, it was decided by that Court, that a penalty of this nature the Court does not give effect to, and, therefore, the Plaintiffs' right to redeem had remained to them; that as respected the operation of the Act of limitation, it was to be observed that the Act would only run against the Plaintiffs from the time they might have tendered the sum of the mortgage, and that the Defendants might have refused to accept it, and make over the lands. It was not alleged that any such tender or refusal had occurred. The Court resolved, therefore, to set aside the decree of the Principal Sudder Ameen, and to affirm that of the District Moonsiff.

As the value of the subject in suit was below Rs. 10,000, on a petition to Her Majesty in Council, special leave to appeal was granted on the 16th of April, 1861, on the ground of the great general importance in point of law with respect to the application of the Regulation of limitation and of the equitable doctrines in the Sudder Court, and enforcement of such doctrines as against a Purchaser for value without notice.

No appearance having been entered for the Respondents, the appeal was heard *ex parte*.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.—As there was no regular appeal from the Principal Sudder Ameen's decree, his finding upon the facts must be taken as conclusive. The late Sudder Court, contrary to the express condition of the Deed of mortgage and conditional sale, decreed redemption on pay-[565]-ment of the principal moneys, and ordered possession to be given of the lands enjoyed by the Appellant, a *bona fide* Purchaser for valuable consideration. We insist, that this finding is wrong, as the special condition contained in the Deed took the transaction out of the category of a simple mortgage by providing, that on the default of the Mortgagor in making payment of the principal sum, due within five years, the transaction should become *ipso facto* an absolute sale, and that is, we contend, the present law of Madras, as in Bengal, *Forbes v. Amceeroonissa Begum* (10 Moore's Ind. App. Cases, 348); *Sureefoonissa v. Sheikh Enayet Hossein* (5 W. R. 88); *Shureenth Oola Choudree v. Gunga Pershad Sookul* (9 Ben. Sud. Dew. Rep., 229); *Marshall's Guide to the Civil Law*, secs. 143, 144, p. 611 [2nd Ed.]. By the ancient law of India, if there was no redemption of a pledge within a given day it operated as a forfeiture, *Colebrooke's Dig.*, Vol. I. pp. 183, 184 [Ed. 1801.]. *Mad. Reg. XXXIV. of 1802*, sec. 8, enacts, that the questions at issue are to be determined according to the former customs of the Country. That certainly must be the ancient law of India, in force at Madras, as the provisions of *Ben. Reg. XV. of 1793*, and *XVII. of 1806*, have never been extended to Madras. It cannot be effectually maintained, that the *Mad. Reg. of limitations II. of 1802*, sec. 18, cl. 4, does not apply. The Appellant and those through whom he claimed title to the lands had, previously to the institution of the suit, held possession as proprietors without interruption for upwards of thirty years, and under sec. 18, of *Mad. Regulation*, such possession ought to have been held as proof of a sufficient right of property in the Appellant.

[566] Judgment was reserved, and now delivered by

The Right Hon. Lord Chelmsford (Jan. 20, 1871).—In this case the Appellant claims to be the absolute Owner of the lands in question under several conveyances from the first and second of his co-defendants in the suit, or from those whom they represent. That the title of his Vendors or their ancestor was originally a mortgage title is undisputed; and the suit out of which the appeal has arisen was brought, in October, 1853, by the representatives of the Mortgagor to redeem the property, alleging it to be still redeemable. The decision of the Court of First Instance was in their favour, but that was reversed by the Principal Sudder Ameen of Combaconum, who decreed in favour of the Appellant. His decree was reversed by the late Sudder Dewanny Adawlut of Madras on special appeal; and the present appeal is against the decree of that Court.

The Sudder Court, having no jurisdiction to determine on special appeal any question of fact, and there being no cross appeal to Her Majesty in Council against the decree of the Principal Sudder Ameen, their Lordships must accept his findings on the facts as conclusive.

Those findings were:—

First, that the original contract between the Mortgagor and the Mortgagee was contained in the deed of conditional sale, dated the 13th of June, 1808, and is there called Exhibit No. 1; and that the Plaintiffs had failed to establish that there was any other instrument of mortgage.

Second, that Exhibit No. 2, purporting to have [567] been executed on the 16th June, 1861, upon which the Appellant had relied either as a confirmation of the then absolute title of his Vendors, or as a conveyance or lease of the right of redemption to them, was not a genuine document.

Third, that certain Letters, put in by the Plaintiffs in order to prove acknowledgments by the Mortgagees that the mortgage was a subsisting and redeemable mortgage as late as 1851, were also forgeries.

The conclusion of law which the Principal Sudder Ameen drew from his first finding was, that under Exhibit No. 1 the title of the Mortgagees became absolute on the 10th of June, 1813, by reason of the failure of the Mortgagor to redeem at

that date; and the special appeal was admitted to try the correctness of that conclusion. Hence, the sole question for their Lordships' determination is whether, under the law of the Madras Presidency, the interest of a Mortgagee under a Deed of conditional sale does or does not become absolute, according to the terms of the contract, by the mere failure of the Mortgagor to redeem at or before the time specified in the deed.

This form of security being common in India, the question is of very general importance, and on that ground the Appellant obtained Her Majesty's special leave to prosecute this appeal, which, after considerable delay, has, unfortunately, come on to be heard *ex parte*.

The contract embodied in Exhibit No. 1 was, that the Mortgagee should hold possession of the land for five years, paying the Government revenue; that the Mortgagor should repay the principal and redeem the land on the 10th of June, 1813; and that, in [568] default, the Mortgagee and his posterity should enjoy the land as if the transaction were an absolute sale, with the right of alienating the same by gift, sale, etc.

The transaction then was one of mortgage by Bye-bil-wufa or Kut-kabala usufructuary: the usufruct of the property to be taken in lieu of interest. And the first question that suggests itself is, was there any rule of law to prevent the Court from giving effect to such a contract according to the intent and meaning of the parties plainly expressed by its language?

That this form of security has long been common in India is notorious. The fact is stated in the preamble to the Ben. Reg. I. of 1798. That such contracts were recognized and enforced according to their letter by the ancient Hindoo law appears from several passages in Colebrooke's Digest (vol. I. pp. 183, 187, 188, and 193). That they were equally recognized and enforced between Mahomedans is shown by Mr. Baillie in his introduction to his learned work on the Mahomedan law of sale. If the ancient law of the Country has been modified by any later rule, having the force of law, that rule must be founded either on positive legislation, or on established practice.

Nothing concerning such contracts is, so far as their Lordships are informed, to be found in the Statute Law relating to the Presidency of Madras except Mad. Regulation, XXXIV. of 1802. The 8th and 9th sections of that Regulation extended to Madras, the provisions of the 10th and 11th sections of the Ben. Regulation, XV. of 1793. Both these Regulations were passed with the object of fixing the [569] legal rate of interest, and of preventing the taking of interest in excess of it: and both have since been wholly or in great part repealed with other usury laws by Act, No. XXVIII. of 1855. The clauses in question affected only that part of the contract now under consideration which related to the usufruct of the property. As to that they may have made it necessary, contrary to the intention of the parties, to take upon a redemption an account of the rents and profits as between Mortgagor and Mortgagee in possession, compelling the latter to set what he might have received in excess of legal interest against the principal: but they neither extended the time of redemption nor imposed upon the Mortgagee, when the Mortgagor had failed to redeem within the stipulated period, the obligation of taking any judicial or other proceedings in order to make his title absolute.

In Bengal there was further legislation. In that Presidency, Regulation XVII. of 1806, was passed, which allowed a Mortgagor, who had executed such a security as that now in question, to redeem at any time before the Mortgagee had finally foreclosed the mortgage by taking the proceedings which the Regulation made essential to foreclosure.

It is, however, unnecessary to observe that this Bengal Regulation had of itself no force in the Presidency of Madras. And their Lordships cannot find, either in the Madras Regulations or in the Acts of the Indian Legislature subsequent to the Charter Act of 1834, any Act, by which similar provisions have been enacted for Madras.

That, in cases to which Regulation XVII. of 1806 does not apply, the interest of a Mortgagee under a [570] Deed of conditional sale becomes absolute according to the terms of the contract, by the mere failure of the Mortgagor to redeem within the stipulated period, has recently been decided by a full Bench of the High Court

of Bengal in the case of *Surreefootussa v. Shaikh Enayet Hossein* (5 Weekly Reporter, p. 88). In that case the mortgage bore date the 30th of November, 1801; the mortgage was made payable on the 28th of September, 1806. The Mortgagor sued for redemption, and the Mortgagee admitted that there had been no foreclosure pursuant to the Regulation. The High Court, however, ruled that, if the Regulation did not apply, the interest of the Mortgagee became absolute on the 28th of September, 1806, and, finding that the Regulation had not been promulgated, and, therefore, had not become operative in the District until the 7th of January, 1807, dismissed the Plaintiff's suit. The point, so decided, is also assumed to be law in the judgment delivered at this Board in the case of *Forbes v. Amceeronissa Begum* (10 Moore's Ind. App. Cases, 348); and unless it be law it is difficult to see why the Regulation of 1806 was passed.

Their Lordships have been unable to discover that there has been any course of decisions in the Court of Madras, which can be set against the authority just cited. The utmost that can be gathered from this record is, that some uncertainty concerning the operation of these contracts may have crept into the Lower Courts of Madras. If the Principal Sudder Ameen was right in thinking, that this afforded a reason why the Appellant had sought to strengthen his title by the production of the false Deed No. 2, [571] it is to be observed that the Plaintiffs, on the other hand, showed their sense of the uncertainty of the law by setting up the false case that another form of mortgage had finally been substituted for the Deed of conditional sale. Moreover, the Sudder Court does not rest its judgment upon decided cases. The first reason advanced in support of that judgment is clearly untenable. That a party is precluded from relying upon a title established by a Deed conclusively found to be genuine, because he has foolishly and wickedly set up a false Deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title, is a proposition for which there is no foundation either in reason or in law. Nor does the second reason assigned for the judgment appear to their Lordships to be better founded. It assumes that an obligation lay on the Mortgagee to do some act by way of enforcing what is not very correctly termed the penalty; and that there could be no adverse possession against the Mortgagor until there had been a tender and refusal of the mortgage money. But this assumption implies that in some way or another the rights and obligations of the parties as defined by the contract had been qualified by a known rule of law. Their Lordships have already stated that, so far as they can discover, no such qualifications have been introduced, as in Bengal, by any act of legislation into the Statute Law applicable to Madras. What is known in the law of England as "the equity of redemption," depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of [572] India: and if it could have been introduced by the decisions of the Courts of the East Indian Company, their Lordships can find no such course of decision. In fact, the weight of authority seems to be the other way. It must not, then, be supposed that in allowing this appeal their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the law of the *Forum*, wherever such may prevail, or to affect any title founded thereon.

Their Lordships, therefore, being of opinion, that the decree under appeal is erroneous and ought to be reversed, and that the special appeal to the Sudder Court ought to have been dismissed with costs, will advise Her Majesty accordingly. But considering the great and unexplained delay which has taken place in the prosecution of this appeal, they do not think that they ought to give the Appellant the costs of it.

[Explained and approved, *Thumbasawmy Mudelly v. Mahomed Hossain Rowthen*, 1875, L.R. 2 Ind. App. 241; see also *Balkishen Dass v. Legge*, 1899, L.R. 27 Ind. App. 66.]

[573] MUSSUMAT MITNA, *Appellant*, SYUD FUZL RUB, MUSSUMAT CHUTTO BEBEA, HIDAYUTOONISSA BIBEE, SHEIK MAHOMED AMEENODDEEN, SHEIK MAHOMED FUTTEHOOLLAIL, and SHEIK NUSEEROODDEEN, *Respondents* * [Dec. 10, 1870].

On appeal from the High Court of Judicature, North-Western Provinces, Agra.

Although it is the duty of the Judge of the Court of First Instance to settle and record the issues, as provided by secs. 139 and 140 of the Civil Code of Procedure Act, No. VIII. of 1859, yet there is no positive provisions in that Act which make the omission by the Judge to settle issues fatal to the trial of the suit [13 Moo. Ind. App. 582].

No issues were settled or recorded by the principal Sudder Ameen, and no objections taken on that ground by either party, and after hearing evidence a decree was made. On appeal to the High Court, an objection was made on the ground of the omission of issues, but the Court being satisfied with the evidence, decided the appeal on the merits. Held, by the Judicial Committee, that the High Court acted rightly, as it had a discretion to remand the case under sec. 354 of the Act, No. VIII. of 1859, and, as there had been no failure of justice in consequence of the omission to settle and record the issues, they refused to remand the case for settlement of issues and a retrial.

The case of *Baboo Rewun Pershad v. Jankee Pershad*, 11 Moore's Ind. App. Cases, 25, observed on [13 Moo. Ind. App. 582].

The Appellant brought this suit to recover the amount alleged to be due on a Bond signed by Respondent, Syud Fuzl Rub, on behalf of himself and the Respondents, Mussumat Chutto Bebea, Hidayutoonissa Bibee. The two first Respondents ad-[574]mitted the Bond by a plea of confession. The last Respondent admitted the making of the Bond on the expectation that the consideration would be paid, but denied any liability upon it on the ground of fraud and non-payment of the money.

The other Respondents intervened in the suit on the ground that the Bond was fraudulent and intended to defraud them as Creditors of the parties making the Bond.

The Appellant brought the suit to recover the money mentioned in the Bond, and filed the Bond in Court, when it was found to have been torn and pasted together. The Appellant only sued the parties who were Obligors on the Bond, whereupon the Respondents, Sheik Mahomed Ameenooddeen, Sheik Mahomed Futtehoollah, and Sheik Nusseerooddeen, intervened and objected on the ground that the Bond was fraudulent, having been, in fact, cancelled, and they were admitted as Defendants.

Syud Fuzl Rub and Mussumat Chutto Bebea filed an admission of the Bond being genuine and binding on them, but the Respondent, Mussumat Hidayutoonissa, by a written statement alleged the Bond to have been given without consideration and to have been cancelled, and the other of the Respondents put in written statements alleging that the Bond was false and fraudulent.

The Principal Sudder Ameen (Mr. A. W. Wollaston), without framing issues of law or fact, examined the Witnesses in attendance adduced by the several parties.

The material facts and the nature of the evidence adduced appear in the judgment of the Principal Sudder Ameen.

[575] On the 5th of July, 1867, the Principal Sudder Ameen dismissed the suit with costs. In his judgment he stated:—

"Had Syud Fuzl Rub actually received the money from Plaintiff, he would have paid up Heenga Mull and his other Creditors, whose names are mentioned in the Bond, which he did not do. Instead of that, he borrowed Rs. 12,000 from Rae Manik Chund, another Banker, on the 17th of September, 1862, just twenty days after the date of the Plaintiff's Bond, and it was out of that Rs. 12,000 that he paid

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish.

up the claims of Heenga Mull, Choone Lall, and Baboo Lall. Again, in less than six months, *i.e.*, on 14th of February, 1863, he borrowed a further sum of Rs. 12,000 from the same Heenga Mull, to pay up the claims of other Creditors, viz., Buldeo Narain *alias* Chootoo Lall, and others. As to the six Witnesses put in by the Plaintiff, I place no faith in their testimony. They are interested in the Plaintiff's and Syud Fuzl Rub's success as regards this suit, in which the demand has risen from Rs. 10,000 to Rs. 21,333:5, by addition of interest. They all profess to have seen the money paid by Kashipershad to Syud Fuzl Rub, yet five of them say it was paid at five P.M. near evening; but Usghur Ali says it was paid at nine A.M. Again, Kashi Pershad, who was Syud Fuzl Rub's Mokhtar at the time, says, that out of the Rs. 10,000 Rs. 5000 was taken by Syud Fuzl Rub and himself to Heenga Mull's house that same night to clear off Heenga's debt; but the Witness, Goorbuksh Rae, who also professes to have gone with the money and with Syud Fuzl Rub to Heenga's house, says the amount was Rs. 10,000; these Witnesses also differ widely as to the persons who were present at the payment of [576] the consideration. Names mentioned by one are omitted by others, and *vice versa*; and the strongest thing is, that not one of them, not even Kashi Pershad, can say what Syud Fuzl Rub did with that Rs. 10,000 *i.e.*, which of his Creditors was paid out of it. As to the money said to have been taken to Heenga Mull's, the two Witnesses who mention this incident, also say, that it was brought back the same night, as Heenga refused to receive it. Nor are the Witnesses agreed as to whether this money was paid before or after registration of the Bond. Again, the Bond in question gives the Plaintiff the power to sue at once for his money in the event of any other creditor suing or taking out execution against Syud Fuzl Rub, or on the occurrence of any one of several other contingencies, yet when suits were filed and decrees were given against Syud Fuzl Rub on all sides, and his property advertised for sale, the Plaintiff took no action upon his bond; and, instead of suing on the Bond for Rs. 10,000, he sued Syud Fuzl Rub on a subsequent Bond of 1863, for a much smaller amount (*i.e.*, for Rs. 2000) which was a *bona fide* instrument on which consideration had really passed. I notice, also, that two of the witnesses (for Defendants) have filed Bonds, one for Rs. 175, dated 14th of September, 1865, and the other for Rs. 432, dated 9th of December, 1862, filed by Atta Hosein and Hyder Hosein respectively, to show that in their case too Plaintiff got them to execute the Bonds and have them registered, and yet at the last moment declined to let them have the money. The Plaintiff has filed a great number of exhibits by way of documentary evidence, tending to show that Beharee, a Banker, was a man of substance; but I do not see the use of these [577] documents, as the liability of Beharee to lend Rs. 10,000 is not questioned. There are two papers to show that, in a former suit, also, some of the Defendants denied the payment of the consideration on another Bond, and were mistaken. But those papers are no proof that the Defendants are mistaken in the present case also. I, therefore, dismiss the claim with costs. In addition to her own costs, the Plaintiff will pay the costs of Hidayutoomissa as one party, and of the remaining Defendants as another party, and no more."

The Appellant appealed from this judgment to the High Court, and on the 26th of November, 1867, a Division Bench, consisting of Messrs. A. Ross and W. Roberts, affirmed the Principal Sudder Ameen's decree. The material part of the judgment of the Court was in these terms:—

"It is much to be regretted, we think, that, considering the great value of the matter in litigation, the Principal Sudder Ameen should have fixed a day for the final disposal of the suit, without having previously settled the issues to be decided. The omission to fix issues, whether on a day previous to that fixed for hearing and deciding the suit, or on such day, would in most cases undoubtedly be a defect and an irregularity calculated to effect the merits of the case, and would necessitate a remand of the case to the Court of First Instance, in order that such defect of procedure might be cured. But, in this case, we think that the omission, although it is to be regretted, is not of that character. The only issue arising in the case is the simple one 'did any consideration pass on the Bond, or is the suit a collusive one, brought with a view of defrauding the Mortgagees [578] and Auction-purchasers?' From the Plaintiff's statements, and the evidence adduced in support of them we think it is quite clear that the parties perfectly understood the issues to be deter-

mined, and we do not consider, with reference to the evidence on the record, and the nature of the further evidence offered by the Appellant (Plaintiff), that the Plaintiff's case would, in any way, be benefited by such further evidence. We are of opinion, therefore, that there is sufficient evidence on the record to enable us to decide the case without remanding it to the Lower Court for further investigation, and re-decision. On the merits, we are of opinion, that the Plaintiff's appeal must fail. We concur with the Principal Sudder Ameen, and generally, for the reasons stated by him in holding that, notwithstanding that the Bond sued upon was at the time of the suit in the possession of, and was produced by the Plaintiff, the probabilities of the case are strongly against her. In the absence of conflicting oral evidence of a perfectly trustworthy character, we consider it highly improbable that the confessing Defendant Syud Fuzl Rub should, within twenty days of contracting the loan now disputed, have contracted a second loan for the payment of debts due to parties, some of whom are identical with those for payment of whom the first loan is said to have been contracted: that the Plaintiff should have lain by, negligent of her own interests, and contrary to the express conditions of her Bond, while the principal Defendants were contracting fresh loans of large amount, and while suits were being brought and decrees obtained and sued out against the Defendants: or that the Plaintiff herself should have sued the Defendants for the [579] recovery of a debt of comparatively small amount of a more recent date, while her larger and older claim remained unsatisfied: or, again, that she would have made to Defendants further loans, of small amount, without alluding to or reciting in the Bonds for such loans the larger debt of older date. Nor do we consider the explanations offered by the Plaintiff of her apparent negligence of her own interests sufficient to rebut the presumptions against her arising out of her conduct in the matter. We feel compelled, therefore, under all the circumstances of the case, to uphold the decision of the Principal Sudder Ameen, and to dismiss the appeal with three sets of costs, and interest thereon at six per cent. per annum."

The appeal was from this decreee.

Mr. Leith, and Mr. Doyne, for the Appellant.—There has been a miscarriage, and such a mis-trial as to render it incumbent on this Court to reverse the decisions appealed from, and remand the case to India for settlement of proper issues, and a re-trial of such issues. Nothing can be more dangerous in the administration of justice than to allow unprofessional Judges to decide a case without issues duly recorded. Here the Principal Sudder Ameen, without framing or recording any issues whatever, either of law or fact, as required by sec. 139, of Act, No. VIII. of 1859, the Code of Civil Procedure, examined Witnesses and made a decree. In so acting, we contend, that he proceeded altogether irregularly, and in contravention of secs. 139, 140, 144, and 145 of the Civil Procedure Act, which provides, that no evidence can be received except on recorded issues. Macpherson's New Civil Proc., p. 146 [Ed. 1871]. It was such a patent defect and [580] irregularity as would have justly necessitated a remand of the suit by the High Court, in order to give an opportunity to the parties to tender further evidence: but that Court erroneously refused to remand the suit, and simply decided the case by affirming the Principal Sudder Ameen's decision. The imperative necessity for recording issues, and the fatal effect of their omission, has been affirmatively settled by this Tribunal in a series of decisions both under the Regulation law, as well as the Code of Civil Procedure, Act, No. VIII. of 1859: first, with respect to construction of Mad. Reg. XV. of 1816, sec. 10, *Srimut Mootee Vijaya Raghunatha Gowery Vallabha Perria Woodar Taver v. Rany Anga Moottoo Natchiar* (3 Moore's Ind. App. Cases, 278). So with the Ben. Reg. XXVI. of 1814, sec. 10, cl. 3, *Ranee Cawnbas Koonwur v. Baboo Lal Bahadoor Singh* (9 Moore's Ind. App. Cases, 39): *Mohun Lal Sookool v. Goluck Chunder Dutt* (10 Moore's Ind. App. Cases, 1); and also in Bombay, *Sumbhoolal Girdhurlall v. The Collector of Surat* (8 Moore's Ind. App. Cases, 1); and under the Civil Procedure Code, Act, No. VIII. of 1859, secs. 139, 140, the same rule has been recognized, *Baboo Rewun Pershad v. Jankee Pershad* (11 Moore's Ind. App. Cases, 25): *Katchekaleyan Rungappa Kalakka Tola Oodiar v. Kachivijaya Rungappa Kalakka Tola Oodiar* (12 Moore's Ind. App. Cases, 495).

Upon the merits, we contended, that as the execution and registration of the Bond was admitted, and the evidence sufficiently proved the payment of the con-

sideration money, as well as the *bona fides* of the transaction, the Appellant was entitled to a decree.

[581] Sir R. Palmer, Q.C., and Mr. J. D. Bell, for the Respondents, Hidayutoonnissa Bebea and the three last Respondents.

The point now raised as to the effect of the omission to frame issues was distinctly brought before the Judges of the High Court, who, in their discretion, under section 354 of the Civil Procedure Act, No. VIII, of 1859, refused to remand the case to the Lower Court for further investigation and new trial. They were satisfied that there was sufficient evidence on the record to enable them to decide the case. Now, the question in the present appeal is one of fact only, and this Court will not reverse concurrent decisions of Courts in India, *Goshain Pota Ram v. Rajah Rickmance Bullub* (*ante* [13 Moo. Ind. App.], p. 77), *Rajah Leelanund Singh v. Rajah Mohendernarain* (*ante* [13 Moo. Ind. App.], p. 57), unless there has been a failure of justice. Here the suit was founded on a false and fraudulent claim, in pursuance of a scheme between the Appellant and the Respondent, Syud Fuzl Rub, to defraud Creditors, and the Appellant is on that ground entitled to no encouragement.

Their Lordships' judgment was delivered by

The Right Hon. Sir James W. Colvile.—It has candidly been admitted by the learned Counsel for the Appellant that in this case they would despair of inducing their Lordships to interfere with the finding of the Courts in India upon the questions of fact, and the conclusions which they have drawn from the evidence on the record. The question upon the appeal, therefore, is narrowed to this, has there [582] been in this cause such a mis-trial as renders it incumbent upon their Lordships to reverse the decisions under appeal, and to remand the case for the settlement of proper issues, and a re-trial upon those issues?

Their Lordships are desirous to avoid saying anything which may have the effect of introducing any laxity in the Courts of India in regard to the observance of those provisions of the Civil Procedure Code which direct the settlement of issues, provisions which their Lordships regard as most important. But they do not find in the Code anything which says positively that the omission to settle those issues is fatal to the trial. With respect to the former decisions of his Court, it is to be observed that the decisions upon the Regulations which preceded the passing of this Code of Procedure were not altogether uniform. Most of them show their Lordships' desire to maintain the strictness of the obligation on the Judges of the Country Courts to record the points to be tried, but there is one which has been cited by Sir Roundell Palmer, which certainly shows that they did not in all cases consider the omission to be fatal. Those Regulations, moreover, contained words to the effect that no evidence should be given except upon points which had been recorded. The case of *Baboo Rewun Pershad v. Jankee Pershad* (11 Moore's Ind. App. Cases, 26), which is a case upon the Code of Procedure, appears to have been complex, and the explanation given for what took place in that case, certainly shows that their Lordships may have been exercising a discretion which cannot now be questioned. All the cases cited, however, differ from the present case in this respect. In this case the omission [583] to raise the issues was brought before the notice of the appellate Court; the appellate Court expressed its regret, and their Lordships are glad to observe that it did express its regret that the Principal Sudder Ameen had omitted to settle the issues. The Court, however, nevertheless conceived that it was not under any positive obligation to remand the case; but seeing that the parties had gone to trial knowing what the real question between them was, that the evidence had been taken, and that the conclusion had been in the opinion of the appellate Court correctly drawn from that evidence, they thought it within their competence to affirm that decision without sending the case back for a re-trial. Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 354th section of the Civil Procedure Code. At all events, it appears to their Lordships that there is nothing in the Code which made it imperative upon the appellate Court, or now makes it imperative upon their Lordships, to yield to that objection, and, therefore, fully concurring in the observations made by the appellate Court that it was the duty of the Judge to settle the issues, and that it was much to

be regretted that he omitted to settle those issues, they still think that, under all the circumstances of the case, substantial justice having been done, there has not been the fatal mis-trial of the cause which vitiates all the proceedings and renders a new trial necessary.

Their Lordships, in coming to this conclusion, have had regard to the circumstance that no objection seems to have been taken in the Court below to dealing with the case without the settlement of the issues. If the objection had been taken, their Lordships think [584] that the Appellant would have stood on higher grounds, and it would then have been very difficult to say that a trial proceeding in the face of the objection could be held to be regular for any purpose. They do not, however, mean to affirm that mere waiver, or rather the omission to take the objection, is in all cases sufficient to purge the irregularity. They are of opinion, that if it had appeared that substantial justice had not been done, the objection might well have been taken when it was taken before the appellate Court, and when taken ought to have prevailed. But being of opinion that there has not in this case been a failure of justice in consequence of the omission to settle the issues, their Lordships are not prepared to send it back for further litigation, and they must, therefore, advise Her Majesty to dismiss the appeal with costs.

[See *Soorjomonee Dayee v. Suddanund Mohapatter*, 1873, L.R. Ind. App. Sup. Vol. 216.]

[585] MUSSUMAT OODEY KOOWUR,—Appellant; MUSSUMAT LADOO (Widow of BULDEO BUKSH), ROSHUN ALI, and SHOOJAUT ALI,—Respondents *
[Dec. 10, 1870].

On appeal from the High Court, North-Western Provinces, Agra.

A petition of review was heard in 1865 before four of the Judges of the Sudder Court at Agra, who were equally divided in opinion, and though by the 7th sec. of Ben. Reg. VI. of 1831, power is given in such circumstances to refer the suit for the opinion of one or more of the Judges of the High Court at Calcutta; no such reference appeared to have been made. Under the provisions of the Statute, 24th and 25th Vict. c. 104, the Crown, by Letters Patent, dated the 17th of March, 1866, abolished the Sudder Court at Agra, and erected instead a High Court for the North-Western Provinces. In August, 1866, the Chief Justice of the High Court for the North-Western Provinces re-heard the petition of review and made a decree. Held, that the Chief Justice had, by the 27th sec. of the Letters Patent, jurisdiction.

In a suit to redeem a mortgage, A., to avoid an objection taken as to parties, filed a petition disclaiming all interest in the estate. A. had then only an expectant right to the estate, but to which she afterwards became absolutely entitled. Held, in the circumstances, and in the absence of any consideration given to A., that the petition did not (1) operate as a conveyance of A.'s rights, or (2) as an estoppel to a suit by her for possession of the estate.

This appeal arose under the following circumstances:—

Buldeo Buksh, who was the Husband of the Respondent, Mussumat Ladoo, had two Sons, Kullyan Singh, and Shib Lall. The elder of these, Kullyan Singh, married the Appellant, and died in the life-[586]-time of his Father, leaving the Appellant a childless Widow. Upon his death Buldeo Buksh and his Wife, the Respondent, Mussumat Ladoo, gave their younger Son to be the adopted Son of this Appellant, he being an infant.

Buldeo Buksh had three estates, held rent-free from Government, one called

* Present: The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor.—The Right Hon. Sir Lawrence Peel.

Tanikya, and the two others called Omeepore and Umleera. These two last estates he mortgaged to one Chowdree Nusseroollah Khan, and they subsequently came into the hands of Dildar Ali Khan.

Litigation arose between Dildar Ali Khan and Buldeo Buksh, the former attempting to enforce a Bill of sale, the latter claiming to recover the estates from Dildar Ali Khan. It appeared that the litigation resulted in the estates remaining in the possession of Dildar Ali Khan at his death, and then of his heiresses, Mussumat Muhtab Koor, and Kareemoolnessa.

In 1857, Buldeo Buksh having died, his Widow, the Respondent, Mussumat Ladoo, instead of inserting her own name, had the names of the Appellant and Shib Lall entered in the proprietary column of the certificate of Buldeo Buksh's death.

As to the other estates of Omeepore and Umleera, it being necessary to take steps to redeem them from the heiress of Dildar Ali Khan, the Appellant accordingly, as Widow of Kullyan Singh, commenced a suit on behalf of herself, and as Guardian of Shib Lall, to redeem these estates.

It appeared that the Defendants in that suit took objection to her suing, instead of the Widow of Buldeo Buksh.

In consequence of that objection, the first Respon-[587]-dent intervened in the suit and presented a petition, which, after reciting the pendency of the redemption suit, proceeded as follows:—"Since the date of Kullyan Singh's demise, Buldeo Buksh, my Husband, and myself gave our Son, Sheo Lall, to Mussumat Oodey Koowur, to be adopted as her Son, and since then she has been his Guardian and protectress. Moreover, owing to my old age, infirmity, and imbecility, I also caused only the names of Oodey Koowur and Sheo Lall to be entered in the proprietary column of the certificate of death of Buldeo Buksh, and I have no claim whatever to the proprietary rights in the two villages in question, Oodey Koowur herself, and as Guardian of Sheo Lall, being their sole owner. I have now become very old and imbecile, and have no strength to go about, look after, or understand my affairs, and Mussumat Oodey Koowur herself, and as Guardian to Sheo Lall, my Son, is in every way proprietor and owner."

After the filing of this petition the Appellant proceeded with the redemption suit, and on the 21st of November, 1859, the Principal Sudder Ameen decided the case in favour of the heiress of Dildar Ali Khan.

Against that decision the Appellant, on behalf of herself and Shib Lall, appealed to the Sudder Dewanny Adawlut, at Agra, and while the appeal was pending, and on the 5th May, 1861, Shib Lall died in infancy unmarried, whereby the Appellant, as his adoptive Mother, as also by the relinquishment of the Respondent, Mussumat Ladoo, of her proprietary right, claimed to have become entitled to all the estate.

On the 25th of May, 1861, the Respondent, [588] Mussumat Ladoo, filed a petition in the redemption suit, alleging that the Appellant's position was only that of Guardian, and seeking to strike out her name and substitute the Respondent's as the Mother of the deceased, which the Court refused to do on the ground of the previous waiver of her rights.

The redemption suit, being heard on appeal, was decided in the Appellant's favour and remanded, and on the 21st of January, 1862, the Appellant obtained a final decree in the redemption suit, and took possession.

On the 10th of February, 1863, the first Respondent instituted the present suit, for possession of the three estates with mesne profits. The plaintiff denied the fact and validity of the adoption.

The Appellant by her answer relied on the adoption, and on the relinquishment by the first Respondent of her proprietary rights in her favour.

The Appellant put in evidence the petition whereby the first Respondent had abandoned her rights, and examined five Witnesses, to prove that fact.

On the 18th of August, 1863, the officiating Judge (Mr. R. Spankie) pronounced a decree in the first Respondent's favour for Mouzah Tanikya, and dismissed the case as to the other Mouzahs. As to that portion which, by dismissing the suit, the decree passed in the Plaintiff's favour, the Judge gave the following reasons:-- "The issues have been laid down separately, and are attached to this judgment with regard to the estates of Omeepore and Umleera, and the decree with reference to

them. There can be no question that the Plaintiff's claim must be dismissed. It is proved that on the 24th of August, 1859, she entirely waived all claim to these estates, filing and [589] attesting a petition to that effect in the Principal Sudder Ameen's Court at Allyghurh. This abnegation of her right was recognized by the Sudder Dewany Adawlut on the 27th of May, 1861, on her petition to have her name entered in the appeal of *Mussumat Oodey Koowur* (Plaintiff) Appellant v. *Muhtab Koowur* (Defendant) Respondent. The Court expressly declares that she had already distinctly waived all right and claim to conduct the case, and all her rights and interests whatever, and has formally resigned her rights to the Plaintiff, Oodey Koowur, both on her own part and as Guardian of Shib Lall. The Court ruled that Shib Lall was dead. Mussumat Oodey Koowur survived as Plaintiff in the case pending before them on her own part: they, therefore, declined to enter the Petitioner's name in the register of the suit. After this it appears to me that it is perfectly unnecessary to enter further into the merits of the Plaintiff's claim to these two estates of Omeepore and Unleera and the decree appertaining to them. This portion of the Plaintiff's suit must be dismissed."

Against that decree the first Respondent appealed to the Sudder Court at Agra.

On the 16th of June, 1864, the other Respondents having bought, from the first Respondent, a part of the interest in the estate in dispute, were added as parties.

On the 27th of August, 1864, the Sudder Court, consisting of Messrs. Lindsay and Simson, the presiding Judges, dismissed the appeal with costs.

The Respondent, Mussumat Ladoo, filed a petition of review, which was admitted, and on the 18th of March, 1865, the case came on for hearing on review. [590] before four of the Judges of the Sudder Dewanny Adawlut at Agra, consisting of Messrs. Edwards, Pearson, Ross, and Roberts.

Messrs. Edwards and Pearson held that the Respondent had not transferred her rights to the Appellant. The effect of their judgment, therefore, was that the decision, on appeal, should be reversed. Messrs. Ross and Roberts, in approving of the review being admitted, gave it as their opinion, that the acts of the Respondent were such as to relinquish to the Appellant a moiety of the two mouzahs of Omeepore and Unleera, but not to entitle the Appellant to succeed to the moiety which Shib Lall died possessed of, and consequently, the effect of their judgment was to modify the decision of the Court below by decreeing to the Appellant only one moiety of that property, to the whole of which, by the Court's decree, she had been declared entitled.

As the opinions of the Judges were equally divided, it was declared by the Court to be necessary, under Ben. Reg. VI. of 1831, section 7, to refer the case for the opinion of one or more of the Judges of the High Court of Calcutta.

It did not appear that any reference was made to the High Court of Calcutta, but on the 21st of August, 1866, the Crown by Letters Patent, dated the 17th of March, 1866, abolished the Sudder Dewanny Adawlut, and erected the High Court of Judicature at Agra instead. Sir Walter Morgan, Chief Justice of the High Court for the North-Western Provinces, heard the petition on review and decreed in favour of the Respondents, Mussumat Ladoo, Roshun Ali, and Shoojaut Ali.

The Chief Justice stating as the ground for such [591] decree his opinion as follows:—"I agree with the learned Judges, who think that the Plaintiff's petition of August, 1859, cannot be regarded as a disclaimer or relinquishment of any portion of the rights which are asserted by her in the present suit. She is undoubtedly the heir of her Son, Shib Lall, and entitled to the inheritance, unless she has transferred her rights wholly or in part to the Defendant. She is supposed to have done so by the petition, or at least to have made such allegations therein as must now preclude her from maintaining this suit. But in my judgment she did not contemplate at that time the event which has since occurred, and her real intention was to cure the objection which had been made by the Mortgagee to prosecution of the suit for redemption by the now Defendant (a stranger), who had (beyond her maintenance) no right in the property, and was not the lawful Guardian of the minor whose rights were then in suit. The whole of the property was the Son's, and neither of the Widows had any right or interest in it which the one could relinquish in the other's favour. It is possible that a person may by his acts preclude himself from asserting not only his present rights but all others which

may hereafter accrue to him; but this result does not follow from doubtful or ambiguous acts or admissions. In the present case, even if the language of the petition had clearly shown an intention to disclaim all interest whatsoever, present and future, in the property, the Court might well hesitate to give to it this effect. Looking at the occasion when it was presented, and at the condition of the old woman at that period, and at the language employed, I should regard it as little more than an [592] admission made for the purpose of that suit, though made in terms which might perhaps well tend to throw discredit on any subsequent assertion of the Plaintiff inconsistent with the allegations in the petition. The weight to be fairly attached to it depends upon a consideration of the whole of the circumstances under which it was made not less than upon its words. As a document relinquishing or disclaiming the rights which the Plaintiff now sues for (the inheritance), it seems to me to deserve little or no weight."

The appeal was from this decree.

Mr. J. D. Bell, for the Appellant.—First, the High Court at Agra had no jurisdiction to make the Order of the 21st of August, 1866, as the Chief Justice of that Court had no authority or jurisdiction to hear or determine the appeal on review. No power is to be found in the Letters Patent of the 17th of March, 1866, sec. 10, establishing the High Court, under the provisions of the Statute, 24th and 25th Viet. c. 104, sec. 27. Broughton's Code of Civil Procedure, pp. 287, 348 [Ed. 1867]. The equal division of the four Judges on the Bench took place at the hearing of the petition of review before the High Court was erected, and the then Sudder Court were in error in declaring that it was necessary under Ben. Reg. VI. of 1831, sec. 7, to refer the case for the opinion of one of the Judges of the High Court at Calcutta. That section does not apply. The only Regulation which applies where there is a difference of opinion, when the case has been heard by four Judges, is Ben. Reg. IX. of 1831, sec. 9. Even if it were a [593] case in which a reference to the Supreme Court at Calcutta could have been made, no decree could be passed reversing the decree of the Sudder Court of the 27th of August, 1864, without such reference being made, and an opinion given by the High Court at Calcutta, which, in this case, has not been done.

Secondly, upon the merits. It is admitted that it cannot be successfully contended that Shib Lall was regularly adopted by the Appellant's Husband, but he was adopted by the Appellant. She, therefore, at his death, was entitled to succeed to him as his heiress. Now, the first Respondent, as appears from the petition presented by her, entirely parted with all her estate and interest in the property in dispute, which, although it was an expectancy, and might subsequently vest in her, she could legally convey and disclaim her proprietary right. In *Smith v. Osborne* (6 H.L. Cases, 390) Lord Chelmsford says, "The doctrine of the Court of Chancery is, that if a man contracts to convey, or to mortgage, or to settle an estate, and he has not at the time of his contract a title to the estate, but he afterwards acquires such title as enables him to perform his contract, he shall be ordered to do so." And he refers to *Taylor v. Debar* (1 Ch. Cases, 174), and *Seabournee v. Povel* (2 Vern. 11); and the same principle is recognized in *Jones v. Kearney* (1 Dr. and W. 134, 157). It is submitted, therefore, that the petition operated as a conveyance, and also as an estoppel.

Mr. Leith, for the Respondent, insisted that the judgment of the Chief Justice of [594] the High Court was right in declaring that the infant Shib Lall was sole heir-at-law of his Father, Buldeo Buksh, and as such succeeded to the entirety of the estate, and also in holding that neither the Respondent, Mussumat Ladoo, as the Widow of Buldeo Buksh, nor the Appellant, as the Widow of his Son who predeceased him, had any share in, or any right or title to, any portion of his estate, during the lifetime of Shib Lall, and that the Respondent, Mussumat Ladoo, and the Appellant, were only entitled to maintenance. The Chief Justice put the right interpretation and construction upon the language of the petition of the Respondent, Mussumat Ladoo, that the petition did not operate as a disclaimer or relinquishment on her part of the right, title, and interest, which accrued to her upon the death of her Son as his heir-at-law, or of the estate and property to which she then succeeded. It is clear, that she did not intend to convey and assign, and did not

either in fact or law convey and assign, in and by the language of the petition, the estate and interest in the property which she became entitled to upon his death, and which at the date of the petition was a mere expectancy, dependent upon the contingency of her surviving him, an event which considering her great age was then very improbable, and, therefore, such future estate could not have been in the contemplation of the parties at the time. If it could be so construed, then we submit there was no consideration in law to support and enforce a contract or agreement on her part to convey or assign her estate and interest when it should subsequently vest in her and come into her possession and enjoyment as such heir.

[595] Judgment was pronounced by

The Right Hon. the Lord Justice Mellish.—The first question in this case is, whether there was any jurisdiction in the Chief Justice for the North-Western Provinces to make the decree, from which the appeal is brought, in the Court below? Now the matter has been inquired into, their Lordships are clearly of opinion, that there was such jurisdiction. The appeal had been brought to the Sudder Adawlut of the North-Western Provinces, and the Judges of that Court had given a decision. Then an application had been made for a review, and an Order was made that the case should be heard on review. It was so heard, before four Judges, who were equally divided in opinion. By the Law, as it then stood, as appears by the Order made at the end of their judgment, they being equally divided in opinion, the case was, under the provisions of section 7, Regulation VI. of 1831, referred for the opinion of one or more Judges of the High Court of Calcutta. There was, however, a power, by the 24th and 25th Viet. c. 101, for the Crown to erect a Court in the North-Western Provinces, and by Letters Patent of the 17th March, 1866, the Crown did erect a High Court in the North-Western Provinces, which had the effect of abolishing the jurisdiction of the Sudder Adawlut. The consequence was, that no final decision having been given on review, that proceeding was a proceeding pending, which was, therefore, to be decided by the new High Court of the North-Western Provinces. The 27th section of those Letters Patent is as follows:—"We do hereby declare that any function which is hereby directed to [596] be performed by the said High Court of Judicature for the North-Western Provinces, in the exercise of its original or appellate jurisdiction, may be performed by any Judge"; and, accordingly, the Chief Justice, Sir Walter Morgan, did sit, apparently as a single Judge. He appears to have heard the parties and given his final decision, and that was the decision of the High Court of Agra, which their Lordships are of opinion had, under these circumstances, jurisdiction, and the appeal, therefore, is brought from that decision.

Now, the action itself is an action brought by one Hindoo Widow, Mussumat Ladoo, against another Hindoo Widow, Mussumat Oodey, the Widow of her eldest Son, to recover three several properties. The only question before their Lordships relates to two of those properties, because, as to the third property, all the judges below agree that the Plaintiff was entitled to recover, and there is no appeal as to that. The Plaintiff brought the suit on the ground that the Defendant was in possession of the property, but that she, the Plaintiff, was entitled to it as heir-at-law of her Son, Shib Lall, and there appears no question that she was such heir-at-law. The property had originally belonged to Buldeo Buksh. He had two Sons, of whom one, the Husband of the Defendant in the suit, died in the lifetime of Buldeo Buksh. There appears to have been some attempted adoption, that is to say, Buldeo Buksh and Mussumat Ladoo appear to have attempted to give their second Son, who was an infant, as an adopted Son to the Widow of their eldest Son. But it is admitted that for various reasons that adoption, if it were ever attempted, was wholly invalid according to Hindoo law: if for no [597] other reason at any rate for this reason, that the Husband of the Widow who made the adoption had never given any permission to the Widow to make such adoption, and it was admitted before us that the adoption was wholly invalid.

That being so, it is plain that the Son, Shib Lall, on the death of Buldeo Buksh, became solely entitled to the property; and upon his death his mother became entitled as his heir, and, therefore, if the matter remained there, it is admitted that she would be entitled. But it is alleged that she had done certain acts and become

a party to certain documents, the effect of which was, at any rate as to these two latter portions of the property, to prevent her from recovering.

Buldeo Buksh, had mortgaged these two properties in question, and a suit had been commenced, first in the name of Shib Lall by his assumed Guardian, probably in the first instance on account of this invalid adoption, against the Mortgagees to redeem the mortgage, which was resisted by them on the ground, which it is now quite immaterial to consider, that the mortgage had been a real sale. Some proceedings had also taken place for the mutation of names; and it would appear that in those proceedings for the mutation of names, the Collector and the parties had wrongfully assumed that the two Widows and the Son were jointly heirs of Buldeo Buksh. Then it was said that the Plaintiff being old, and not wishing to interfere with the affairs, she had agreed that Shib Lall and Mussumat Oodey should alone be entered as the owners of the property, and that her name should be omitted.

In the suit for the redemption of the mortgage, an [598] objection was taken by the Mortgagees, that the suit was wrongly constituted, because Mussumat Ladoo, and not Mussumat Oodey, was the proper Guardian of the infant, and the proper person to bring the suit. On that occasion Mussumat Ladoo presented a petition, on which the matter before us principally turns, the main object of which unquestionably was to enable the suit to be carried on by Mussumat Oodey, either in her own name or as Guardian of the infant without joining the name of Mussumat Ladoo, and the entire contention on the part of the Appellant before us is, that by the proceedings which have been already described with respect to the mutation of names and by the language of this petition, Mussumat Ladoo in fact abandoned all her right to the property in question, so that when she became in point of law entitled to the property as heir of her Son, she could no longer avail herself of that right as against the Defendant. The petition is in these terms. [His Lordship read the petition, *ante* [13 Moo. Ind. App.], p. 587.]

If that is to prevent her recovering the property now in question, it must do so either because it operated as a conveyance or as a contract to convey the interest which she now claims, or because it operated by way of estoppel. There is no other way in which it can operate. Now, did it operate either as a conveyance or as a contract to convey the interest to which she has now become entitled as heir of her Son? Their Lordships are of opinion, that it is quite impossible that it could so operate, and that for two reasons: first, because at the time when she presented this petition she had not in fact any interest in the property at all, and certainly had not become entitled to any interest as the heir of her Son, who was at that [599] time alive; and in the next place, there is not the least reason to suppose that in the petition she in any degree contemplated a conveyance of any such right. That was not the right which they were then considering at all. The main object of the petition was simply to enable the redemption suit to go on, and to enable the persons who had begun it as Plaintiff,—Oodey Koowur and Sheo Lall—to carry it on. There was nothing in the language and nothing in the position of the parties which could lead any one to suppose that she had any interest that she might hereafter acquire as heir of her Son, in her contemplation at all. On these grounds, it appears quite impossible that it can operate either as a conveyance or as a contract to convey her subsequently acquired interests.

Well, now, is she in any way estopped? It is very difficult to see how she can possibly be estopped. There has been a difference of opinion among the learned Judges in the Court below as to the construction of this instrument,—whether it ought to be construed solely as relating to her rights as Guardian, and to convey them, and not to relate to the property at all? The language certainly, in some parts of it, does appear to refer very strongly to an interest as Owner, and probably it may be that the meaning of the instrument rather refers to her supposed interest as Owner, but it appears to their Lordships hardly necessary conclusively to decide upon the proper construction of this instrument, because even assuming, that it does refer to her interest as Owner, that is to say, to her present interest as Owner, and that she is assuming incorrectly that she has some interest as heir of her Husband, their Lordships are of [600] opinion, that her stating that, and professing to resign that in favour of Oodey Koowur, could not possibly in point of law, estop, or pre-

vent her from setting up her real right as heir of her Son, when that right actually accrued. There is, in the first place, no consideration whatever for this conveyance of her particular interest; even if she had it, she receives nothing for it. Neither does Oodey Koowur act on any representation made by her, or alter her position in any way. There is no misrepresentation to Oodey Koowur of any sort or kind. Oodey Koowur was acquainted with the actual facts of the case, just as much as Mussumat Ladoo was. The real effect of the petition seems rather to be that they mutually agreed to represent what was not the fact, for the purpose of enabling a certain suit to be carried on. Their Lordships are of opinion that, assuming she did intend to convey a present interest in the properties, which she supposed or assumed she had, there is no principle of law or justice by which that can prevent her from setting up her real right when that right has accrued. It is true that this petition had the desired effect, and that Mussumat Oodey was allowed to carry on the suit, and afterwards, when Shib Lall died, and Mussumat Ladoo immediately proceeded to present petitions to be allowed to carry on the suit instead of her, the Court, as their Lordships are disposed to think improperly, prevented her from carrying on the redemption suit, would not grant that petition, and allowed the redemption suit to go on in the name of Mussumat Oodey, who had begun it, but that mistake cannot, as their Lordships think, possibly deprive her now of the right to which she is in law entitled, though it accounts for [601] the judgment of the Judge in the first instance, who properly considered that it was no business of his to overrule or to differ from the judgment of the Superior Court.

On these grounds their Lordships are of opinion, that the petition cannot possibly operate either as a conveyance, or as a contract to convey, nor by way of estoppel, so as to deprive the Plaintiff of her right to recover all these properties, and their Lordships entirely agree in the judgment of Sir Walter Morgan, which was practically to the same effect. Their Lordships, therefore, will advise Her Majesty that this appeal ought to be dismissed, and the judgment of the High Court of Agra ought to be confirmed, with costs.

[602] RANEE BISTOOPRIA PUTMADAYE.—*Appellant*: NUND DHUL and Others.—*Respondents* * [Dec. 12, 1870].

On appeal from the High Court of Judicature at Fort William, Bengal.

An appeal to the Queen in Council was allowed by the High Court, in a suit instituted by a Hindoo Widow as Guardian of her Husband's adopted Son, a Minor. After the allowance of the appeal and transmission of the record to England, the adopted Son having become of age, petitioned the High Court for the withdrawal of the appeal. The High Court referred the application to the Judicial Committee. On a petition by the Respondents, founded on these proceedings, to dismiss the appeal, the Appellant resisted the application on grounds, first, that as a Hindoo Widow she had preferable title to the estate to the adopted Son; and, secondly, with respect to the costs incurred by her as Guardian in bringing the suit. Held, dismissing the appeal, *simpliciter*, (1) that as the adopted Son was of age and *dominus litis*, and had directed the withdrawal of the appeal, the Appellant had no *locus standi*; (2) that any claim she had as Widow must be the subject of an independent suit; and (3) that any costs incurred by her were to be recouped from the adopted Son's estate.

This was an application by the Respondents to dismiss the appeal.

The suit was brought by the Appellant, as Guardian of an infant, the adopted Son of her deceased Husband, to recover possession of an estate from the Respond-

* Present:—Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and Sir Joseph Napier, Bart.

ents. The High Court decided against her claim, and she obtained leave to appeal to the Queen in Council. After the transcript was forwarded to England, and [603] before the appeal was heard, the Minor became of age, and executed a Mookternamah instructing his Mookter to withdraw the appeal. The High Court refused to act upon the application to withdraw the appeal and remitted the proceedings to England. The Respondents then presented a petition to dismiss the appeal for want of prosecution.

Mr. Leith, in support of the application, referred to *Jackson v. Prothero* (3 Moore's P.C. Cases, 490).

Mr. J. D. Bell opposed.

First, the appellant, as a Hindoo Widow, has a title to the property sued for independently of the rights of the adopted Son of her Husband, and, therefore, she has an interest to prosecute the appeal: and, secondly, she has a right to costs incurred by her in bringing the suit as Guardian for the Minor.

The Right Hon. Lord Cairns.—In this case we understand that the Lady represented by Mr. Bell, as Guardian of an infant who was represented to have been duly adopted as the Son of her late Husband, instituted a suit to recover certain property from the Respondent, who was in possession under a claim that the infant was the Son and legal heir of the deceased. The suit was heard by two Courts. It is unnecessary for us, upon this application, to consider further whether the decisions both passed against the title of the infant was right or wrong. We will assume that she may have had legitimate ground for applying in the Court below for leave to appeal to this Board.

[604] That leave was granted in 1866, when the boy was still admittedly an infant. So far the proceedings seem to have been entirely regular. The transcript came home in 1867. The record was printed here, and the only thing which can be suggested as any irregularity may have been the lodging of the petition of appeal so late as 1870, after the infant had come of age, and was for all purposes *dominus litis*.

It appears that the proceedings which are embodied in the supplementary record, have taken place in India, and the effect of them is to show that upon being called into that Court the infant expressed his desire to abandon the appeal, and that the Court ultimately felt that it could not decide that question, and, the appeal having been transmitted here, sent the whole of the proceedings for the adjudication of their Lordships.

In that state of things the Respondents now apply that the appeal may be dismissed, and the application is resisted by the Lady who was originally the Guardian of the infant.

At one time it appeared to their Lordships that it might possibly be necessary to ascertain more clearly that the Son is a consenting party to this application, which could only be done by directing the Court in India to take further proceedings, in order to have the fact ascertained. But looking to these proceedings, and considering what the Court has done, it appears to their Lordships unnecessary to take that step, and to put the parties to the further delay and expense which it would involve. When the suggestions were made to Mr. Leith their Lordships had not sufficiently adverted to the terms of the [605] Mookternamah. We knew that the boy had made a clear admission to the Moonsiff, which had satisfied the Judge and the High Court, that he was of age, and that he had executed that Mookternamah; but it did not, as it appeared to us at that time, follow that he had adopted all the statements in the petition which was presented under the Mookternamah. But when you come to look at the Mookternamah, of which he has admitted the execution, it seems very clear that he knew what he was about and what his Mookter would do under that instrument.

He says, "Now I have attained majority, and considering that no other profit will arise by carrying on the said case than a useless expenditure of money, and with the desire of withdrawing from the said case, I do appoint Jugmohun Doss Putto Naik, inhabitant of Saooda Khotee of Pergunnah Mayahagun, in Zillah Midnapore, as Mookter in my behalf, in order to engage a Pleader of the High

Court, and agree that the Pleader of the High Court in Calcutta, who will be appointed by the said Mookter, will file a petition of withdrawal from the said case, and the said withdrawal will be one as if filed by me, and completely valid."

Therefore, it seems to their Lordships that they have sufficient evidence before them in these proceedings, that the young man is a consenting party to this application.

The question, then, is reduced to this—whether the Lady who is represented by Mr. Bell has really such an interest in the appeal, or such a *locus standi* in this Court, as entitles her to resist this application and to insist that the appeal shall go on, although [606] the party in whose name it is brought wishes to withdraw from it.

Their Lordships are of opinion that she has not; if she has incurred costs there can be no appeal for mere costs; having incurred costs on behalf of the infant in this suit, she may have a claim to be recouped from his estate, if he has any; but that does not entitle her to prosecute this appeal in his name against his will, with probably but faint chances of success.

It was thrown out that the decree had not dealt with the title of the Defendant, and that she might have a preferable title to him; but the obvious answer to that argument is this—there has been a clear adjudication that the nominal Plaintiff in this suit had no title. If the Lady herself, as Widow, has a better title, that title cannot be litigated in this suit, but must be litigated in an independent suit, in which, rejecting the adoption, she would come forward as the next heir of the deceased.

Therefore we do not see that we should be justified in keeping this appeal upon our records. But considering the peculiar nature of the application and the position of the parties, it does not seem to us that we can do anything but dismiss the appeal *simpliciter*, saying nothing about costs. There is no proof that the infant has undertaken to pay the costs; and we also think that we ought not to give to either side the costs of this petition.

[607] RANEE SURUT SOONDREE DEBEA.—*Appellant*; BABOO PROSONNO COOMAR TAGORE, and after his death, ROMANATH TAGORE and Others,—*Respondents* * [Dec. 12, 13, 14, 1870].

On appeal from the High Court of Judicature at Fort William, in Bengal.

Suit to recover chur lands thrown up by the river Brahmapootra. A compromise took place, and the question resolved itself into one of identification of boundaries. The Sudder Dewanny Court remitted the suit to the Principal Sudder Ameen, who deputed an Ameen to make local investigation. He did so, and his report was adopted by the Principal Sudder Ameen, and a decree made in conformity with it. The High Court overruled that decree. On appeal, held, by the Judicial Committee, reversing that decree, that although they are reluctant to interfere with a question of fact of that nature, yet as they had to deal with conflicting judgments, of which the decree of the Principal Sudder Ameen was founded on a careful local investigation, and the judgment of the High Court overruling that decree was not supported on satisfactory grounds, the decree of the Court of First Instance must stand, as it was the duty of the High Court not to interfere with the result of a local investigation, except upon clearly defined and sufficient grounds.

The question in this case, related to the identification and boundaries of seven churs, or Islands of alluvial foundation, containing about 14,000 beegahs of land, thrown up by the change of the course of the channel of the river Brahmapootra.

* Present:—Members of the Judicial Committee.—The Right Hon. Sir James William Colville, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and Sir Joseph Napier, Bart.

[608] The appeal was brought from a decree of the High Court which reversed a decree of the Principal Sudder Ameen of Zillah Rungpore, made under an Order of the late Sudder Dewanny Adawlut, remanding the case for re-trial.

The suit in which the above decrees were made was instituted by the late Respondent, Bahoo Prosonno Coomar Tagore, against Jogendronarain Roy, since deceased, the late Husband of the Appellant, for the purpose of carrying out a former decree of the late Sudder Dewanny Adawlut, dated the 3rd of July, 1849, which embodied the terms and conditions of a compromise made by those parties. The decree had been made in a former suit, also instituted by the late Respondent, against the late Ranee Bhoobunmoyee Debea, the Grandmother of the late Husband of the Appellant; the object of which suit was to establish the Respondent's right to possession of seven churs, or Islands, formed in the river Brahmapootra, containing 14,000 beegahs of land.

In that suit a decree had been previously made by the Principal Sudder Ameen of the Zillah Rungpore in favour of the late Respondent; but from it an appeal was preferred to the late Sudder Dewanny Adawlut, and in that appeal the above-mentioned decree of the 3rd of July, 1849, was made.

The principal points of dispute between the parties in the present suit were, as to the meaning and construction of the terms of the compromise, embodied in the decree; and whether the main stream of the river had changed its course since the year 1835, when a Map admitted by both the parties had been made of the lands, by an Ameen of the Civil Court, named Goureeprosaud Moitro; also [609] as to the sites and identity of three of the seven churs, numbered respectively 5, 6, 7, respecting which churs alone the dispute between the parties had arisen.

The decree of the Principal Sudder Ameen (Gurreeb Hossein), dated the 1st of August, 1861, in the present suit, found, after having first personally inspected the locality, and examined carefully the disputed churs, as well as the courses and channels of the river, that the churs claimed by the defendant, Jogendronarain Roy, and which had been pointed out by his Mookter to be the churs 5, 6, and 7, were in fact such churs; and that, as possession had been wrongfully obtained of the same by the Plaintiff, the same respectively should be restored to the Defendant as his property.

By the decree of the Division Bench of the High Court, consisting of Messrs. Kemp and Seton-Karr, dated the 9th of April, 1863, the Court reversed that decree, but without stating any satisfactory reasons or grounds for so doing. The decree decided that a distinct chur, called Moonshe chur, belonging to and then in the possession of the Defendant, was the chur No. 5; and further held that a piece of land, the alluvial accretion of the Dooba chur, also belonging to, and then in the possession of, the Defendant, was chur No. 7, and the decree then ordered that, as the Plaintiff was entitled to 1663 beegahs of land of chur No. 6, that quantity of land should be measured from the west bank of the river, and so taking into the measurement land then actually in the occupation and possession of the Defendant.

The Appellant presented a petition to Her Ma-[610]-jesty in Council for special leave to appeal. The petition alleged that no application had been made for leave to appeal to the Court in India, as the Court there had held that all orders of the Court in miscellaneous cases were final, and that the Court refused to admit any appeals to the Queen in Council except those expressly provided for by Ben. Reg. XV. of 1797. By an Order in Council, dated the 4th of February, 1865, special leave to appeal from the decree of the High Court was granted.

The appeal now came on for hearing.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant, and Mr. Doyne, for the Respondents.

The substance of the argument is considered in their Lordships' judgment.

On the question of accretion, *Eckowrie Sing v. Hoorololl Sing* (12 Moore's Ind. App. Cases, 136) and Ben. Reg. XI. of 1825.

The consideration of their Lordships' judgment was reserved.

Judgment was now pronounced by

The Right Hon. Sir James W. Colville (Dec. 16, 1870).—The Appellant and the Respondents in this case are the representatives of two Zemindars, who, some

six-and-thirty years ago, engaged in litigation concerning the title to certain chur land thrown up by the river Brahmapootra.

This litigation was begun by a suit, brought in [611] 1834, by Prosonno Coomar Tagore, whom it will be convenient to describe as the Respondent, for the recovery of 5000 beegahs of the land in question. In the course of that suit, and in the year 1835, a map of the land in dispute, with the land and water immediately surrounding it, was made by an Ameen, named Goureepersaud Moitra, under the authority of the Court; and in that map the different churs are delineated, and marked with different numbers, from 1 to 7 inclusive.

This first suit was successful; and Prosonno Coomar Tagore obtained a decree for about 5000 beegahs of chur land. In 1845 he brought a second suit for 14,000 beegahs of like land, and obtained a decree from the Court of First Instance. The Defendants then appealed; and, pending their appeal, and in July, 1849, the parties came to a compromise, which was embodied in a decree of the Sudder Dewanny Adawlut, dated the 3rd of July, 1849, and was thereby directed to be carried into effect.

The effect of this compromise was, that the churs marked in Goureepersaud's map as Nos. 5 and 7, with 1663 beegahs and 15 cottahs of chur No. 6, were to belong to those who are represented by the Appellant; and that the churs Nos. 1, 2, 3, and 4, with the rest of chur No. 6, were to belong to the Respondent. The boundaries, if the parties differed about them, were to be settled by arbitration; and if the parties could not agree to appoint Arbitrations, were to be fixed through the Court Ameen in execution of the decree.

If, then, this map, which was the basis of the compromise, had correctly described the land as it then existed, nothing remained to be done, but to measure [612] off the 1663 and odd beegahs from chur No. 6, and to put the parties into possession of their respective shares.

Unfortunately the land, which was the subject of the compromise, was in some sort the creation of the River Brahmapootra, which is said after each annual flood to be apt to shift its course, and to effect considerable changes in the alluvial deposits on either side of its channel. And thus it came to pass that as soon as the parties proceeded to carry out the compromise, a contest arose whether, either between 1835 and 1849, or at some subsequent period, the river had not so changed its course as materially to alter the configuration of some of the seven churs, and their bearings to its main stream. The only effect, therefore, of the compromise was to convert a dispute touching the title to lands into one touching the identification of parcels; the principal question being not how chur No. 6 was to be divided, but where churs Nos. 5 and 7, which unquestionably belonged to the Appellant's zemindary, were to be found. And this dispute has given rise to the intermittent litigation which, after lasting for more than fifteen years, was, in 1863, closed by the decree now under appeal.

The following is a short summary of that litigation:—Some time after 1849, and before April, 1853, the Respondent was put into possession of a considerable part, if not of the whole, of so much of the land contained in the seven churs as then lay on the western side of the Brahmapootra; and the possession so taken was confirmed by an Order of the then Principal Sudder Ameen of Rungpore, dated the 19th of April, 1853. But that Order was, on the appeal of the other party, set aside by Mr. Dunbar, [613] one of the Judges of the Sudder Dewanny Adawlut, whose Order of the 24th of September, 1853, directed the Principal Sudder Ameen to reopen the inquiry, but apparently did not disturb the possession already given to the Respondent. Some delay in giving effect to this Order took place, in consequence of the Respondent's having contrived to strike the execution case off the file; but it was restored under an order of the Sudder Dewanny Adawlut, dated the 14th of February, 1855.

The case was then investigated by the Principal Sudder Ameen; each party filed a map before him; he himself held a local investigation, and made or caused to be made the map of 1855; and finally, on the 27th of June, 1856, passed an order overruling the objections made to the Record of his investigation by the Respondent in his petition, declaring the possession given to the Respondent to be null and void, and directing that possession should be given to the parties in accordance, as

their Lordships understood the order, with the present contention of the Appellant. No change, however, seems ever actually to have been made in the possession of the land, of which possession was given by the Moonsiff. The Respondent appealed against the last-mentioned Order, and the question was again re-opened by Mr. Torren's order of the 30th January, 1857, which remitted the case to the Principal Sudder Ameen, with directions that in respect of those parcels which he had given to the then Respondent (the present Appellant), he should again allow execution of the decree, and after that, prepare a map (better than the present map), so that it might clearly appear for the perusal of the appellate Court, and in other respects [614] what was the former and present course of the River Brahmapootra over the disputed lands, as stated in the map of Goureepersaud Ameen.

The execution of this Order was somewhat delayed by the rainy season, during which a local investigation was impossible, but on the 2nd of December, 1857, the Principal Sudder Ameen passed an order for the appointment of an Ameen acquainted with measurement by the compass. From one cause or another, however, nothing effectual was done under this last Order until December, 1860, when Kalidoss Moitro the Ameen proceeded to the spot, made a careful local investigation, prepared the map which bears his name, and on the 30th of April, 1861, filed the elaborate report. That report, though it did not precisely adopt the representations of either party, in the main supported the contention of the Appellant. It was adopted by the Principal Sudder Ameen, who, on the 1st of August, 1861, passed a decree finding that churs Nos. 5 and 7 were where the Appellant placed them, and not where the Respondent placed them, directing that possession should be given accordingly: and also giving the necessary directions for ascertaining and making over that part of chur No. 6 (as to the position of which there seems to be no controversy) which under the compromise belonged to the Appellant.

The Respondent appealed against his decree. The High Court reversed it, finding that churs Nos. 5 and 7 were where the Respondent placed them, and varying the Principal Sudder Ameen's decree accordingly. The present appeal is against that decree, and the first question for their Lordships' determination is, whether it can be supported. It [615] rests entirely upon the assumption that churs Nos. 5 and 7, which unquestionably were on the west of the main stream of the River Brahmapootra when the map of Goureepersaud was made in 1835, are now by reason of the altered course of that river on the eastern side of it. If that is not made out, the reasons assigned for the judgment wholly fail.

Upon what does this assumption purport to be founded? "On an examination of the maps filed in the cause, and on the explanations and arguments of the Pleaders on both sides." What the latter may have been their Lordships are unable to say. But having given full consideration to the able argument of Mr. Doyne on behalf of the Respondent: and having carefully examined the maps, they are unable to see any satisfactory grounds for coming to the conclusion contrary to the finding of those who have investigated the question on the spot, that the river has, since 1835, by making for itself a new channel to the west of its former channel, so changed its course as to put either of the churs described by Goureepersaud as Nos. 5 and 7, or whatever may remain of either of them, on its eastern instead of its western bank.

It would be strange indeed if this conclusion necessarily resulted from a mere comparison of the maps, since it is opposed to the expressed convictions of the Ameen Kalidoss Moitro, who made the last and most scientific of the maps, and to that of the Principal Sudder Ameen, who conducted the local investigation and made the map of 1855. Mr. Doyne, indeed, has argued that the conclusion of the High Court may have been an inference, and would have been a legitimate inference, from the application of what he [616] treats as the known law of the formation of churs to certain newly-formed chur land appearing in parts of Kalidoss Moitro's map. But the High Court has not assigned this as one of the grounds of its judgment. Nor are their Lordships, considering the disturbing forces which may exist in a river of so vast a volume and of such irregular action as the Brahmapootra, and also the positions of the several portions of chur land indicated in the map, by any means satisfied that the inference is legitimate, or so certain that it ought to outweigh the positive findings of the Ameen.

Again, the High Court observed that the Principal Sudder Ameen had not, in their opinion, duly considered the landmarks by which in both maps, when duly compared, the situation of churs 5 and 7 may be satisfactorily identified. The Court has omitted to state specifically to what landmarks it refers as instances of this omission. The instance most pressed in argument has been that of the Tamarind trees appearing on the east side of the River in Gungapersad's map. But the real position of those trees, if they still exist, was also the subject of controversy; and after investigations on the spot, the Ameen rejected the Respondent's theory concerning it. There is nothing to show that he was wrong in this. It is obviously impossible to draw that conclusion from Gungapersad's map, which, it is admitted, was not made by compass, or according to scale.

Another point made in the argument, though not adverted to in the judgment, is the bearing of the village of Kompopoor to the land alleged by either party to be chur No. 5. It cannot be said that the Ameen has neglected to consider this landmark. And his explanation of the discrepancy in this respect [617] between his map and that of Gungapersad, viz.: that the village, of which the position is very loosely indicated, is erroneously placed on the latter to the south instead of to the east of the River Jhelye, appears to their Lordships to be plausible.

Their Lordships, then, are unable to see any satisfactory grounds for the assumption which is the foundation of the judgment of the High Court. They would themselves be very slow to interfere with the judgment of an Indian Court upon a question of this nature. But they have to deal here with conflicting judgments, of which one is founded on a long and careful local investigation; and the other, overruling the former, is supported by no reasons that their Lordships can pronounce to be satisfactory. And their Lordships may observe that the considerations which make them reluctant to set their judgment against that of an Indian Court upon such a question as this, ought to influence in some degree the appellate Court in India, and to prevent its interference with the result of a local inquiry, except upon clearly defined and sufficient grounds. Such grounds the appellate Court may have thought it had in this case, but it has failed to express them. Against its judgment their Lordships have now to weigh the elaborate report of the Ameen and the judgment founded upon it. The integrity of the Ameen is unquestioned; his careful and laborious execution of his task is proved by his report; he has not blindly adopted the assertions of either party; and without going minutely into details, their Lordships think it sufficient to say that they see no ground for impugning the accuracy of his conclusion upon what they conceive to be the broad and cardinal issue upon which the determination of this [618] case depends, viz.: whether the lands which represent churs Nos. 5 and 7 of Gungapersad's map are now on the east or still on the west of the main channel of the River Brahmapootra. On the contrary, they believe the conclusion of the Ameen to be correct. And they are fortified in that conviction by the following considerations:—

It is to be observed that this controversy was by no means of recent date. The question was not, whether the change alleged had been effected by the action of the river between 1835 and 1863. It appears by the Respondent's petition and the maps that his contention was certainly as early as 1855, and possibly as early as the Moonsiff's proceeding, that the lands which represented the churs Nos. 5 and 7 of the compromise were then on the eastern side of the main course of the river. That this was in fact the case in 1849 is in the highest degree improbable. Though it is too clear that the parties by a compromise made upon loose data merely shifted the ground of contention instead of determining their disputes; it is almost inconceivable that they should have drawn and executed, as they did, the instruments of compromise upon the footing of Gungapersad's map, without adverting to so great a change in the position of the churs relatively to the main channel of the river, if such a change had then taken place. The change, then, if it ever really took place, must have taken place between 1849 and the Moonsiff's proceeding, or the year 1855; and in that case it might easily have been proved. It would then have been recent and notorious, yet in 1855 the Principal Sudder Ameen, after local investigation, decided against the Respondent.

[619] Again, their Lordships upon the evidence see no reason to doubt that

the land which the Respondent treats as chur No. 5, is in fact the Pookamaree chur, and an accretion on an estate which never belonged to the Appellant's family, and now belongs to Government,—an estate of which the Moonshee chur, one of the landmarks of the Map of 1835, formed part. There is nothing which induces their Lordships to believe that any of those whom the Appellant represents were ever in possession of that chur. Yet the High Court, without adverting to this point, affirmed it to be the chur No. 5 of the compromise, and directed that the Respondent should be maintained in the possession of it.

Upon the whole, then, their Lordships have come to the conclusion that it is their duty to advise Her Majesty to allow this appeal, to reverse the decree of the High Court; to direct that in lieu thereof the appeal to that Court from the decree of the Principal Sudder Ameen be dismissed, and the last-mentioned decree affirmed with costs. The Appellant must also have her costs of this appeal.

[9]

APPENDIX.

RULES OF THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL (IN ITS APPELLATE JURISDICTION), RELATING TO THE ADMISSION OF APPEALS TO HER MAJESTY IN COUNCIL, AND TO THE TRANSMISSION OF SUCH APPEALS TO ENGLAND.

I.—Every petition for the admission of an appeal, under section 39 of the Letters Patent, shall contain, amongst other things, an application for a Certificate either that the—

- (1) Value of the sum, or matter at issue, or of the property to which the claim or question relates, is not less than Rs. 10,000;
- (2) Or, that the case is a fit one for appeal.

Upon such petition and application being made, notice will be served on the opposite party to show cause, within the time specified in the notice, why such Certificate should not be granted; and any Vakeel who appeared for such opposite party in the High Court, shall be bound to accept service of such notice; and such service shall be binding on the Client.

[10] If such Certificate be not granted, the petition will be dismissed.

II.—With the petition, or within six months from the date of the decision appealed against, the Appellant shall furnish security for the costs of the Respondent, to the extent, in ordinary cases, of Rs. 4000; such security may consist either of cash or Government securities, or of immoveable property; or the Appellant, if the appeal be against a judgment passed in original jurisdiction, may enter into a recognizance with two Sureties to be approved by the Registrar.

When the security offered consists of immoveable property, the Appellant shall file a mortgage Bond, duly registered, together with a specification of the surety's title.

When such Bond has been filed, the Court shall direct the security to be tested either by the Registrar, or by the Judge of the Zillah Court in which the immoveable property pledged is situated. If the security be found insufficient, the Appellant shall be bound within six weeks from the date of an Order to that effect, to deposit cash or Government securities to the extent of Rs. 4000, or to such amount as may raise the value of such security to Rs. 4000.

But in any special case, the Court may, if it think fit, on the application of the Respondent, require security to a larger amount; in no case, however, exceeding Rs. 10,000.

III.—It shall be competent to the Court, at any time before the admission of the appeal, upon cause shown, to revoke the acceptance of any security, and to make further directions thereon.

IV.—With his petition for the admission of the [11] appeal, the Appellant shall deposit the sum necessary to defray the cost of translating, transcribing (or printing), and transmitting the Record. Such sum shall be in respect of the appeals from the appellate side of the Court—either Rs. 2000, or the sum certified by the Clerk of Privy Council appeals as the probable cost of such transcript, and so forth, the estimate of such cost being prepared as directed in Rule XII.; and in respect of appeals from original jurisdiction, Rs. 500 when the Record is not to be printed, or Rs. 700 when it is to be printed here.

V.—When the security has been approved and the deposit made for transcript, etc., under Rule IV., the Court may declare the appeal admitted; but if the Petitioner shall not perfect his security and make such deposit within such time as the Court may direct, his petition shall be dismissed.

VI.—After the lodging of the petition, or on the application of any party intending to appeal to Her Majesty in Council, accompanied by a fee of Rs. 16, the Clerk of Privy Council appeals shall forthwith prepare an estimate of the expense of translating, transcribing, or printing, and forwarding to the Registrar of the Privy Council the Record of the case, including a margin of Rs. 500, and shall furnish such estimate to the Vakeel or Attorney of the Appellant, or Applicant, who shall be bound to pay into Court, within one month from receipt of such estimate, the difference between the amount thereof and the amount already deposited, if any; provided that the Appellant, within two weeks after his making payment, shall be at liberty to object to the estimate, and to obtain the order of the Court on such objection.

[12] VII.—The application for estimate shall state, whether or not, the transcript is to be printed in India.

VIII.—Ordinary, the whole Record shall be transcribed with the following exceptions:—

First.—Such formal documents as are directed by clause 2 of Her Majesty's Order in Council, dated 13th of June, 1853, to be excluded, and whereof the omission is to be certified in the second Index.

Second.—Such papers as the parties may agree to omit.

Third.—Such accounts, or portions of accounts, as the Registrar, or other Officer empowered for that purpose, may consider unnecessary, and as the parties may not have specifically prayed to include, by application to the proper Officer, within one month from the filing of the petition in respect of the Appellant, and from receipt of notice in respect of the Respondent. Provided that neither of the parties shall be at liberty to apply for the inclusion of any account or part of an account which has not been marked or endorsed as an exhibit under the 39th or 132nd sections of the Code of Civil Procedure, unless with the special leave of the Court on motion made for that purpose. Provided also, that if any party shall apply to have included in the transcript Record any accounts or documents which the Registrar or other Officer may consider unnecessary, such document shall be translated and transcribed as an Appendix to the transcript, with a note of the circumstance.

[13] IX.—All documents which are not originally in the English language, and which have not been translated for the use of the Court, shall be translated into English, and all translations made or used shall be revised and certified by the sworn Examiner.

X.—An Index of all the documents included in the transcript shall be prepared and annexed to the Record in the form now in use, and shall be followed by a list of all other papers, documents, and exhibits in the cause not included in the transcript: the draft of this Index, instead of a vernacular list of papers (as hitherto supplied), shall be furnished to the parties, who shall be at liberty to object thereto within three weeks from date of receipt.

In the Index and transcript, the papers shall be placed in the following order:—

Plaint.

Written statements.

Examination of parties or their Agents, etc.

Injunctions.

Orders of attachment, etc. (if any), obtained before judgment.

Issues framed (if any).

Exhibits of Plaintiff.

----- of Defendant.

Depositions of witnesses for Plaintiff.

----- for Defendant.

Report of Commissioner (if any), with maps, depositions, etc., annexed.

Judgment and decree.

Memorandum of appeal.

Cross appeal or memo. of objections under section 348 (if any).

Proceedings in appellate Court (if any).

Judgment and decree of that Court.

Appendix (if any).

List of papers omitted under clause 2 of Her Majesty's Order in Council, and under the 8th of these Rules.

[14] XI.—The following charges shall be payable in respect of the matters specified:—

Estimate of costs	Rs. 16 0 0
Translation of vernacular portion of Record per 1000 words	6 10 8
Examination of ditto	3 5 4
Copying English portion of record, for every 1440 words, or part thereof	1 0 0
Examining ditto, for every 1440 words, etc.	0 8 0
Transcribing (one copy) per folio of 72 words	0 2 0
(Or at the option of Appellant.)	
Printing (55 copies), per printed page	3 8 0
Examination of transcript Record, for every 72 words, or part thereof	0 1 0
Ditto, correction of the press, for every 1125 words	1 0 0
Certifying two copies of printed Record, for every 10 printed or manuscript pages, or part of 10 pages	1 0 0
Preparation of Index, for every 10 papers, or part of 10 papers	2 0 0

The above rates will be subject to alteration.

XII.—The estimate shall include these several matters, and be framed in accordance with the charges above specified; and any Appellant who has filed his petition of appeal shall be deemed to have incurred the charge for the preparation of an Index and estimate, whether the appeal be admitted or not.

XIII.—If, at any time after the admission of the appeal, but before the transmission of the Record to England, it be shown to the satisfaction of the Court that the security given by the Appellant is insufficient, or it should appear to the Court that further payment is required for the purposes of the transcript, the Court may call on the Appellant to furnish other and sufficient security, or to make the required payment [15] within a time to be limited, and if the Appellant fail to comply with such Order, the proceedings shall be stayed, and the appeal shall not proceed without an Order of the Judicial Committee, and in the meantime execution of the decree of the High Court shall not be stayed.

XIV.—When the Record has been transmitted to the Privy Council, the Appellant may obtain a refund of the balance, if any, of the amount which he has paid into Court under Rules IV. and VII.

XV.—The foregoing Rule shall take effect from and after the 15th of August next, all previous Rules, including those made by the late Sudder Court by a Resolution, bearing date the 7th of December, 1858, being superseded and rescinded, and shall apply to all petitions now pending for the admission of an appeal to Her Majesty in Council, as if the same had been presented on the said 15th day of August.

By order of the Court,

(Signed) J. S. CARSTAIRS,
Officiating Registrar.

30th July, 1870.

[17]

Act, 34th and 35th Vict. c. 91.

AN ACT TO MAKE FURTHER PROVISION FOR THE DESPATCH OF BUSINESS BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 21ST AUGUST, 1871.

Whereas it is expedient to make further provision for the despatch of business by the Judicial Committee of the Privy Council:

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Her Majesty may within twelve months after the passing of this Act, by warrant under her Sign Manual, appoint four persons qualified as in this Act mentioned, whether already Members of such Judicial Committee or not, to act as Members of the Judicial Committee of the Privy Council under the Provisions [18] of this Act, and may, from time to time, within two years after the passing of this Act by a like warrant fill any vacancies occasioned by death or otherwise in the offices of the persons so appointed.

Any persons appointed to act under the provisions of this Act as members of the said Judicial Committee must be specially qualified as follows: that is to say, must at the date of their appointment be or have been Judges of one of Her Majesty's Superior Courts at Westminster, or a Chief Justice of the High Court of Judicature at Fort William in Bengal, or Madras or Bombay, or of the late Supreme Court of Judicature at Fort William in Bengal.

Where any person appointed in pursuance of the provisions herein contained to act as a member of the said Judicial Committee is at the date of his appointment a Judge as aforesaid, he shall on his appointment vacate his office as such Judge, but as to pension shall remain in the same position as if no such appointment had been made; and service as a member of the Judicial Committee shall for the purposes of pension be reckoned as service in the Court from which he was removed.

Whereas doubts have been entertained as to the meaning and effect of the provisions of the Court of Probate Act and the Divorce Act as to the pension of the Judge of the Probate and Judge of the Divorce Courts: Be it declared and enacted, that the said pension was intended to be and shall be similar in amount and in all other respects to the pension to which the puisne Judges of the superior Courts of common law are entitled.

There shall be paid to each of the said Judges of the Judicial Committee so long as he shall hold such [19] office a salary of five thousand pounds a year including any pension to which he may be entitled.

Any salary payable under this Act shall be charged on and paid out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland. It shall grow due from day to day, and shall be payable to the person entitled thereto, or to his Executors or Administrators, at such intervals in every year, not being longer than three months, as the Treasury may from time to time determine.

It shall be the duty of every person appointed to act as a paid member of the Judicial Committee under this Act to attend the sittings of the said Committee when summoned thereto unless he shall be prevented by reasonable cause; and such members shall hold their office during good behaviour, and shall continue to hold their offices notwithstanding the demise of the Crown, but they shall be removable by Her Majesty, Her heirs and successors, upon the address of both Houses of Parliament: Provided always, they shall hold their offices subject to such arrangements as may be hereafter made by Parliament for the constitution of a Supreme Court of appellate jurisdiction.

Provided that no member of the Judicial Committee of the Privy Council shall take part in the hearing of any appeal from any decision or judgment which he has given or assisted in giving.

2. In this Act—

The term "Superior Courts at Westminster" means Her Majesty's Superior Courts of Law and Equity at Westminster inclusive of the Court of Probate in England and the Court for Divorce and Matrimonial Causes, and the High Court of Admiralty of England.

3. This Act shall not, except in so far as is by this Act expressly provided, affect the Act of the session of the third and fourth years of the reign of King William the Fourth, chapter forty-one, intituled "An Act for the better administration of justice in His Majesty's Privy Council," or any Act amending the same.

4. This Act may be cited as "The Judicial Committee Act, 1871," and shall, so far as is consistent with the tenor thereof, be construed as one with any Acts for the time being in force relating to the Judicial Committee of the Privy Council.

REPORTS OF CASES heard and determined
by the Judicial Committee and the Lords
of the Privy Council, on Appeal from the
Supreme and Sudder Dewanny Courts in
the East Indies, 1871-72. By EDMUND F.
MOORE, Barrister-at-Law. Vol. XIV.

RADANATH DOSS and Others,—*Appellants*; GISBORNE AND CO.,—*Respondents* * [Jan. 16, 18, and 19, 1871].

On appeal from the High Court of Judicature at Calcutta.

A usufructuary mortgage, to run over a certain number of years, was executed in 1828 by a member of a joint Hindoo family, with the consent of the other members, to R., who afterwards sold the mortgaged estate to H. and H., whose Agent R. was. H. and H. subsequently, in 1841 and 1851, conveyed the estate to G. and Co., as an absolute purchase in fee. In a suit for redemption of the mortgage brought in 1864, G. and Co. set up as a defence their title as *bona fide* Purchasers without notice, and, having been in possession more than twelve years, pleaded the Limitation of suits Act, No. XIV. of 1859, sect. 5, as a bar to the suit. Held: First, that the *onus* was on G. and Co. to establish by clear and satisfactory evidence the termination of the mortgage and the absolute sale by the Mortgagees to R. the root of their title; and, in the absence of such proof, that the transaction in 1841 and 1851 was merely an assignment of the mortgage [14 Moo. Ind. App. 15], and, Secondly, in the circumstances, that G. and Co. were not "Purchasers" within the true construction of sect. 5 of Act, No. XIV. of 1859, to entitle them to the benefit of the twelve years' limitation as a bar to the suit for redemption [15 Moo. Ind. App. 22].

The suit in this appeal was brought by the Appellants for redemption of a mortgaged estate called Maheenwan, consisting of villages and other lands, with mesne profits, against the Respondents, who were [2] in possession, and claimed to be Assignees and *bona fide* Purchasers of the estate without notice of the Appellants' equity of redemption.

The Respondents, who were the Assignees of the original Mortgagees, admitted the Deed of Sale to Russick Lall Doss by Kunhya Lall Doss, a member of the Appel-

* Present: Members of the Judicial Committee,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Hon. Sir Joseph Napier Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

lants' family, and also an Ikrarnamah, by which such sale was made conditional, which Ikrarnamah they alleged had been subsequently surrendered by Kunhya Lall Doss, whereby the sale became absolute, and Russick Lall Doss, under whom they claimed, the sole Owner of the estate in question. They denied that the estate was the property of an undivided family, or that Kunhya Lall Doss had acted only as the Agent and Manager of the family in his dealings with it, and they insisted on the law of limitation, contained in Act, No. XIV. of 1859, as a bar to the claim of the Appellants.

The plaint was filed by the Appellants in 1862, in the Court of the Principal Sudder Ameen of Bhagulpore, against the Respondents, for the redemption of the mortgage executed on the 21st of November, 1828. The plaint set forth the joint interest of the family in the premises so mortgaged, and alleged that full satisfaction and payment of the mortgage debt, had taken place by means of the usufruct and produce of the mortgaged lands, leaving a large sum to be accounted for and paid over by the Mortgagees and their Assignees to the Mortgagors; and it denied that the conditional sale was ever converted into an absolute sale by the surrender of the Ikrarnamah; but insisted, that the alleged transaction of the return of the latter [3] instrument to Russick Lall Doss was entered into, without the other shareholders' knowledge, by Kunhya Lall Doss collusively with the former, in order to avoid an execution, and without effecting, or intending to effect, any real alteration in the relation of Mortgagors and Mortgagee.

The Respondents by their written statement pleaded the Limitation of suits Act, No. XIV. of 1859, as a bar to the suit, and also denied the joint interest of the Plaintiffs with Kunhya Lall Doss, in the Maheeanwan estate, and asserted that the conditional sale had been converted into an absolute sale by the return of the Ikrarnamah, on the 8th of November, 1829.

The hearing took place before Mr. H. R. Madocks, the Judge of Bhagulpore, who, on the 28th of August, 1865, delivered judgment, in which, after review of the evidence and arguments, he decided:—First, that Kunhya Lall Doss was a co-partner in the Maheeanwan estate of the Plaintiffs. Secondly, that the mortgage was not extinguished by the return of the Ikrarnamah. Thirdly, that the Plaintiffs' claim was not barred by limitation, as under Act, No. XIV. of 1859, sect. 15, the period for the redemption of a mortgage of immoveable property was sixty years, which period had not then elapsed. Fourthly, that the Plaintiffs were not estopped from bringing the suit by reason of having made any contrary allegation in a previous suit. Fifthly, that the Defendants were not Purchasers without notice, but had, or might have had, if they had desired it, full notice and knowledge of the Plaintiffs' claim. As to mesne profits, the Judge found that the mortgage debt had been fully paid off out of the usufruct, leaving [4] a surplus due to the Plaintiffs from the Respondents, which for the six years' preceding suit, to which that part of the claim was confined by the law of limitation applicable to mesne profits, amounted to Rs. 24,324, and a decree was given by the Judge to the Appellants for possession of 14 annas shares of the Talook, and the same proportion of the sum of Rs. 24,324 was thereby decreed to them.

The Respondents appealed from this decree to the High Court.

The appeal was heard before a Division Bench of the High Court, consisting of Mr. Justice Norman and Mr. Justice Campbell, who reversed the decree of the Court below, and dismissed the Appellants' suit, leaving each side to pay their own costs. By their judgment the Court stated, that they were disposed to agree with the Judge of Bhagulpore in his finding as to the joint family interest in the Maheeanwan estate; and as to the surrender by Kunhya Lall Doss of Ikrarnamah not having been *bona fide*; although Mr. Justice Norman thought it not proved that the accounts rendered by Russick Lall Doss, after the return of the Ikrarnamah to Kunhya Lall Doss, were so rendered as Mortgagee to Mortgagor, and he was of opinion, that even if there had been fraud on the part of Shawe and Hawes, who bought the estate from Russick Lall Doss, the Respondents, Gisborne and Co., were no parties to it, and that they were proved to have bought from Shawe and Hawes an absolute interest in the Maheeanwan estate for a fair price, though possibly, as he also stated, for a lower one, in consequence of the exceptionable character of the title, but without any want of good faith, and that, therefore, under

[5] the Law of limitation Act, No. XIV. of 1859, sect. 1, cl. 15, and sect. 5, not being Mortgagees, as incorrectly, as he considered, found by the Lower Court, but Purchasers from the Mortgagees; Gisborne and Co. could successfully plead twelve years' adverse possession from the date of their purchase, and that to constitute a *bona fide* purchase for valuable consideration, under the 5th section, it was not necessary for the Purchasers to satisfy the Court, that at the time of their purchase they had no notice of the Plaintiffs' claim, but only that they were guilty of no actual fraud, or wilful shutting of their eyes to the truth. Mr. Justice Campbell, although expressing his general concurrence with Mr. Justice Norman, differed from him as to the exact position of Gisborne and Co., who, as he observed, "had no covenant for title, and their Vendors did not specifically sell the estate now in dispute, and so far, they might be considered as mere Assignees of the mortgage." And further, that:—"They (Gisborne and Co.) purchased an estate with a doubtful title for what it was worth; but that they never knew, or had the means of knowing, that the Plaintiffs' claim was a good claim." And Mr. Justice Campbell expressed his opinion that, "though they (Gisborne and Co.) might not be *bona fide* Purchasers without notice, who could at once defeat a *cestui que trust*, they were *bona fide* Purchasers within the meaning of the Law of limitation, that is, they were parties who purchased honestly without actual fraud." And he finally stated in his judgment that he concurred, "though with much doubt and hesitation," in dismissing the suit on the ground of limitation.

[6] The appeal was from this decree.

Sir R. Palmer, Q.C., Mr. Leith, and Mr. Doyne, for the Appellants, and the Solicitor-General (Sir John D. Coleridge, Q.C.), Mr. Cotton, Q.C., and Mr. J. D. Bell, for the Respondents.

The questions argued were:—

First, whether the estate was a joint Hindoo family property.

Second, whether the mortgage transaction in 1828 afterwards became an absolute sale, and

Third, whether the Respondents were *bona fide* Purchasers for a valuable consideration, without notice from the Mortgagees, and from length of possession as Purchasers, the right of redemption was barred by sect. 5 of Act, No. XIV. of 1859.

Upon the operation of the limitation, after twelve years' possession, as a bar to the suit, Ben. Regs. III. of 1793, sect. 14; VII. of 1795, sect. 8; II. of 1803, sect. 18; and Act, No. XIV. of 1859, sect. 1, cl. 15, sects. 5, 13, and 15, were cited.

As to the title of the Respondents as Purchasers, and the equities affecting their Vendors in respect to the estate attaching to them, *Whitworth v. Gaugain* (3 Hare, 416); *Rodger v. The Comptoir d'Escompte de Paris* (5 Moore's P.C. Cases (N.S.), 538), were referred to and relied on.

Their Lordships' judgment was pronounced by

The Right Hon. Lord Cairns.—The claim in this case, which led to the decision [7] which is under appeal, was a claim, in substance, for the recovery of property at present in the possession of the Respondents, Messrs. Gisborne and Company. The recovery of that property was sought by the Appellants on the footing, that it had been made the subject of a conditional sale in the year 1828; and that they, the Appellants, had now the right to redeem the property,—the amount for which the property had been conditionally sold or mortgaged, having been paid off by the receipt of profits. This mortgage, made in the year 1828, was made by a person of the name of Kunhya Lall Doss as Mortgagor, to one Russick Lall Doss as Mortgagee. The Appellants say, that Kunhya Lall Doss was the member of a joint family, joint as regards this property, and that they were the other members of that joint family, and that the mortgage was made either with their previous approbation, or their subsequent assent. Russick Lall Doss, beyond doubt, was the native Agent of the firm of Shawe and Hawes, and the mortgage, beyond doubt, was made to Russick Lall Doss, because as the law stood at that time, Europeans could not have held immoveable property in this part of India in their own name (see Ben. Reg. xxxviii. of 1793). That law having subsequently been altered, Russick Lall Doss assigned over to his principals, Shawe and Hawes, the property which he thus held for them in mortgage. Subsequently Shawe relinquished his share to

Hawes, and finally by a Deed executed in the year 1841, the details of which will afterwards have to be referred to, Hawes passed over or conveyed [8] the property to the present Respondents, Messrs. Gisborne and Company.

Now, the first question which arises in this state of things, is as to the right of the Plaintiffs to redeem this property? Their possession as members of a joint family is denied by the Respondents, who contend, that there is no evidence that the family was joint, or that this property belonged originally to any person other than Kunhya Lall Doss, the Mortgagee. Upon that question, Mr. Madocks, the District Judge before whom the case first came, delivered a very elaborate and careful judgment, in which he came to the conclusion, that the joint ownership of the property was made out in favour of the Appellants, and, although it was not necessary for the High Court of Calcutta, in the view they took of another part of the case, absolutely to decide that question, they do not appear to have disapproved of the conclusion at which Mr. Madocks had arrived on this point. The evidence having been so fully and satisfactorily commented upon by Mr. Madocks, their Lordships do not think it necessary to say more than this, that looking to the form of the Government settlement of this property, looking to the history of the family, which is in evidence, looking to the accounts going down to the year before the date of the mortgage showing the dealings of the family between themselves, looking to the Ikramnamah executed between Kunhya Lall Doss and the other members of the family almost contemporaneously with the mortgage of 1828, looking to the dealings with the Mauzali Ugada which was excepted out of the mortgage of 1828, although forming part of the [9] whole estate, their Lordships are satisfied that this property was the joint property of the family, and that Kunhya Lall Doss was mortgaging it with the assent of and as the Manager for the whole family.

Their Lordships would add to the general description of the evidence which has satisfied them of this, a reference also to the statements which were made very shortly after the conveyance of 1841 to Messrs. Gisborne and Company. In 1843, a suit was brought by the present Appellants, or some of them, against Messrs. Gisborne and Company, making parties also Russick Lall Doss and Kunhya Lall Doss. The Plaintiffs in that suit were non-suited upon technical grounds, but in that suit the Plaintiffs stated their title substantially in the same way that it is now stated, and in the answers to that suit their Lordships find that Mr. Barnes, a member of the firm of Gisborne and Company, and the other members of that firm, stated that the Plaintiffs' suit was totally false, and that the reasons of the falsity of the Plaintiffs' suit were stated in the answer of Russick Lall Doss, another Defendant, and that that answer was sufficient. They, therefore, referred their case to the answer of Russick Lall Doss, and were content to adopt it as the statement of their case. Now, Russick Lall Doss, as has been said, was the native Agent of the Indigo Factory of Shawe and Hawes at the time of the mortgage in 1828. He must have known perfectly well everything connected with the title and the circumstances of the family, one member of which was making a mortgage to him; and what Russick Lall Doss, having these means of peculiar knowledge, said in the year 1843, was this, "Oh! [10] administer of justice, let your presence consider the fact, that although the Plaintiffs have no right and interest in the said mouzahs, yet even it is clearly evident from the contents of the former plaint that the Plaintiffs themselves have admitted that the said Kunhya Lall Doss, by the advice and with the concurrence of the Plaintiffs, sold the property in dispute to me"—that of course means mortgaged—"for the sum of Rs. 17,011, with the object of liquidating the money due to the said Gentleman from Kunhya Lall Doss, under the Deed of mortgage, dated the 25th May, 1826." Russick Lall Doss was, therefore, content to affirm at this time, and Messrs. Gisborne and Company were content to adopt his statement, that Kunhya Lall Doss had previously mortgaged the property by the advice and with the concurrence of the Plaintiffs,—advice and concurrence which would have been utterly useless and unmeaning unless the Plaintiffs had been joint Owners of the property.

Their Lordships, therefore, on this part of the case, have no hesitation in accepting the conclusion of the Court of First Instance, and they have the satisfaction of thinking, that in that respect, they are not differing from the opinion of the High

Court of Calcutta, although it was not absolutely necessary for that Court to decide the question.

The next objection which was taken to the title of the Plaintiffs to redeem is this. It is said that the conditional sale having been made in the year 1828, and the condition of that sale being for liquidation of the amount of mortgage-money in eleven years,—a year afterwards, in November, 1829, [11] the Ikrarnamah which contained the condition making the transaction a mortgage was returned by Kunhya Lall Doss and Russick Lall Doss, with an indorsement. The indorsement is partly defaced, but it runs thus:—“(Defaced) the said mehal, according to the conditions of the Ikrar (defaced), the Government revenue, and interest and the consideration being (defaced); therefore, I have returned this Ikrarnamah to Russick Lall Doss, the Purchaser. The Mouzahs stated in the Ikrarnamah, I have absolutely sold. Dated the 27th Kartick, 1237. Kunhya Lall Doss, Zemindar.” It is said that the meaning of this indorsement, which was partly defaced, is, that it amounted to an assertion that the profits of the Zemindary were insufficient to pay the principal and interest and the Government revenue, and that, therefore, the Ikrarnamah was returned by Kunhya Lall Doss to Russick Lall Doss.

Now, without going further, their Lordships are compelled to say, that this is a transaction which, upon the face of it, is almost incredible. The property was mortgaged by a usufructuary mortgage, to run over eleven years. The Mortgagee was bound, on the face of the Deed, to pay the Government duty. The mortgage created no personal liability with regard to the payment of the debt. If the debt should be paid in the course of eleven years, the land would be free, if not paid, at all events, the Mortgagor would be in no worse condition than he was at the end of the first year. There is no consideration moving to the Mortgagor for the release of the equity of redemption. It is said that the District in which the property, or to sell the equity of redemption of it, as being the property of Kunhya Lall the uncertainties of dry seasons; but, although that might lead to a diminution of the produce in one year, on the other hand, the absence of drought and the presence of moisture in another season might lead to a more plentiful crop, and the uncertainty is one which might have a double bearing as regards the ultimate result of the conditional sale.

But it is further to be observed, that this allegation of the return of the Ikrarnamah, and the production of it with the indorsement, was never heard of, until about two years subsequently, when one Bholanath, having sued Kunhya Lall Doss upon a debt of his own due to Bholanath, was taking proceedings to sell this property, or to sell the equity of redemption of it, as being the property of Kunhya Lall Doss. Then it was that the return of the Ikrarnamah was set up, and that this indorsement was produced. The moment that defence was set up it was challenged,—challenged not merely by Bholanath, but by the other members of the joint family,—and steps were taken to dispute it. It is true that, from circumstances connected with the attempted sale of Bholanath going off, the question was not ultimately decided at that time, which is very much to be regretted. The primary Judge decided against the transaction,—decided that it was not a real transaction, but a fraudulent one to defeat the Creditor. There was an appeal to the appellate Tribunal. The appellate Court thought that an investigation of the circumstances should take place, and sent it back for that purpose. The biddings at the sale not having been sufficient to lead to a sale taking place, the Primary Judge thought that it was [13] unnecessary to pursue that investigation. But, both at that time and at every time since, when the return of the Ikrarnamah has been set up, the transaction has been challenged as an unreal and fictitious transaction.

Their Lordships are of opinion, that it is, on the face of it, an incredible transaction, and they cannot arrive at any other conclusion than that it was a transaction between Russick Lall Doss and Kunhya Lall Doss for the purpose of defeating the proceedings of the Creditor, Bholanath.

Their Lordships must add this further observation: the mortgage or conditional sale of 1828 is clear and undisputed. It lies upon those who desire to set up any title putting an end to the mortgage to establish their case by evidence which is clear and satisfactory. That *onus* certainly is not discharged in this case, and their Lordships, therefore, are of opinion, that on this point also the title of the

Appellants is made out, and that, unless on some other ground yet to be considered, they are precluded from redeeming, they are not precluded by the pretended return of the *Ikrarnamah*. Upon this point also their Lordships, in substance, agree with the view of all the Judges in the High Court in India.

We come now to the remaining part of the case, which is this: Assuming the title of the Plaintiffs to redeem to be made out, the Respondents, Messrs. Gisborne and Company, claim the benefit of the Act of Limitation of suits, No. XIV. of 1859, and assert that the time during which the title of the Plaintiffs to redeem could be put in force has elapsed. In the first place, they say that the Appellants are barred [14] by the 13th section of the Law if limitations, that is to say, the section which speaks of suits for enforcing the right to share in any property moveable or immoveable, on the ground that it is joint family property. It is not necessary to repeat that section at length, for their Lordships are of opinion, that it is a section which deals with suits between one or some member or members of the joint family and some other member of the joint family, complaining of what we should term in this Country an ouster of some members by others, or of a failure by the member in occupation to account for profits, or to pay maintenance where it is due. The present case is a case by no means of that description. In the present case the foundation of the title of the Plaintiffs is a mortgage, which, as has been already said, was in its inception, in substance, the mortgage of the whole of the joint family. The circumstance that it is not the whole of the members of the joint family, but only some who now come to recover their share of the property, does not make this a dispute in any way between members of the joint family as to the question of, whether the property is joint or not. It is merely a question of the title of the Plaintiffs to redeem, and the question of joint or not joint property has only to be decided incidentally for the purpose of establishing that title as against strangers.

The Respondents then allege, that they are entitled to the benefit of the 5th section of the same Act, which enacts that, "In suits for the recovery from the Purchaser, or any person claiming under him, of any property purchased *bona fide*, and for valuable consideration, from a Trustee, Depositary, Pawnee, or Mortgagee, [15] the cause of action shall be deemed to have arisen at the date of the purchase." Now, questions of very considerable importance have been raised and argued as to the meaning of this section. Their Lordships desire to say, that the provision of this section is founded, no doubt, upon considerations of high policy,—of a policy which their Lordships do not at all doubt is one which is extremely beneficial to India, having regard to the circumstances of that Country. But their Lordships cannot fail to observe, that the provisions of this section are of an extremely stringent kind. They take away and cut down the title, which *ex hypothesi* is a good title of a *cestui que* trust, or of a person who has deposited, pawned, or mortgaged property; they cut down that title as regards the number of years that the person would have had a right to assert it; from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this section should clearly and distinctly show that he fills the position of the person contemplated by this section, as a person who ought to be protected. Their Lordships think, that in order to claim the benefit of this section a Defendant must show three things:—First, that he is a Purchaser according to the proper meaning of that term; second, that he is a *bona fide* Purchaser; and third, that he is a Purchaser for valuable consideration.

Now, what is the meaning of the term "Purchaser" in this section? It cannot be a person who purchases a mortgage as a mortgage, because that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage [16] with a clear and distinct understanding that it was nothing more than a mortgage. It, therefore, must mean, in their Lordships' opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him, and in the full belief that it is not a mortgage, but an absolute title.

Now, it is important in this case to consider how it is that in pleading in the first instance the transaction which here has taken place, the Respondents have put their title. In the sixth head of their statement, they express themselves thus:— "The Defendants, as Purchasers for a just consideration, have all along held

adverse possession of the disputed property for more than twelve years without notice of any legal right as co-partners, *i.e.*, if any right had existed pertaining to the Plaintiffs as well as to those persons from whom the Defendants have acquired their right. Thus, in such a case, also, the Plaintiffs' claim is, by reason of limitation, inadmissible." There is no averment there of any fact; it is merely a statement that as Purchasers they are entitled to the benefit of the Act, but when they come to their averment of facts, their statement is this: the second head is, "On the 16th May, 1838, A.D., Russick Lall Doss sold the said mouzahs to Messrs. William Shawe and William Hawes for Rs. 17,011, and caused the names of the Messrs. William Shawe and William Hawes to be entered in the Government records, on the excision of his own name, and Mr. William Shawe sold his share to Mr. William Hawes, who after that sold it to Messrs. Gisborne and Co. and Mr. C. H. Barnes, and Mr. C. H. Barnes sold his 4 annas share to Messrs. Gisborne and Co., and mutation of names [17] took place." This is a statement which puts the title of Gisborne and Company exactly in the same position as the title of Shawe and Hawes. It alleges, that Russick Lall Doss sold to Shawe and Hawes, that Shawe sold to Hawes, and then that Hawes sold to Gisborne and Company. It draws no distinction between the various transfers of the property, but puts them all exactly on the same footing. Now, an allegation or a plea of a purchase for value is perfectly well known and understood, and the averments in such a plea are not matters of technicality,—they are matters of substance. In pleading a purchase for valuable consideration in this Country, the very first averment in the plea is, that the person selling either was seized, or alleged that he was seized, for an absolute title, and then the plea goes on to say, that being so seized, or alleging that he was so seized, he contracted to sell, and did sell and convey that absolute title, asserting it to be such, to the Purchaser, who paid his money for that which was thus sold. There is not a fragment of an averment of that kind in the whole of the pleadings in this case. The pleading is perfectly consistent with the transaction having been nothing more than the purchase, that is to say, the transfer of that which was a conditional title, or a title by way of mortgage.

We turn then from the pleadings to see what is the evidence of the transaction in the case. Now, there is no evidence at all of any negotiation for this purchase, of any specification, or schedule, or inventory of what the property was that was to be included in the general purchase of the Factory which was taking place. There is no evidence of any allegation or [18] statement on the part of the Vendor which would lead Messrs. Gisborne and Company to believe that this was an absolute title which they held to the property in question. The only evidence that there were Purchasers at all is the production of the purchase Deed to which reference is now made.

The purchase Deed contains a recital of the manner in which the Vendor, the first party to the Deed, Hawes, had had conveyed to him the various Factories which were to be handed over to Gisborne and Company. It then contains this recital of the contract between Hawes and Gisborne and Company:—"And whereas the said John Dougal, George Dougal, Charles Jones Richards, Matthew Gisborne, and John Richards have contracted and agreed with the said William Hawes for the absolute purchase of the said several indigo Factories or works and premises hereinafter described, at and for the price or sum of Company's Rs. 210,000, and the same are intended to be conveyed and assured unto the said John Dougal, George Dougal, Charles Jones Richards, Matthew Gisborne, and John Richards, and their heirs in the manner hereinafter expressed." It is a contract for the absolute purchase of those premises which are afterwards described in this Deed and intended to be conveyed by it. When we turn to what these premises are, we find first an enumeration of the Indigo Factory; then this addition, "All lands cultivated and uncultivated to the said several and respective Indigo Factories or sets of works respectively belonging or in any wise appertaining"; and further on, "And all the estate, right, title, interest, use, trust, property, possession, possibility, claim, and demand whatsoever, both at law and in equity of them the said William Hawes, Robert Molloy, and James Cullen and each of them in, to, out of, or upon the said several and respective Indigo Factories or sets of works, lands, hereditaments, chattels, and premises, and every or any part or parcel thereof."

Now, assume that there was in this commercial House, as a part of their property

in trade, a mortgage securing to them the debt which has been mentioned; assume that that was perfectly well known to every person connected with them, and to the Purchasers. No more fit or apt Deed could have been devised than this for the purpose of conveying a title to that mortgage as the rightful title upon which the property was to be held by the Purchasers. The Deed, in other words, is perfectly consistent with it not having been the intention of any person to this transaction to do more than to hand over this along with all the other property which the commercial Firm possessed, according to whatever might be the right and true title upon which each portion of the property was held. Their Lordships can find in this Deed no evidence of a statement on the part of the Vendor or of any belief on the part of the Purchasers that the property of the Maheewan estate was a property which the Vendor claimed to hold by what we should call in this Country a fee-simple title.

Under these circumstances, their Lordships think, that the first requisite in the law of limitation is not made out, and that the Respondents here are unable to show, or at all events have not shown, that [20] they are Purchasers of this specific property as an absolute property in contradistinction to a mortgage property upon a contract by the Vendor to convey the property to them as an absolute property.

This would be sufficient to decide the case; for, of course, unless the whole of the three requisites exist, the benefit of the Limitation of suits Act is not obtained. Their Lordships, however, think it right to go further, and to say that they are not satisfied that even if this objection did not exist, Messrs. Gisborne and Co. are able to show that they are *bona fide* Purchasers. It is unnecessary to impute, and their Lordships would not desire to impute, to Messrs. Gisborne and Co. any dishonesty whatever in the transaction, or any moral obliquity in their dealings in this matter. But what their Lordships have to observe is this: Messrs. Gisborne and Co. must be regarded as dealing in this case upon one of two footings. Either they were aware in the year 1841, when they took this conveyance, of all that had passed between this native family and the predecessors in title of Gisborne and Co. by way of allegation and averment, and claim upon the one side and upon the other, that is to say, they must either have been aware of all the contents of the papers connected with the litigation which had taken place in previous years, or if not aware of the contents of those papers, they must at all events have been aware of the original Conditional sale of 1828, and of the alleged return of the Ikrarnamah with its indorsement. It has not been very clear to their Lordships upon which of these two footings the Counsel for the Respondents would desire Messrs. [21] Gisborne and Co. to be dealt with. At one time it rather appeared that their Counsel would wish it to be considered that they knew nothing, or should be taken as knowing nothing but the Conditional sale and the alleged return of the Ikrarnamah. At another time their Counsel appeared desirous to refer to certain portions, at all events, of the proceedings which had taken place between the Conditional sale and the year 1841. But assuming that they were not aware of the details of that litigation; assuming that Messrs. Gisborne and Co. knew nothing but what has been called the bare title to the property, the Conditional sale, the alleged indorsement upon and return of the Ikrarnamah, and the transfer subsequently from Russick Lall Doss to Hawes and Shawe; their Lordships are of opinion, that looking to the clear and undisputed mortgage in the first instance—looking to the transparent unreality of the transaction connected with the alleged return of the Ikrarnamah, the mere production of the indorsement upon that Ikrarnamah as the description of the cause for its return was amply sufficient to put any persons in the possession of Messrs. Gisborne and Co. upon an inquiry and consideration as to whether that transaction could be a real transaction, or whether it was a transaction which could form part of the title of a Purchaser. On the other hand, if, as seems to have been rather the opinion of the learned Judges of the Court below, and certainly seems much more consistent with all the facts of the case,—if it be taken that Messrs. Gisborne and Co. were perfectly aware of all the accounts in the Factory and of all the details of the litigation, and of all the claims that [22] had been made before with regard to this property, then their Lordships consider that their attention was pointedly and distinctly called to the infirmity of title in this case, and that, with their attention so called, they could not be considered to be *bona fide* Purchasers.

• Therefore upon both grounds, upon the ground that they are not Purchasers within the meaning of the limitation law, and upon the ground that, if they were Purchasers they are not, in the sense in which the words are used in the Act, "*bona fide* Purchasers," their Lordships think that Messrs. Gisborne and Company are not entitled to the benefit of this Act of limitation.

It would perhaps be right that their Lordships should advert also to an argument which was adduced, although not very warmly pressed, that under the 10th section of the Limitation of suits Act, Messrs. Gisborne and Co. might find protection. The 10th section says, "In suits in which the cause of action is founded on a fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged." This, in their Lordships' opinion, is not an action founded upon fraud in that sense. It is an action upon a title to recover the possession of property to which the Plaintiffs are entitled, which clearly they must recover, unless there be some specific protection given to those now in possession of it by virtue of the other sections of the Act to which reference has been made.

This being the opinion at which their Lordships have arrived, they will humbly recommend to Her [23] Majesty that the decree of the High Court of Calcutta should be reversed, and that in place of it an Order should be made dismissing the appeal to the High Court, and dismissing it with costs. That would set up again the decree of Mr. Madocks, the Zillah Judge. Their Lordships are content to allow that decree to stand, and are unwilling to enter upon any criticism of the precise form of it, because no argument has been adduced before their Lordships upon the footing that, supposing the decree in substance to be right, any modification should be made of it in detail. Their Lordships, therefore, will leave that decree to be the decree in the cause, and will only further add that the Appellants should also have the costs of this appeal.

[Approved *Juggernath Sahoo v. Syud Shah Mahomed Hossein*, 1871, L.R. 2 Ind. App. 48.]

[24] MANTAPPA NADGOWDA,—*Appellant*: BASWUNTRAO NADGOWDA.—*Respondent* * [Jan. 20, 1871].

On appeal from the High Court of Judicature at Bombay.

A., one of three Brothers of the Nad Gowdki family, in Bombay, in which family it was alleged, a custom existed (the estate not being a Raj or Principality) by which the eldest Son succeeded to the estate, and the younger Brothers received maintenance, or an allotment out of the estate in lieu of maintenance; received an allotment of land from his elder Brother. In consequence of disputes as to the allotment, A. afterwards executed a release in his elder Brother's favour, renouncing all share in the family estate. The Deed was written on unstamped paper, but it was stipulated in the Deed that A. should get it stamped; which was done, but, instead of an *ad valorem* stamp, a stamp of 2 annas only was impressed. A., after having been in possession of his allotment for ten years, brought a suit against his elder Brother, claiming a share in the family estate, according to the ordinary Hindoo law, and impeaching the Deed of release as a forgery. The Sudder Ameen upheld the Deed. On appeal to the Civil Court of Dharwar, A. for the first time objected to the reception of the Deed as evidence, as not being impressed with a stamp sufficient to cover the value of the property allotted to him. That Court admitted the Deed as evidence of the release. On appeal, the High

* Present: Members of the Judicial Committee,—The Right Hon. Lord Cairns, the Right Hon. Sir James William Colvile, and the Right Sir Joseph Napier, Bart. Assessor,—The Right Hon. Sir Lawrence Peel.

Court also upheld the Deed, but, under Bom. Reg. XVIII. of 1827, sects. 10, cl. 1, and 12, cl. 2, reduced its effect and operation by making it a Deed of release for so much only of the property comprised in it as would be covered by the 2 anna stamp impressed. Held by the Judicial Committee, reversing such decree:—

First, that (without deciding, whether such family custom as pleaded existed,) the Deed of release constituted a transaction in the nature of a family arrangement, and was properly received in evidence, and was binding on A. [14 Moo. Ind. App. 39].

Secondly, that the course adopted by the High Court in respect to the insufficiency of the stamp was erroneous, as it was the duty of that Court (1) either to have refused to admit the Deed as evidence for want of a proper stamp, or (2), in the alternative, to have required the Deed to be properly stamped before admitting it as evidence [14 Moo. Ind. App. 38].

In this appeal the suit was brought by the Respondent in the Court of the Sudder Ameen, at Bagulkot, to recover the sum of Rs. 567, claimed by him as the value of a one-third share of a family estate described as a "Nad Gowdki," Gowdki Enam, [25] Government land and Houses in several villages of the Hoongoond Talooka."

The Respondent was the second, and the Appellant the eldest Son of one Kidiganappa Gowda, deceased. There was no dispute about the relationship of the parties.

The claim of the Respondent, as laid in his plaint, was based upon the general rule of Hindoo law, that all Sons share equally in any property descended from a common ancestor.

The Appellant, by his answer, stated first, that for a series of generations no share had ever been allowed to Bhai Biradars (kinsmen) in the Nad Gowdki and Gowdki estate of the family, and that there were accordingly many branches of the family, who having failed to obtain shares, held only a part of the landed property received in lieu of maintenance, their members living separate, as their predecessors had lived for hundreds of years before the date of the suit. Secondly, that the Respondent, as one of the kinsmen, had accepted a small part of the landed property and a House by way of maintenance, and had lived apart from the Appellant for ten or twelve years, but that on his complaining that such provision was insufficient, he had received an additional allowance of land, whereupon he had executed a Deed of release to the Appellant, on the 17th of October, 1852, giving up all pretensions to the Nad Gowdki and Gowdki offices. [26] The Appellant, in his answer, further stated, that the Respondent had falsely described the family estate in his plaint, both in mentioning as part of it certain lands which had been granted away by the Appellant's ancestors, and which the family had ceased to occupy for many years, and in omitting to mention so much of the estate as was in the possession of the Respondent, a third of which, on his own showing, ought to have belonged to the Appellant.

The Appellant put in evidence the Deed of release executed in his favour by the Respondent, which was in these terms:—

"I, Baswuntrao, Son of Kidiganappa, resident at Kasba Kelur, execute a Deed of release to the following effect. As differences arose in the family between you and me, I live separate, my continuance in the House being impossible. As it was customary from the time of our ancestors for grants for maintenance to be allowed, I asked for land for the support and maintenance for my family, and accordingly you have given me for maintenance the land and Houses described below" (which were described, and proceeded): "You have thus made me a grant of land and a House. I shall have no connection with the payment of the debts contracted both by ancestors and by yourself. Whatever debts there may be you will pay or receive payment. You, as being born in the elder line, will in the same manner as the first-born descendant used to do from the time of our ancestors, enjoy the Nad Gowdki Wuttun, the Bodihall and Kadapaty estate, the Halli Chasrat and the Chasrat of this Kusba, the land of Gowdki Wuttun and whatever else may be, together with the rasoom (cash allowance or fees), Hak Bab, and the rights and

[27] privileges (of the hereditary office). I have no right to claim them. You will continue to pay as heretofore the Nad Gowdki, Mahal Joodee, and the Gowdki Joodee, and enjoy the whole of the Wuttun for yourself. You will allow no dispute to be raised about the land and House now granted to me. I shall enjoy the said House and land, and live in peace; with the exception of the two, namely the fields and the House. I have no right over the rest of the Wutnee land and property; you will not be liable for the payment of any debts, etc., which I may contract. As there was no stamp available for the occasion, I have drawn this up on plain paper. I promise to get the stamp within eight days from this date, and write the Deed upon it, and take this paper back. In case I should fail to procure the stamp, and give the Deed written upon it, I agree to pay all the expenses and the penalty which may be incurred for getting this paper stamped. To this effect I deliver and sign this Deed of release of my own free will and in my sound mind. The date this Ashwig Sooda, 5 Paridhavi Sumoussoar Shuke, 1771 (October 17th, 1852)." To this document a mark was affixed, after which was the following: "This mark affixed by Baswuntrao." Signed, NURSING RAO DESPANDÉ, Hoongoond.

At the hearing of the suit before the Sudder Ameen, the Respondent disputed the Deed of release, on the ground of genuineness only, maintaining in his deposition that he had known how to write from his boyhood, and could have written his signature in the character (Canarese) in which the Deed was drawn up, and denying, therefore, the authenticity of the Deed in consequence of the mark attached to it. In support of his contention that he was entitled as the Appel-[28]-lant's Brother to a third share of the estate, and not to maintenance only, the Respondent examined Witnesses. The first deposed that he knew nothing of the matter, while the second said that in the Nad Gowdki Wuttun an allowance was made to the Brothers for their maintenance. The Appellant, on the other hand, called several Witnesses to prove the authenticity of the Deed of release and the custom of the family to allow maintenance to younger Brothers. On the question of the family custom, the Appellant's Witnesses were unanimous. The Appellant himself deposed to having, in various instances, made allowances for maintenance to kinsmen, instancing the village of Chickwadga as having been given to Mantappa, Son of Parwat Gowda, and the village of Idalji to Milapa, the Brother of Sangapa. These two persons were called as Witnesses, and confirmed the fact of these grants having been made to them for maintenance only. Malappa, the younger Brother of the parties to the suit, was also called, and in the course of his evidence said, "In my family maintenance is granted, but no share is allowed by custom."

On the 7th of June, 1862, the Sudder Ameen (Tirmatrao Venkatesh), gave judgment, dismissing the suit, with costs; the material part of his judgment being as follows:—"On the fourth issue the Court holds, that Baswuntrao did execute the Deed of release to Mantappa, because the Witnesses depose that Baswuntrao, having got written the Deed of release, and having affixed his mark to it, caused it to be attested and delivered it over. On the other hand, it is stated by members of the family and some of the Witnesses, that Baswuntrao formerly did not know how to write; that he learned to write when he was appointed [29] to manage police business; that there is no custom of allowing shares to Brothers in the Nad Gowdki family, but that maintenance only is allowed; and that Baswuntrao having received maintenance accordingly lived separate. Baswuntrao contends, that he knows how to write, and that the Deed of release does not bear his signature; but he states in his disposition that he knows how to write his signature only. On looking at his signature it does not appear to be a settled hand. The signature exhibits the appearance of one having been newly learned to write. Gerry Mallappa, a Witness for Baswuntrao, does not state that Baswuntrao knew how to write from his boyhood. He simply says, that Baswuntrao has known for the last twelve years to write his signature only. Neither does the decree produced by Baswuntrao, prove that Baswuntrao knew how to write. A claim brought on a Bond, which bore his mark, was thrown out because the Bond put in as evidence to support the action was not proved. This circumstance alone would not prove that Baswuntrao knew how to write. Baswuntrao brings forward Bonds dated in Shuke, 1770 and 1771, purporting to have been executed by him to third parties, and bearing his signature; but he does not show how he came to be possessed of the Bonds granted to others. Besides this,

on a careful examination of these papers on both sides, they appear to be new ones, and not so old as thirteen or fourteen years. The copy of the Vakeeletnamah (Power of Attorney) produced by Mantappa, and authenticated by the signature of the Assistant-Judge, proves that Baswuntrao affixed his mark and not his signature to a Vakeeletnamah, executed by him in suit, No. 204 of 1847. It is, therefore, estab-[30]lished that Baswuntrao has only recently learned how to write. Besides this, Baswuntrao holds, at present, possession of the land called Kala Holla and Killeda Holla, both in the village of Kelur. He has also built a House at Kelur. Baswuntrao admits, in his deposition, that he has not included those lands in his plaint. Mantappa produces a petition presented by Baswuntrao at the Talooka Cutcherry, in 1861, the purport of which goes to show that there was a dispute regarding the boundaries of these very lands. These are the fields alluded to in the Deed of release. In the manner aforesaid the Deed of release is proved. It is to be observed chiefly that the lands therein referred to are in the possession of Baswuntrao, and that he has not included them in the plaint, a circumstance which strengthens the authenticity of the Deed of release. For all these reasons it appears that the Deed of release was really executed."

From this decision the Respondent appealed to the Civil Court of the Zillah of Dharwar, and for the first time objected to the Deed of release, on the ground of the insufficiency of the stamp on the Deed.

On the 28th of October, 1864, Mr. C. F. H. Shaw, the Acting Judge of the Civil Court District of Dharwar, gave judgment in favour of the Appellant, confirming the decision of the Sudder Ameen, and dismissing the appeal with costs. The Judge held, with respect to the objection as to the insufficiency of the stamp, that according to the old law it was only necessary for the stamp to prove the actual property delivered. In his judgment he observed: "Baswuntrao sues his Brother for a one-third shares of the Hoongoond Nagowda Wuttuns, but he admits that [31] he has lands not entered in his plaint, and that the Respondent, Mantappa, holds the others for which he has not preferred his claim to share." Mantappa meets the suit by denying the custom of the family to divide the estate, and his evidence to show that the different members receive merely Potgee maintenance is stronger far than the Witnesses called by Baswuntrao to prove the custom of division, and the Court places more reliance on Mantappa's plea, confirmed as it is by the Exhibit No. 21, a decision of Arbitrators rejecting a similar claim to the present as far back as the year 1829. But had even custom allowed the division of the family estate, there was no reason why the Appellant and the Respondent should not make a special agreement for enjoying the Wuttun, and pass a phareekut (release), such as Exhibit No. 10; and the argument that this phareekut is passed on insufficient consideration is worth nothing, when the Appellant allows that he holds other lands besides those referred to in it. In fact the phareekut proves the additional consideration for passing it. That the phareekut is a genuine document the Court considers established from the fact, that the date of stamping is earlier than that of the action, and which confirms the deposition of Mantappa, Exhibit No. 54."

From this decision the Respondent appealed to the High Court at Bombay, without advancing any new grounds in support of his claim, and on the 26th of July, 1865, judgment was delivered in favour of the Respondent, reversing the decisions of both the Courts below.

The High Court, consisting of Messrs. Forbes and Newton, based their decision upon grounds different from those relied upon by the Respondent, and held [32] that sufficient proof had not been given by the Appellant of the custom for which he contended, and that even if such a custom did exist, it had never been and could not be allowed to override the ordinary Hindoo law on the subject, unless in the case of a Raj or Principality, where it was shown to have descended undivided to the eldest male heir during several generations, as in the cases of *Rawut Urjun Singh v. Rawut Gumsiam Singh* (5 Moore's Ind. App. Cases, 169), and *Bahoo Gunesht Dutt Singh v. Maharaja Moheshur Singh* (6 Moore's Ind. App. Cases, 164), and Appeal No. 2, of 1864. In the case of a Raj the Court admitted the law of primogeniture would be unhesitatingly applied where the custom warranted it. On the question of the Deed of release, the High Court held, that the judgments of the Courts below

as to its genuineness as a question of fact was final. But they proceeded to say, that—"Under the provisions of cl. 1, sec. 10, of Bom. Reg. XVIII. of 1827, it requires a stamp, and under cl. 2, sec. 12, of the same Regulation, as it is a writing not for a specific sum, it might have been executed on a stamp of the value of eight rupees, or if written on a stamp of less value, may be made effective only up to the utmost sum covered by such stamp under the rule contained in the previous clause of the same section. It was originally written on plain paper, and contains an agreement for subsequent stamping, which was permitted by sec. 13 of the same Regulation; a stamp of two annas has since been impressed on it, and by this, under the clause previously referred to, and Appx. B to the same Regulation, the highest sum or value that can be secured is Rs. 64. To this extent only, therefore, the Deed of release is valid, [33] and to this extent it operates to reduce the Plaintiff's claim."

Dissatisfied with this decision, the Appellant twice applied for a review of judgment, but failing to obtain it, he petitioned the High Court for leave to appeal to Her Majesty in Council, which was granted.

The appeal now came on for hearing. As the Respondent did not appear the appeal was heard *ex parte*.

Sir R. Palmer, Q.C., and Mr. H. C. Merivale, for the Appellant.—There are two questions: the first as regards the family custom, that younger Brothers and kinsmen are entitled to maintenance but not to a share of the family estate, thus superseding the general rule of the Hindoo law of succession, and the second, respecting the validity of the Deed of release and the sufficiency of a stamp thereon.

Upon the first point, as a question of fact, it was proved by the Respondent's own admission in the Deed of release; by the Arbitrator's Award showing the Wuttun to be undivided, and also by the parol evidence, including that of the Younger Brother, who had accepted maintenance, that it was the custom in the Appellant's family, for the eldest Son to succeed to the family estate, and that the Younger Brothers and kinsmen were entitled to maintenance only, or an allotment of property in lieu thereof, and not to a share of the estate, according to the ordinary Hindoo law in force in Bombay. The High Court had no authority to review the facts of the family custom which was one of evidence only, *Hurreechur Mookeree v. Jadunath Ghose* (10 W.R., 153). There are similar customs [34] recognized in Hindoo families, which supersedes the general Hindoo law. *Tara Chund v. Reeb Ram* (3 Mad. High Court Rep. 50); *The Government v. Monohur Deo* (W.R., 1864, p. 39); Steel's on the Law and customs of Hindoo castes in the Dekhun, tit. Inheritance, sect. lxxi., p. 229 [Ed. 1868].

Secondly, the Respondent, in pursuance of such custom, and to avoid litigation in the family, executed the Deed of release in favour of the Appellant, by which, in consideration of the allotment of part of the family estate for his maintenance, he renounced all further claim thereto. This Deed, we submit, was a valid and effective release of all the Respondent could claim out of the family estate, but the High Court, while allowing its genuineness, treated it as only partially valid, on the supposed insufficiency in the amount of the stamp impressed on the Deed. According to the High Court's construction of Bom. Reg. XVIII. of 1827, sec. 10, cl. 1, and sec. 12, cl. 2, the Deed was admissible in evidence only with respect to the value of the property covered by the stamp. A construction at variance with all authorities, *Doomah Sahoo v. Jomarian Loll* (12 W.R., 362); *Ram Brem Lal v. Abluckh Singh* (Marsh., Ben. App. Cases, 267); Acts, No. XXXVI. of 1860, and No. X. of 1862 (see, also, the Imperial Statute, 17th and 18th Vict. c. 83, sec. 27, which enacts, that an instrument liable to stamp duty is admissible in evidence, in criminal proceedings, although it may not have the stamp required by law impressed thereon). But the objection to the sufficiency of the stamp was never raised by the pleadings or in issue in the Court of First Instance, and no opportunity was given to the Appellant to remedy, if necessary, such insufficiency. By the 13th section of [35] the Bom. Reg. XVIII. it might even now, if necessary, be properly stamped. Macpherson's Civil Proc., ch. III. pp. 139, 140, 141 [Ed. 1871]. The High Court, therefore, was wrong in so dealing with the Deed. Even if the Deed was not receivable as a release, it ought to have been admitted as evidence as a memorandum of agreement for a family arrangement afterwards carried out. In *Evans v. Prothero* (1 De G.M. and G., 572), Lord St. Leonards held, that a document containing all the requisites to make it a valid

contract, and purporting to be a receipt, though by reason of its being insufficiently stamped inadmissible as such, could be received as evidence of the contract.

Judgment was delivered by

The Right Hon. Lord Cairns.—The first question raised in this case is as to the existence of a custom in the Nad Gowdki family by which, on descent, where there was more than one Son, it is alleged, that the younger Brothers did not, according to the ordinary Hindoo law, share with the eldest Son in a division of the property, but received maintenance, or an allotment of property in lieu of maintenance, in place of sharing in the whole property. Their Lordships feel a difficulty in knowing exactly what the precise terms of the custom are which the Appellant desires to rely upon. But further than that, after considering the evidence, their Lordships find no sufficient evidence of a special custom of the kind urged at the Bar to have prevailed in this family. They, therefore, think it unnecessary to consider the question raised by the High Court, as [36] to whether, in that part of India, a custom of the kind suggested might or might not be valid. That is a question which would properly arise for determination as soon as it was ascertained that in point of fact such a custom prevailed. Their Lordships, however, find sufficient materials which would enable them to dispose of this case from the dealings that have taken place between the Appellant and the Respondent.

It appears that there were three Brothers, the Appellant being the eldest, the Respondent the second, and another Brother, not a party to this suit, who was the third. It appears that upon the descent of the family property, the third Brother received an allotment of land in lieu of maintenance, and did not claim to be, and was not allowed to be, a sharer, in the family property. It appears further, that the Respondent, on the 17th of October, 1852, entered into an engagement, evidenced by a Deed of that date, between himself and the Appellant, his elder Brother, to this effect. [His Lordship read the Deed, *ante* [14 Moo. Ind. App.], p. 26.]

Now, if that is a valid Deed, if it is not impeachable on the ground of fraud or any other ground, it appears to their Lordships that there is a clear and distinct contract between the Appellant and the Respondent, by which the Respondent accepts an allotment of specific land and a House; obtains certain benefits by being relieved from the family debts, and makes stipulations with his Brother which are binding and enforceable,—which would be binding and enforceable probably in any case, but are still more so when the transaction is one in the nature of a family arrangement. It is true that the arrangement is made upon the expression of belief on the part of the Respondent that he [37] was acting in accordance with the custom of the family. It is very probable that that belief was founded upon fact, and the existence of that belief on his part does not in any way detract from, but rather adds to, the stringency and the effect of the family arrangement. It ought to be added that this Deed having been executed on the 17th of October, 1852, the Respondent appears to have entered into possession of the allotted property, and to have remained in possession until the year 1861, when the suit was instituted, without any complaint on his part except that the portion allotted to him by way of maintenance was too small, which complaint appears to have been met by a further portion being allotted to him for the purpose of increased maintenance.

Therefore, if this be a valid document, and not open to challenge on the ground of fraud, or upon any other ground, their Lordships would be slow to fail to give effect to a family arrangement of the kind thus expressed, followed, as it has been, by enjoyment and possession for a period of ten years.

Well, then, is there any ground for impeaching this document? Now, in the first place, it is to be observed, that in the plaint filed by the Respondent there is no challenge of this document whatever. The plaint does not seek to set aside the Deed on the ground that he was misled, that he had not sufficient advice, or that he was ignorant of his rights at the time he executed the release. But when the document was presented as a defence on the part of the Appellant, then the Respondent challenged it, not upon the ground of fraud or ignorance of his rights, but upon the allegation that the document never had [38] existed at all, and that he never had signed such a document. Upon that issue, evidence was entered into on both sides. The two Courts before whom the case was first heard, the Court of First Instance and

the Court of first appeal, weighing that evidence, considering it very fully and very carefully, disbelieved the evidence of the Respondent, and held that the Deed was beyond doubt a genuine document executed by him. The second Court of appeal did not differ from the conclusion arrived at by the first two Courts, but the second Court of appeal made this objection to the document. It appeared that in the first instance it had not been stamped at all: indeed, on the face of it, it professed to be a document written on plain paper, the stamp for which was afterwards to be supplied by the Respondent. After it was first produced it appears to have had a stamp of two annas impressed upon it, and the High Court took notice that that was an insufficient sum to cover the amount of the property comprised in the Deed. Now, admitting that the stamp was insufficient, which may be assumed, it appears to their Lordships, that there were two courses which ought to have been taken by the High Court. The Court might have refused to admit the document for want of a proper stamp. Their Lordships do not say that that would have been a correct course, but it would have been a possible course; or they might under the Acts and Regulations for that purpose, have required the document to be properly stamped, and the penalty paid into Court for the purposes of the revenue. As to rejecting the document *in toto* for want of a stamp, there would have been this serious difficulty, that there does not appear to have been any [39] objection raised to its admission in the Court of First Instance, and it is difficult to see how, that being the case, it would have been a just course to have rejected *in toto* the document in the Court of last appeal. However, the Court of last appeal in India did not take either of those courses. It did not reject the document. It did not do what obviously would have been the more correct course, require the Deed to be properly stamped and the penalty to be paid, but it left the Deed as part of the evidence in the case, just in the way in which it had been placed among the evidence by the Court of First Instance, and it qualified its effect, and the extent of its operation, by making it a Deed of release, releasing so much of that which the Plaintiff might otherwise claim, as would be covered by the insufficient stamp of two annas. Their Lordships cannot do otherwise than express their surprise at the course thus taken, which appears to them to be entirely without precedent, without principle, and without authority.

Their Lordships, therefore, find the Deed as part of the evidence in the suit. They are prepared to say that, being evidence in the case, they think the full and natural weight should be given to it as part of the evidence in the cause; and being of that opinion, they have already said that the Deed not being challenged on the ground of fraud, or on the ground of any ignorance of rights, is the expression of a valid family contract between the two Brothers, acted upon by both of them and ought not now to be disturbed.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be allowed, that [40] the decision of the High Court should be reversed, and the first decision which dismissed the suit of the Respondent, be restored, and that the Appellant should have his costs of this appeal as well as of the hearing in the Court of second appeal in India.

SYUD TUFFUZZOOL HOSSEIN KHAN, *Appellant*; RUGHOONATH PERSHAD and LADLEE PERSHAUD,—*Respondents* * [Feb. 3, 1871].

On appeal from the Judicial Commissioner of Oude.

Under a remit from the Privy Council to the Court of First Instance, to refer to arbitration, with the consent of the parties, the accounts of a partnership Firm, a reference under a submission and Order of the Court was duly made to Arbitrators. Before any Award made, the "rights and interests" of one of the parties in the Award were by Order of the Court sold by auction in

* Present.—Members of the Judicial Committee—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James.

satisfaction of a decree against him made in another suit by a third party. Held, that the expectant claim under an inchoate Award was not "property" within the meaning of sect. 205 of Act, No. VIII. of 1859, and was not saleable in execution of a decree.

Seemle, a mere right of suit is not "property," but a title to recover future property [14 Moo. Ind. App. 49].

This suit was brought by the Appellant against the Respondents to obtain a decree to establish his rights as Purchaser at an auction sale in execution of a decree, of the right, title, and interest of the [41] deceased Father of the Respondent, Rughoonath Pershad, as partner with another person in a Firm or co-partnership of Merchants and Bankers, being wound-up, and an account being then taken by Arbitrators under a submission, and also under an Order of the Court of the Civil Judge of Lucknow, to ascertain the amount to be paid in money as his proportion or share of the co-partnership assets.

It appeared, that a former suit had been instituted in the Civil Court of Lucknow by one Ramnath, the late Father of the Respondent, Ragonath Pershad, against Sheonath. The parties were partners trading as Merchants and Bankers, and the object of the suit was for a general account and a partition. The Civil Judge, in opposition to the protest of Ramnath, referred the accounts to Arbitrators, and the Court afterwards adopted the Award of the Arbitrators. His decree was confirmed by the Judicial Commissioner of Oude, and against that decree an appeal to Her Majesty in Council was brought (see *Sheonath v. Ramnath*, 10 Moore's Ind. App. Cases, 413). In that appeal the question raised and adjudicated was, whether it was competent to the Court under the Civil Procedure Act to refer the questions to the Arbitrators nominated by the Court against the protest. The Judicial Committee reversed the judgment of the Judicial Commissioner, and remitted the suit to India, with directions as to winding up the outstanding concerns of the co-partnership, leaving it open to the Court, if both parties consented, to refer any question in respect of their respective rights in the outstanding debts to Arbitrators; but if the parties did not consent to any such mode of settling their disputes, then it directed that it was the duty of the Court to [42] adjust the accounts still unsettled between them in a regular way, by taking an account (see *Sheonath v. Ramnath*, 10 Moore's Ind. App. Cases, 429).

Under the Order in Council made on this judgment, Sheonath and the Respondent, Rughoonath Pershad, the heir-at-law of Ramnath, who had died pending the proceedings, presented a petition to the Court, stating that they had agreed to abide by the Award of certain Arbitrators with regard to the outstanding debts of the joint Firm that had been realized, and the Court thereon referred the matter to the Arbitrators named.

It appeared that in the year 1865 another and distinct suit was instituted in the Civil Court of Lucknow, in which one Sah Banarsee Doss sued Ramnath, and a decree was made in favour of the Plaintiff in that suit for Rs. 683 : 3 : 0, and under an Order of the Court, an attachment, at the instance of the Decree-holder, was ordered of the "claim of *Ramnath v. Sheonath*, which has been returned by the Privy Council for settlement of the accounts." As the judgment debt was not paid, the Court, before the making of the Award by the Arbitrators, directed the claim in *Ramnath v. Sheonath*, which was remanded by the Privy Council for settlement of accounts, and had been referred to Arbitration, to be put up for public auction, and at the sale thereof the Appellant purchased the rights and interests of Ramnath in that suit for the sum of Rs. 1350. He afterwards intervened in the suit of *Sheonath v. Ramnath*, as such Purchaser, submitting that the Respondent, Rughoonath Pershad, had no claim in that suit, as he had purchased his rights and interests at public sale. This application was resisted, and the Court afterwards rescinded the auction sale. By the Award of the Arbitrators the sum of Rs. 34,000 was [43] awarded to the Respondent, Rughoonath Pershad. In consequence the present suit was brought by the Appellant.

By the decree of Mr. Fraser, the Judge of the Civil Court of Lucknow, it was declared that the Respondent, Rughoonath Pershad, the judgment Debtor, who had urged the irregularity and invalidity in the procedure and sale, had made no effort

to postpone or stay the sale, but on the contrary had allowed it to go on, his own Agent having attended as a bidder thereat: and, that the sale being of moveable property became at once complete and absolute on payment of the purchase-money and the granting of the receipt for the same to the Purchaser, the Appellant, according to the provisions of sect. 251 of the Civil Procedure Code, Act, No. VIII. of 1859.

On appeal Sir George Couper, the Judicial Commissioner of Oude, reversed that decree, declaring and decreeing that Construction 1248 of the *Sudder Dewanny Adawlut*, dated in 1839 and 1840, which declared that by law "unproved claims" of B against C were to be considered "as assets available in the execution of A's Decree against B, and be sold by auction," was repealed by the Civil Procedure Code, Act, No. VIII. of 1859; and that, therefore, the attachment and sale of the right, title, and interest of the partner aforesaid, dependent, as the Judicial Commissioner held, on an *inchoate Award*, was not "property" susceptible of sale under section 205 of that Act; and further, that the sale to the Appellant was invalid, because the property was not attached in the manner prescribed by law for such property—holding it to consist of "debts" within the meaning of section 236 of that Act, and that the [44] mode of attaching debts, prescribed by that section, had not been followed by the Nazir.

The appeal was from this decree. No appearance having been put in by the Respondents, the case was heard *ex parte*.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant, contended, that by the law and practice of the Courts of India, the right, title and interest of a partner in a trade or business could be attached and sold in execution of a money decree against such Partner, even if the assets of the partnership could not be ascertained or fixed until an account then pending before Arbitrators, or the opinion of the Court, had been taken, and the relative proportions of the co-partners determined by decree of the Court and Award of the Arbitrators. They referred to Construction by the *Sudder Dewanny Adawlut*, No. 1248, dated 1839 and 1840, Civil Procedure Code, Act, No. VIII. 1859, sects. 205, 236, 251. And, as to the irregularity of the sale, they cited sect. 252 of that Act.

The case stood over for consideration.

Their Lordships' judgment was now delivered by

The Right Hon. the Lord Justice James (Feb. 20, 1871).—This is an appeal from a decision of Sir George Couper, the Judicial Commissioner of Oude, reversing a decree of Mr. Fraser, the Judge of the Civil Court at Lucknow, given in favour of the Appellant, the Plaintiff in a suit which he had brought to set aside an alleged illegal Order of Mr. [45] Smith, the officiating Civil Judge of that City. The Order in question cancelled a judicial sale in execution of a decree for a money demand made in a suit in which one Sah Banarsee Doss was Plaintiff, and Ramnath, the Father of the first Respondent, was the Defendant; in which suit the Plaintiff recovered the sum of Rs. 683. 3 annas. The Decree-holder, Sah Banarsee Doss, unable to obtain payment of this demand, attached as the property of his Debtor a certain claim in a pending arbitration between Ramnath, the judgment Debtor, and Sheonath, his former partner. He proceeded, as if in the regular course of such executions, to its sale in satisfaction of his decree. It was sold accordingly by auction by the Nazir of the Court, and the Appellant became the Purchaser of it for the sum of Rs. 1350.

The claim was thus described in the notice of sale:—

"The claim of *Ramnath v. Sheonath*, which was remanded by the Lords of the Privy Council for the settlement of accounts, and has been referred to Arbitrators."

The sale took place on the 25th of October, 1866, and on the following day the Arbitrators made their Award, and awarded to the first Respondent, as the Son and representative of Ramnath, then deceased, the partner of Sheonath, the sum of Rs. 34,000, and the outstanding debts they awarded to Sheonath. These outstanding were partnership debts due to the late Firm, in respect of which neither partner, however, had incurred any special liability to the other. The submission, which was in the most general terms, and conferred the most ample discretionary powers on the Arbitrators, contained the [46] following expressions: "The case has been made over to you for your decision. We, the parties concerned, agree to have our cause decided among ourselves, and are willing to abide by an amicable adjustment. We, therefore, of our own free will and accord declare and do state in writing that in

any way whatsoever our case may be decided by you, the same will be accepted and recognized by us."

The Appellant claims to be entitled to the sum of Rs. 31,000, as Purchaser of the same at the auction sale for the sum of Rs. 1350. The sum so claimed, however, had no existence at the time of the attachment; it was not a debt nor liability at that time from Sheonath to Ramnath's Son; it was a debt created by the Award, and not the liquidation of a preceding unliquidated demand *ex contractu*. It was (amongst other matters) an Award of an extinguished share of debts which were till then debts due to the Partners jointly, and became, under the Award, the sole property of Sheonath. It was quite competent for the Arbitrators to award money to be paid by, instead of to, the judgment Debtor, and to give him the outstanding debts. The attachment was not of a several share of the outstanding debts; had such a claim as that been made it should have been asserted by a different notice, directed also to the original Debtors. On its effect, if so made, it is not necessary to decide.

Mr. Smith set aside the Order directing the sale. He made his annulling Order *ex parte*, without any notice to the Appellant, who was in ignorance of, and had no opportunity of opposing it. The Appellant, on becoming aware of the Order, petitioned Mr. Smith against it. His petition was received; it stated [47] in detail all his objections to the Order, which were fully considered; Mr. Smith, however, adhered to his opinion, and sustained his Order.

In consequence of this decision by Mr. Smith, the Appellant brought a regular suit to set aside the Order annulling the purchase, and to enforce his rights as Purchaser. Mr. Fraser decreed the suit in his favour; but, on appeal to the Judicial Commissioner, that decree was reversed. From this last decree the present appeal has been brought.

The decision of this appeal depends on the true construction of section 205 of Act, No. VIII. of 1859; but before their Lordships enter upon the consideration of the effect of that section they will dispose of some other objections which were urged against Mr. Smith's Order.

The Judge proceeded, it is said, in reversing the sale, on the ground of irregularity alone. The real objection, however, to this sale, if sustainable in law, is not one of irregularity; it is one which, from its nature, as founded on a want of power in the Court, affects equally, if it be valid in law, the title of a Purchaser under a strictly regular sale.

Assuming the decision under appeal to be correct, the sale would be simply inoperative, though uncanceled.

This answer substantially disposes of another objection which was directed against the propriety of Mr. Smith's act in cancelling the sale. The act itself may have been right, though he erred in his mode of doing it.

Mr. Fraser appears to have supposed a Judge of that Court unable to correct his own error, in sending [48] forth, *per incuriam*, an invalid Order which he would not have made if duly informed.

To proceed, so far as the practice of his Court will allow him, to recall and cancel an invalid Order is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the Suitor. It would be a serious injury to the Suitor himself to suffer him to attempt to execute an inoperative Order.

If, then, the decision appealed from be correct, no other objection can reasonably be urged against the course adopted by Mr. Smith than this, that he did irregularly without notice, that which it was his duty by a more regular course to do.

Their Lordships are satisfied, however, that no harm or wrong was done by Mr. Smith's suspending *ex mero motu* an Order which appeared to him *ex facie* improper—and this was, in effect and substance, what he did.

The section on the true construction of which the decision of this appeal depends is the 205 of Act, No. VIII. of 1859. After an enumeration of many specific subjects of attachment of various natures, the section, at its close, employs very general words, as if to include all property not enumerated. These words, "and all other property whatsoever, moveable or immoveable," are, in substance, the same with the words in the old Writ of sequestration pending a suit under the old procedure of the Company's Courts in India. See the form in Macpherson's Civil Procedure,

p. 196 [3rd Ed.] This Writ issued pending a suit to restrain an alienation commenced, or sup-[49]posed to be about to be made, on the part of a Defendant in fraud of his Creditor.

Of this Writ and the ordinary Writ in execution, the Author says, that scarcely any kind of property is exempt from its operation. The old Writ of seizure in the same Courts has words less extensive in their import than those in the former Writ; and it is obvious, that the former, which more resembles an assignment than an ordinary Writ of execution, may have had, by reason of the apprehended danger of waste of inchoate demands which might result in debts, a wider effect than the Writ of actual execution.

The process now under consideration is one differing from both. It is similar to the seizure of effects in the hands of a Garnishee. The question is on what property that proceeding operates, and not what is the widest reach of any execution, including the appointment of a Receiver, which these Courts may issue.

The judgment under appeal refers to the late authority in support of it, which appears fully to bear out the position for which it was cited, viz., that the sums attached must be not inchoate, but existing and definite. No case was quoted in opposition to it.

The 205th section uses the word "property," not claim or right. A mere right of suit is not property, but a title to recover future property.

A debt or property, which is seizable, or may be attached, does not lose those qualities merely by being the subject of a pending suit. The Judicial Commissioner refers to a passage relating to unproved assets which proceeded from a Directory Order of the late Sudder Dewanny Adawlut.

It is certainly said in Mr. Macpherson's Work before [50] referred to, that unproved assets may be seized by attachment; but it is also said, in a passage where he is plainly referring to the said Order in the same work, that mere rights of suit cannot be attached. These two apparently, but not really, conflicting positions, may be reconciled by reading the direction as applying to liquidated demands in their nature definite and certain, though *sub lite* and unproved. Various passages from Mr. Macpherson's Work on Civil Procedure hereinafter referred to, show that future property cannot be attached. It appears plainly from these passages that a mere expectancy, or a mere right of suit, cannot be attached, that the attachment must operate at the time of attachment, and not be anticipatory, so as to fasten on some future state of property in which the suit may result. Thus, if the land of A. be held by A. subject to an option in B. to take it at a definite price or sum, the attachment must be of the land and not of the price. An existing debt, though payable at a future day, may be attached, whilst a salary, wages, or money claim accruing due, may not: and it is added, that if a Creditor desires to have a security on the receipts of a salary as they accrue, that can be effected only by contract with the Debtor and arrangement with him, and not by an attachment by the act of the Court: see pp. 432-434 [3rd Ed.]. Mr. Leith referred in his argument to the family property of Hindoos, and urged that such a share in such property may be attached and sold in execution. No doubt can be entertained that such a share is property and that a Decree-holder can reach it. It is specific, existing, and definite; but it is not properly the subject of seizure under this particular process, but rather by process direct against the Owner of it, [51] whether by seizure or sequestration, or appointment of a Receiver.

In the present case the attachment, as it has been observed, is not of the antecedent share in the undivided assets. It is of a claim under a future Award, as to which it is wholly uncertain, until the Award be made, to what the Debtor will be entitled. The uncertainty at the time of the attachment and sale was not limited to a mere question of *quantum*; it was wholly uncertain, as Sir George Couper has correctly explained in his judgment, in what the arbitration might terminate.

Their Lordships think, that this very case affords a clear proof of the wisdom of that construction which the judgment under appeal has put upon the words of this Act. The Courts have power to secure at once the rights of Creditors and those of Debtors by a judicious application of the powers of the Act; but their Lordships feel that it would be a cruel wrong and injustice if under colour of an execution, a thing described as a "claim remanded by the Lords of the Privy Council for the settlement of accounts and referred to Arbitrators" could be put up to judicial

sale: a thing utterly incapable of being estimated or valued, as vague and uncertain and unmeaning a description as if it had been "all the claims of Ramnath against all his Debtors." It is obvious, moreover, what a door of fraud would be opened if, pending a reference, the Award of the Arbitrators could be put up for sale.

Their Lordships throw no kind of doubt on the power of the Court, by sequestration or direct seizure, notice to Debtors or otherwise, to sell or administer, in execution of a Decree-creditor's claim all that the [52] former law allowed him. They do not find in the Act, which apparently regulates rather than extinguishes any prior right of a Creditor, any evidence of intention to exempt property from executions, but they agree in the observation of the Judge that the Code of Procedure is a new starting point, and must be construed on its own terms, and worked in the mode which it prescribes. Sections 236, 241, and 243 of the Code provide sufficiently what debts due to the judgment Debtor may be received and applied in satisfaction of the judgment debt without the sacrifice consequent on a judicial sale. And their Lordships are satisfied, that there is nothing in that Code to authorize such a sale as has been professed to be made in this case, and which would require for its justification words too plain to be mistaken and too inflexible to be controlled.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed.

[53] CHARLES SETON GUTHRIE, and Others,—*Appellants*: ABOOL MOZUFFER and Others,—*Respondents* * [Feb. 4, 6, 1871].

On appeal from the High Court at Fort William, in Bengal.

Ejectment by A. against B. to recover possession of lands conveyed by a Deed of sale by A. to B.

The plaint, filed six years after the date of the transaction, alleged that A. had by duress and coercion by B. been induced to execute the Deed. A. had received the consideration money, but in his plaint he made no offer to account for the same. Held, reversing the decrees of the Courts in India, that upon the evidence, no case of duress had been made out.

Held, further, that A. could only be entitled to relief in a suit properly framed, upon terms of accounting for the consideration-money and interest, as A., if he had been coerced and subjected to such duress as destroyed his free agency, could not, at the same time, avoid the contract and retain the consideration money.

The questions in this appeal, which arose out of an action of ejectment, were: first, whether a Deed of sale by Cazee Nusseeroollah, the Plaintiff in the suit, and since deceased, was executed by him under duress so as to invalidate the Deed, and secondly, whether the Plaintiff was entitled to a decree for immediate possession of the lands in suit with mesne profits, and to oust the Defendant, Henry Inglis, now represented by the Appellants, from certain lands said to be in excess of the quantities conveyed by the Deed.

[54] The facts of the case and the arguments so fully appear in their Lordships' judgment, that no further statement is here necessary.

The appeal was heard *ex parte*, in consequence of the Respondents not putting in an appearance, and was argued by Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants.

At the conclusion of the argument the further consideration of the case was adjourned.

Judgment was now pronounced by

The Right Hon. Sir James Colville (Feb. 20, 1871).—This appeal is against two decrees which have been made in a suit instituted in December, 1862, by one Cazee Nusseeroollah, to recover possession of certain lands with mesne profits, and to set

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colville, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James. Assessor,—The Right Hon. Sir Lawrence Peel.

aside a Deed of sale purporting to have been executed by him on the 11th of October, 1855, to one Inglis, in consideration of Rs. 4000.

The suit was brought against the Widow and representative of Inglis, who died about the beginning of the year 1861. The Judge (Mr. M. Shaw) of Zillah Sylhet made a decree in favour of the Plaintiff on the 13th of December, 1862, and his decree was affirmed by the Chief Justice of the High Court of Calcutta, Sir Barnes Peacock, and Shunboo Nash Pundit, one of the Puisne Judges, on the 30th of November, 1863. Both the Plaintiff and the Defendant have since died, and they are represented [55]—the former by the Respondents, the latter by the Appellants on the record.

The issues settled in the cause are thus stated:—

First, did the Plaintiff voluntarily and on receipt of the sum set forth in the Kaballah, referred to in the plaint, execute to Mr. Inglis the Deed in question, or was the same forcibly taken from him by the latter?

Second, in the event of the Kaballah being proved to be *bona fide* executed for value received, in that case, is the Defendant in possession of only the Talooks therein specified, or has she in addition taken possession of other Seegga lands in addition to that appertaining to the Talooks?

It appears, therefore, that besides the principal question as to the validity of the conveyance impeached, there was a subsidiary question as to the extent and description of the lands held by the Defendant under colour of it.

It will be convenient, in the first instance, shortly to consider what, in September, 1855, was the position of the parties to the transaction, and their relation to each other.

The Cazee was a native landholder, and also a Mahomedan holding an office in the Court of the Judge of Sylhet. He had acquired this property in 1844. Mr. Inglis was a European, resident at Cherra-Poonjee, and engaged in various mercantile speculations, some of which, it may be presumed, rendered the possession of this particular land desirable to him. He had been in possession of it under a Peishree lease granted to him by the Cazee, which in terms expired in August, 1855; but he contended that, by virtue of an instrument subse-[56]-quently executed by the Cazee for securing a further advance of Rs. 200, he was entitled to retain possession until the whole of what was due to him had been paid off. The Cazee, on the other hand, treating the interest of Mr. Inglis as determined, had on the 16th of August, 1855, granted a lease of the lands for four years to one Mr. Sweetland, as Agent for Moran and Co., a European firm, which seems to have been rivals in trade of Mr. Inglis. The result was probably a state of things not infrequent in India—viz., that in which two European speculators are striving in competition with each other to obtain land from a native proprietor, and the native is playing fast and loose with both of them. On the 10th of Assin, 1262, B.S., corresponding with the 24th September, 1855, Mr. Inglis's Agent presented a petition in the Magistrates' Court, stating his principal's title to the land, and the lease to Sweetland, and praying for the intervention of the Magistrate on the ground of an apprehended affray. And, on the preceding day, the Cazee filed a petition in the Judge's Court, stating the loss of his Boat containing his official and private seals, his Register Book, and other property; and insinuating that they had been abstracted and concealed by the contrivance and machinations of the Amlah of Inglis, resident at a place called Chattuck. This petition did not conclude with any prayer for relief, but ends with this statement:—"I, by way of precaution, submit this petition reporting the matter as stated, and am engaged in search of the property. I will submit a detailed account of whatever may come to light hereafter." So stood things immediately before the execution of the Deed of sale. In speaking of what next occurred [57] it will be convenient, when a date is mentioned, to use the Hindoo month Assin, which covers the whole of the transactions.

The Deed of sale was executed on the 26th of Assin at Chattuck, in the House of one Brijomohun, the Dewan or native Manager of Mr. Inglis at that place.

On the following day, the 27th of Assin, the Cazee filed a petition in the Magistrates' Court, which contained the following statement of the circumstances under which, as he alleged, the Deed had been extorted from him.

That on the 3rd of Assin he left Sylhet in a Boat, taking with him his official and private seals, his Registry Book, two gold mohurs, etc. On the way he received in-

formation of the loss of an Elephant from his zemindary at Pharrar Poonjee, and, in order to seek for and trace out the Elephant, he went to that place, which he reached on the 6th of Assin. He met there one Dhuneeram Doss, an Agent of Mr. Inglis, who, after welcoming him with news of the recovery of the Elephant, took him to his lodgings and gave him Betel and Tobacco. On his return to the Ghaut he found his Boat and property gone. On this Dhuneeram Doss took him back to his lodgings, and promised to find the Boat, but returned in the evening with 40 or 50 armed Khasheas, who ultimately were reinforced by 400 or 500 clubmen. His companions were arrested, imprisoned, beaten, and oppressed. He himself was told that Mr. Inglis was very angry with him for having granted the lease to Mr. Sweetland, and that there was no chance of his saving his life unless he would sell the property to Mr. Inglis. On the next day Dhuneeram Doss again [58] visited him, and told him that, unless he agreed to sell the property, he would not get back his Boat and property, nor would he be able to save his honour. Under this pressure he promised that after his return home he would "in some way or another get back the lease to Sweetland and sell to Mr. Harry." He then returned home in another Boat, and presented his petition of the 9th Assin in the Judge's Court. Some days afterwards he again left Sylhet in the company of Biddyanund Rai, the Mookhter of Inglis, went to Chattuck, where he fell into the hands of Dhuneeram Doss and Brojomohun Dewanjee and others, who told him that unless he would sell the mehal to Mr. Harry and receive back his property he would not be able to recover the latter or return home without risking his life and honour. They kept him under restraint for four or five days, and, finally, on the 26th of Assin, compelled him to put his signature to the Deed of sale, on which they had already put the impression of his private seal. They then returned his property, with some slight exceptions, and released him from confinement. After detailing all these outrages, the petition prayed the Magistrate to cause a local investigation to be held; to have the Houses of the parties implicated searched for the property said to be missing; to call for and consider the forged Deed of sale which they had thus forcibly got signed, and to issue an Order suspending its registration. The Magistrate, on the 19 of October, 1855, made an order for a local investigation by the Darogahs therein named.

In the other proceedings which followed on the execution of the Deed there seems to have been some delay, which is probably to be accounted for by the [59] fact, that at that season all the offices were closed for the Doorga Pooja holidays.

On the 14th of November, 1855, the Deed was registered on the appearance of Biddyanund Rai, describing himself as the Mookhter of the party executing and on the usual evidence of execution. By a petition presented on the following day the Cazee protested against the registration.

On the 18th of December, 1855, the Magistrate, pronouncing it to be one of the grossest cases that had ever come before him, dismissed the Cazee's complaint, and by another and substantive proceeding fined him Rs. 200 for having brought a false charge. The first of these Orders was affirmed; the latter was reversed on appeal by the Zillah Judge on the 23rd of January, 1856.

That the Cazee should, after this, have delayed to bring the present suit for nearly six years, is a circumstance which, if unaccounted for, would raise a strong inference against the truth of his case. But this delay is in some measure explained by the intermediate litigation which took place touching the lease to Mr. Sweetland, and which lasted until May, 1861. In the course of that litigation to which the Cazee, seeking to get the benefit of an alleged Ikrah, in which Inglis and the persons claiming under Sweetland were parties, the validity of the Deed of sale of the 11th of October, 1855, came incidentally in question, and was affirmed by the decree of the Principal Sudder Ameen of the 14th of May, 1861.

Their Lordships now proceed to consider the case made by the Cazee in the present suit, and the evidence by which it is supported. He has discarded the whole story of the violence to which, as he alleged [60] before the Magistrate, he was subjected on the 6th and 7th of Assin. It was, indeed, incredible that one on whom such outrages had been perpetrated should return a few days afterwards to perform the promise which had been extorted from him, and place himself again in the power of those who had maltreated him. Moreover, the fact that personal violence was offered to him on that occasion was inconsistent with the statements in his petition

of the 9th of Assin. He does not, however, recommend himself to credit by throwing over the more improbable portions of a story which had been judicially declared to be false, in order to make the rest more plausible. His case in this suit is, that the adherents of Inglis led astray the Elephant; that having thereby brought him to Pharrar Poonjee, they (about the 6th of Assin) concealed his Boat and the property therein; that afterwards, and in order to get his chattels returned, he was induced to go to Chattuck, where, on the 26th of Assin, the creatures of Inglis shut him up, and fraudulently having got a Deed of sale drawn up in respect of the Talooks, desired him to sign it; that although he had refused to do so, yet being well aware that there was no chance of saving his life and reputation unless he attached his signature thereto, he signed and left it, and, proceeding to the Criminal Court, lodged a complaint, which had been dismissed. The gist of his case, therefore, is still duress not only of goods but of person, personal restraint, and danger to his life and reputation. And, accordingly, the latter part of the first of the settled issues was as above stated, was the Deed forcibly taken from him by Mr. Inglis?

The decrees under appeal must be taken to find this issue in favour of the Plaintiff: and either to [61] rule that in consequence of the violence done to him he was entitled to treat the Deed as a nullity and to recover the lands without returning the consideration-money, or to negative the fact that the alleged consideration of Rs. 4000, was paid to him. They do not, in terms, find whether he did, or did not, receive that sum.

That the money was in fact paid by Inglis's people, and received by the Cazeer, their Lordships on the evidence have no doubt. The payment is sworn to by the Defendant's Witnesses, and they are confirmed by at least three of the Plaintiff's Witnesses, viz., Cazeer Buksh, Gholam Hossein, and Kurnuruddee, who all admit that the money reached the Cazeer's Boat. In his earlier deposition before the Magistrate, Gholam Hossein admits this fact even more explicitly, and also his own participation in counting the money. Nor does the Cazeer any where expressly deny that he received the money. From the Magistrate's Order it appears, that on the investigation of his complaint he did not dispute, if indeed he did not expressly admit, the payment of the Rs. 4000.

Again, their Lordships are of opinion, not only that the evidence in the cause falls very far short of proof that the Cazeer was subjected to personal violence of the nature and degree stated in the plaint, but that it is insufficient to warrant the general conclusion that the Deed was forcibly taken from him. It appears from the testimony of the more credible Witnesses produced by him, viz., Gholam Hossein and Kurnuruddee, that so far from being "shut up," he lived two days or more during which the negotiation was going on on board his Boat, which was lying off the Ghaut at Chattuck; that he passed freely from his [62] Boat to and from the House of Brijomohun the Dewan; and that he was in communication with a Jemadar of police, who would doubtless have protected him had his liberty been threatened. These Witnesses further admit that on the first day of the negotiation, and before there was any show of personal violence, he agreed to grant to Mr. Inglis a permanent lease of the land, though he refused to grant a putnee one. The earlier deposition of Gholam Mahomed, which, as made *recente facto*, is far more trustworthy than the testimony given by him in this suit, contains an admission, that after two days' negotiations, and before going to the House of Brijomohun for the last time, on the 26th of Assin, the Cazeer had agreed "to dispose of the mehal for the sum of Rs. 4000." It further admits that he signed the Deed and handed it to Kurnuruddee to be sealed. The only pressure to which this deposition, if taken to be true throughout, shows that the Cazeer yielded, was the fear that unless he signed he would not get back his missing property. The statement, that though he had told the Witness that he would not have been able to save his reputation unless he affixed his signature is indeed thrown in at the end of the deposition. But no fact which renders that statement probable is proved. Against this testimony, the evidence of the Witnesses from the Bazaar is worthless. But even their testimony does not amount to proof of the allegations in the plaint. Their Lordships are, therefore, of opinion, that the Plaintiff in the suit altogether failed to establish the case alleged: and that the evidence in the suit was insufficient to warrant the decrees under appeal.

Their Lordships need hardly remark that, in [63] coming to this conclusion, they have not been insensible to the difficulty which they always feel in disturbing the concurrent judgments of two Indian Courts upon an issue of fact. They observe, however, that they have not here to deal with a consistent case deposed to by the Witnesses for the Plaintiff, and contradicted by the Witnesses for the Defendant, a case of which the determination depends on the credit to be given to the Witnesses on one side or the other. In this case their Lordships' conclusion is very much founded on the inconsistencies and imperfections of the Plaintiff's proofs. Moreover, the finding of the Courts below is inconsistent with the result of the investigation of the Magistrate, held immediately after the transaction, and with the finding of the Principal Sudder Ameen, already adverted to, in favour of the validity of the Deed. The judgment of the Zillah Judge contains several inferences which do not appear to their Lordships to have been warranted by the facts before him, and it treats the Order of the Magistrate dismissing the complaint of the Cazee as reversed, whereas it was confirmed, on appeal. The judgment of the High Court is a mere statement that the Judges of that Court saw no reason to differ from the finding of the Zillah Judge.

Their Lordships, however, regret to say, that they are by no means prepared to affirm, upon the evidence before them, that the conduct of Inglis and his Agents throughout these transactions was fair, honest, and straightforward. The Defendant allowed her defence to be conducted so as to leave her case open to grave suspicions. She has failed to explain what the negotiation really was which induced the Cazee, who a few days before was in a state of hostility, to make the [64] sale. Brijomohun, Dhunecram, and Biddyanund, Mookhter, were all subject to the gravest imputations, yet not one of them was called as a Witness to deny the charges against him. They are not shown to have been dead when the cause was tried; it is pretty clear that Brijomohun at least was then alive.

They had to meet not merely the charge of violence, but the imputation of having contrived, by means of the abstraction of the Cazee's goods, to trick him into coming to Chattuck, where he would be under their influence, and of having made the detention of his goods the means of pressure upon him. From the latter imputation they have certainly not relieved themselves. Nor has Biddyanund shown by what authority he represented himself to be the Mookhter of the Cazee when he procured the registration of the Deed. The non-delivery of the title-deeds, upon which stress was laid at the Zillah Court, seems to their Lordships to be a circumstance of no moment, since it is consistent with either view of the transaction; for those documents are not likely to have been with the Cazee at Chattuck; and his repudiation of the Deed followed immediately on its execution. Nor are their Lordships disposed to think, that the consideration for the purchase was at the date of the transaction inadequate. The lands, whatever be now their value, were then recently settled; and the Peishgee leases afford some criterion of their then annual value.

Let it, however, be assumed that Inglis's Amlah entered into the alleged plot to bring the Cazee to Chattuck; that they caused his goods to be abstracted and made the execution of the Deed of sale the condition of their restoration; and that, on his [65] side, he agreed to sell, and executed the conveyance in order to get back his goods, but with a mental reservation that he would take the earliest opportunity of impeaching the transaction. The testimony of his most trustworthy Witness scarcely carries the case beyond this. What, on such a case, would be his rights? The contract was complete, and he could only be relieved from it in a suit properly framed for that purpose upon proof of facts entitling him to that relief, and upon the terms of accounting for the Rs. 4000, with interest. Whatever be the law applied to such a transaction, whether it be the law of England, which, in this case, was the law of the Defendant, or the Mahomedan law, which was the law of the Plaintiff, or the general rule of equity and good conscience, which was the law of the Forum, these consequences would equally follow. The Plaintiff could not insist that he was subjected to such personal duress as destroyed his free agency, and entitled him to treat his Deed as a mere nullity. He could not both avoid the contract and retain the money. For the law of England it is sufficient to cite *Skeate v. Beale* (11 Ad. and El., p. 983), or Sheppard's Touchstone, ch. IV., p. 61. The Mahomedan law on the point is to be found in the 3rd volume of *The Hedaya* (by Hamilton), pp. 454-458.

The Cazee, however, did not take this course. He sought to gain an advantage over his Opponents by making the transaction the groundwork of false charges which would bring them within the scope of the Criminal law. Whether he might have succeeded in establishing a case for such equitable relief as is above suggested, their Lordships are not in a position to say, since no such case has been alleged or proved before them. In [66] this appeal they can only say, that he has failed to prove the case made, and that his suit ought to have been dismissed. To such a case the rule laid down in *Hickson v. Lombard* (Law Rep. 1, H.L., 324), clearly applies.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be allowed, that the decrees under appeal be reversed, and that, in lieu thereof, a decree be made dismissing the suit with costs in both of the Courts below. Their Lordships would, however, further recommend that this dismissal be without prejudice to any question as to the lands alleged not to have been comprised in the purchase-deed, or to the title of any person other than the Cazee, or those claiming as his representatives. They deem this reservation to be necessary, inasmuch as the evidence as to any lands being held by Mrs. Inglis in excess of those conveyed by the Deed is altogether unsatisfactory; and a claim appears to have been advanced by certain members of the Cazee's family under a title alleged to be prior to that conveyed by the Deed, which was not tried, and could not have been tried between them and the Defendant.

[67] RAJENDRO NATH HOLDAR.—*Appellant*; JOGENDRO NATH BANERJEE and Others,—*Respondents* * [Feb. 7, 8, 1871].

On appeal from the High Court of Judicature at Fort William, Bengal.

A Hindoo Testator by his Will gave authority to his Widow, with the consent of his Mother, to adopt a Son; in pursuance of which a Son was adopted, and the other provisions of the Will acquiesced in by the family for twenty-seven years, when a suit was brought by one of the Testator's heirs claiming the estate then in possession of the adopted Son, on the ground that the adoption was invalid. Held (reversing the decree of the High Court at Calcutta), that although the Defendant was bound to prove his title as adopted Son, as a fact, yet from the long period during which he had been received as adopted Son, every allowance for the absence of evidence to prove such fact was to be favourably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time, and afterwards impeached by a party, who had a right to question the legitimacy, where the Defendant, in order to defend his *status*, is allowed to invoke against the Claimant every presumption which arises from long recognition of his legitimacy by members of his family; and that the case of a Hindoo, long recognized as an adopted Son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family [14 Moo. Ind. App. 76, 77].

On reversal by the Judicial Committee of the decree of the High Court, such costs, as were allowed by the practice of the Courts in India to a successful Plaintiff suing *in forma pauperis*, and paid, were ordered to be restored to the Defendant [14 Moo. Ind. App. 85].

As the heir-at-law in contesting the appointment of an adopted Son had a decree of the High Court in his favour, no costs of appeal were given on such reversal [14 Moo. Ind. App. 85].

In this appeal, the suit was instituted in the Court of the Principal Sudder

* Present:—Members of the Judicial Committee,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. the Lord Justice James. Assessor,—The Right Hon. Sir Lawrence Peel.

Ameen of the 24 Pergunnahs by the first Respondent *in formâ pauperis*, against the Appellant, and the other Respondents, as nominal parties, to recover a moiety of landed property situate at [68] Kalighat, which he claimed as heir of one Kalli Prosad Holdar, on the ground of his being one of Kalli Prosad Holdar's Sister's Sons. The Appellant, and such of the Respondents as contested the suit, denied his title, on the ground of Kalli Prosad Holdar having made a Will disposing of his property, which instrument also empowered his Widow, with the consent of the Testator's Mother, to adopt a Son, under which power it was insisted by the Appellant that he had been duly adopted by the Widow, with the Mother's consent.

The facts and points raised on the appeal are fully stated in their Lordships' judgment.

The case was argued by Mr. J. D. Bell, for the Appellant, and Mr. Doyne, for the first Respondent.

Judgment was delivered by

The Right Hon. Sir James Colville.—This case had been extremely well argued on both sides; but their Lordships having had time to examine the evidence, and having now weighed the arguments on both sides, have come to a clear conclusion, that this appeal ought to be allowed, and the grounds of that conclusion I am now instructed to state.

The question is one touching the right of succession to the estate of one Kalli Prosad Holdar, a Brahmin, who seems to have been possessed of a considerable estate, including certain spiritual rights and privileges connected with the worship of the Goddess Kalee, in the well-known Temple in the vicinity of Calcutta. Kalli Prosad Holdar died on the 16th Assin, 1244, a day which corresponds with some day in September, 1837. He left a Widow, a [69] Mother, and four Sisters. The Mother pre-deceased the Widow, and died in 1855; the Widow died in July, 1861. Of the four Sisters, two are dead; one of them without issue, the other leaving a Daughter. And of the two surviving Sisters, one is childless, and the fourth only has male issue, namely, the Respondent, Jogendro Nath Banerjee, and the infant Respondent, Kameeka Nath Banerjee, and these two persons, if Kalli Prosad Holdar died intestate, are the persons who, according to Hindoo law, would be entitled to inherit the estate in succession to the Widow.

Shortly after the Widow's death, in 1844, the Respondent, Jogendro Nath Banerjee, suing *in formâ pauperis*, commenced this suit, in which he claims to recover an eight annas share of the estate from the Appellant, who claims under an adoption by the Widow, alleged to have been made by virtue of a testamentary disposition of her Husband, and from the other persons claiming interests in the estate under that testamentary disposition. The infant Brother is made a Defendant *pro forma* on the record, and is represented by his Father and Guardian, Kasseeputtee Banerjee.

The appeal, however, has been argued as if the litigation were confined to the adopted Son of the Widow, who is in possession, that is, the Appellant, and the Respondent, Jogendro Nath Banerjee; and in that point of view it will be convenient to consider it.

The issues are these,—“Whether or not the suit is barred by the Statute of Limitations? Whether or not the Will, the Dan Unnoomottee puttro, of the 6th Assin, 1244 B.S., alluded to in the written state-[70]-ment filed by the Defendant, Rajendro Nath Holdar, was a genuine document? if so, whether the Defendant had been, according to the Shastras, adopted by Matunginee Dabea, Widow of Kalli Prosad Holdar, deceased?” The next, whether, in the event of the aforesaid Deed of gift being not proved, the Plaintiff is entitled, under the Hindoo law, to succeed to the estate or property included in the suit? and if so, whether he is entitled to possess the whole estate or not?

Of these issues, the second alone, and perhaps only part of the second, is material. The first issue, that upon the Statute of Limitations, was originally determined by the Principal Sudder Ameen (Baboo Koonjoo Lall Banerjee), the Judge of the Court of First Instance, in favour of the Defendant. His decision was reversed on appeal, and it has been candidly and fairly admitted at the Bar by Mr. Bell that it is impossible to impeach that decision: that, according to the authori-

ties in India, time would only begin to run against the first Respondent from the date of the Widow's death.

Again, the third issue, it may be assumed, would, if it were necessary to try it, be necessarily found in favour of the first Respondent, the Plaintiff in the suit, to the extent of the interest claimed by him in the estate, namely, a moiety, or eight annas.

With respect to the second issue, it has been suggested by Mr. Doyne that it may admit of the contention on his part, that the adoption of the Appellant was invalid, because it was not made with the consent of the Testator's Mother, which the Will made a condition precedent to an adoption. But their Lordships, as they have already intimated, do not consider [71] that that point is in terms open upon the issue, the latter part of the issue being "whether the Defendant had been, according to the Shastras, adopted by Matunginee Dabea, Widow of Kalli Prosad Holdar, deceased." Those words really raise only the question, whether all the ceremonies, and whatever other requisites the Hindoo law has made essential to an adoption, had been complied with. Their Lordships would not have held the parties strictly bound to the terms of the issue, if they had seen any trace that it had been understood in any other sense in the Court below. But they cannot find that that was the case, that it ever was raised in the Court below that the Testator's mother had not given her consent to that adoption; and they are confirmed in this by looking at the grounds of appeal which were filed by the first Respondent in the High Court in which he takes these two points with reference to the adoption: "The Lower Court has failed to consider that Matunginee Dabea had no right to adopt under the existing Hindoo law of adoption. There is no proof to show that the ceremonies and formalities prescribed by the Hindoo law were legally performed, and the Defendant's adoption ought to have been cancelled on that score." There is not a word suggesting that the Testator's Mother's consent had not been given. Under these circumstances, if the Mother's consent were necessary under the Will, as to which their Lordships give no opinion, it must be presumed that that consent was given.

That part of the issue which relates to the validity of the adoption according to the Shastras was found by the Court of First Instance in favour of the Appellant. The High Court has intimated no opinion, as it was not necessary for them to decide that point, [72] whether the judgment in that respect was right or not; but their Lordships have heard no reason whatever, and no grounds have been shown before them at the Bar, for impugning that part of the decision of the Principal Sudder Ameen.

The sole question, therefore, on which the determination of this appeal depends, is the validity of the Dan Unnoomottee puttro, which it will be convenient, as it is in its nature testamentary, to call in the observations which I shall hereafter make, "the Will." This will purports on the face of it to have been executed on the day of the Testator's death. The effect of it, so far as it is necessary to read the passage, is correctly stated in the judgment of the High Court. The Judges say, "This Deed" (as they call it), "it will be observed, gives his Wife, Matunginee Dabea, permission, with the consent of his Mother, Jeemoney, to adopt one Son. It makes a present division of his property into seven annas and nine annas, but postpones the enjoyment of it by the parties for whom the several shares are intended, until the death of his Mother, who, during her lifetime, is to be the proprietor and Manager of the whole sixteen annas of his property, and to pay his debts out of the nine annas share and other expenses of maintenance, etc., out of the sixteen annas. On the death of his Mother, his four Sisters are to take possession of their seven annas share, and, in case of any one of them dying childless, her share is to descend to the children of the other Sisters. The nine annas share is to be the property, without power of alienation, of Matunginee Dabea during her life, and after her death it is to descend to her adopted Son." I stop there, because I am not clear that the Judges have really given the true [73] construction of the concluding clauses of the Will in what follows, and it is unnecessary to consider whether that construction is right or not.

The earliest production of the document was within ten months of the Testator's death, in August, 1838. In that month Jeemoney, the Mother of the deceased, came forward as Executrix, as we should say, under this Will, claiming to be sub-

stituted as Decree-holder in a suit in which her Son had recovered a decree in his lifetime. The Widow appeared on that occasion by her Mookhter to support her Mother-in-law's application. The Judge seems to have required, or the parties to have tendered, proof of this instrument. The Writer of the instrument was examined, and one, if not two, of the attesting Witnesses were also examined. The evidence, such as it was, seems to have satisfied the Judge, at all events for the purposes of the application, that the document was to be treated as a true document, and, accordingly, the Mother was substituted as the Decree-holder.

So far, therefore, the Widow, who was the heiress-at-law of the alleged Testator, was supporting the alleged testacy. In 1844, however, there seems to have been some change in her disposition in that respect, and some disagreement in the family, and she then made the application to sue *in forma pauperis*, in order to assert her rights as heiress-at-law. She appears from that document to have left her Husband's House at that time, and to be residing in her Father's House, where, of course, she would be under the influence of parties who would urge her to assert her extreme rights, and if they considered it necessary for her rights to do so, to dispute the Will. Whatever she may have actually done after that in the [74] suit, does not appear, but it is clear that in 1845 that litigation was compromised, and she reverted to her original position of a person supporting the Will and taking under it. The effect of the compromise was, that the Will was admitted as the foundation of the rights of the family, but the Mother retired from that position in which the Will placed her, of being Mookhter of the whole estate,—the person managing the estate with whatever beneficial interest that management might give her, and supporting the whole family out of the proceeds of the whole estate;—and that she thenceforward agreed to be entitled to receive maintenance only, and to put the Widow in the possession of that which the Will gave to her and the Sisters in immediate possession of that which the Will gave to them. Now, that compromise has been very much relied upon by Mr. Doyne as affording an argument against the validity of the Will. Their Lordships are unable to accede to the argument which he has laid before them. His contention is, that it must be presumed that the Mother would not have agreed to those terms unless she knew that the Will was a false document, and was afraid of its validity being contested in open Court. But, on the other hand, it may equally be said that the Widow would not have agreed to relinquish her claim to the whole estate if she had known that the document could not be proved in open Court, and that she had every chance of gaining her suit. Without imputing such a motive to the Mother, it seems not wholly unnatural to suppose that she might be guided in that by the advice of members of the family,—that they might have put before her that the estate would very likely be wasted in litigation,—that the proof [75] of a Hindoo Will, when a true document, is always an uncertain thing, and that being advanced in years, and having her Daughters put in possession of seven annas of the property, her position would not be materially worse, and that she might fairly agree for the sake of peace to make the sacrifice which she did make. On the whole, their Lordships think, that it is impossible to draw any conclusion from that compromise which militates strongly against the evidence in favour of the Will.

From that time forth, with perhaps one exception, the family appear to have acted consistently upon the Will. This compromise was filed in the year 1845. The adoption was, I think, in 1848; but, intermediately, there are several proceedings both before and after the adoption in which all the family put forward this Will, claiming under the Will; and, in fact, there is nothing except the document to which I am now about to refer which shows that the Will was questioned by any of the immediate family of Kalli Prosad Holdar. That document is the one filed on the part of the Respondents. It is the petition of the Widow when a party, a relation of the family who had recovered a decree for costs against the Mother, was seeking, after the Mother's death, to get these costs from the Widow; and she, after stating that she had no connection with the Widow as heir, that the heirs of the Mother were her Daughters, no doubt does in the second paragraph of her petition speak of having been induced to consent to a division of the whole sixteen annas by collusion. But this document is filed in the Court by her Mookhter: it does not seem to have been signed by her, and their Lordships, considering that in

this very document [76] she describes herself as the Mother and Guardian of the Son adopted under the Will, cannot ascribe any importance to it, or suppose that this statement is anything but one of those statements which a native Mookhter is so apt to put in without much regard to the truth of what is alleged in it, in order to gain some immediate object in the suit in which it is filed. The adoption took place with great publicity and formality, was known to all the members of the family, and must be presumed to have been made under the will.

We, therefore, find that for a period of twenty-seven years this Will was, with the exceptions I have mentioned, acted upon and recognized by the whole of the family of Kalli Prosad Holdar, and that the legal *status* of the Appellant was acquired under it with the knowledge of all the members of the family. If the document had been a fabrication, and if there were persons who might have intervened and have contested the Will, the presumptive heir, who was in existence before his title was defeated by the birth of the present contesting Respondent, might have come forward in one way or another and contested the Will. Therefore, there arises from all these circumstances a very strong presumption, which their Lordships do not feel themselves at liberty to disregard, in favour of the Will. No doubt these circumstances, as the law stands, are not conclusive against the first Respondent. He has the right to call upon the Appellant, the Defendant in the suit, to prove his title; but their Lordships cannot but feel that while he has that extreme right, every allowance that can be fairly made for the loss of evidence during this long period, by death or otherwise—every allowance which can [77] account for any imperfection in the evidence—ought to be made; and, on the other hand, that in testing the credibility of the evidence which is actually given, great weight should be given to all those inferences and presumptions which arise from the conduct of the family with respect to the Will and to the acts done by them under the Will. The case seems to their Lordships to be analogous to one in which the legitimacy of a person in possession is questioned, a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy. In such a case the Defendant, in order to defend his *status*, should be allowed to invoke against the Claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of a Hindoo claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights—he may lose them altogether—which he would have in his own family; and it would be most unjust after long lapse of time to deprive him of the *status* which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title.

With these observations, their Lordships proceed to consider the direct evidence as to the validity of this Will. They do not propose to go into it at any great detail. It was fully considered in the first instance by the Principal Sudder Ameen, himself a Brahmin, who has embodied his conclusions in a judgment, the careful preparation and expression of [78] which seem to their Lordships to be highly creditable to that native Judge. He came to a clear conclusion, that the Witnesses who were called by the first Respondent to show that Kalli Prosad Holdar was in such a state of body that it was impossible that he could have executed this Will, were persons of no credit, and not to be believed. He, also weighing all the circumstances, giving weight to the probabilities of the case, and considering the positive testimony which had been adduced before him, came to a clear conclusion that the Will was genuine and ought to have been affirmed. Upon appeal to the High Court, the learned Judges of that Court, Messrs. C. Travor and F. A. Glover, for reasons which they have not recorded, but which may easily be presumed to have been a desire to examine the subscribing Witnesses for themselves, and also to examine the subscribing Witness who had not been called in the Court below, the Father of the Respondent, re-examined the three Witnesses who had been examined, and examined for the first time Kasseeputte Banerjee. Of the evidence then taken, it may be said that the Witnesses who were re-examined do not appear to have been in any degree shaken, and the cross-examination of one of them, Shiboram Chatterjee, elicited some fuller account of the preparation of the Will, which is not altogether

immaterial, if true, to the Appellant's case. Of the evidence of Kasseeputtee Banerjee it is sufficient to say that it amounted only to this, that though his name did appear upon the document, it had been added some twenty days after the death of the Testator at the instigation of the Mother, who told him that the arrangement was for the benefit of his future Son, and that her consent was necessary to any adoption. He does not [79] venture to express a conviction one way or the other as to the truth or falsehood of the Will. And it is obvious that his statement, taking it in the most favourable sense, that he merely put his signature at that time to a document of which he had not witnessed the execution, on that persuasion, does not entitle him to very much credit. If, on the other hand, he did it believing the document to be a forgery, he would, of course, be entitled to much less credit, and, therefore, his evidence is, not that upon which any reliance can be placed, and the Judges of the High Court do not appear to have grounded their judgment upon it. All they say as to the evidence of Kasseeputtee Banerjee is, "We think it better to form our opinion on the merits of this case irrespective of anything contained in it. Although, notwithstanding the equivocal position in which he stands on his own showing, we are inclined to think that there is some truth in what is stated as to the origin of the Deed now before the Court." That, therefore, may be left out of consideration.

Now, if the two judgments are looked at in opposition to each other, it would appear that the learned Judges of the High Court have, in the first place, differed somewhat from the Principal Sudder Ameen in his appreciation of the probability that such a document as this should have been executed. They say,—“As the Principal Sudder Ameen has remarked, it is contended by the Plaintiff that that Deed was a concoction of Kalli Prosad Holdar's Mother, Jeomoney, who fabricated it to provide for her Daughters, for whom a Hindoo Mother has greater affection than for male children, and that it was only to quiet the Wife that nine annas of the property [80] was allotted to her: whereas by the Defendant it is urged, that Kalli Prosad Holdar's four Sisters were, according to the custom of the family, married to Koolin Brahmins, who never take their Wives to their home or otherwise maintain them; that, mindful of their helpless situation and of his own salvation, he made a provision for the former at the same time that he provided for the maintenance of the latter; and that as a dutiful Hindoo Son, he made the Mother Manager and proprietor; that, moreover, Kalli Prosad Holdar's income was about Rs. 800 a year, and that one-quarter of seven annas of that sum, viz. Rs. 85 per annum, was not an out-of-the-way sum for each of his Sisters. There is no doubt that this Deed is for the benefit of the Sisters of Kalli Prosad Holdar, and that it is only in case his adopted Son has issue that nine annas of the property can remain away from the Sisters or their heirs eventually. Without going so far as saying that there is an antecedent improbability in this distribution of the Testator's property, the Court has no hesitation in saying that that distribution is unusual. A permission is not given to the Wife to adopt more than one Son, and the adopted Son's patrimony is cut down, and it does not become vested in him until after his Mother's death, and if he dies issueless the property goes to the Testator's Sisters and their heirs. As to the necessity of Kalli Prosad Holdar providing for his Sisters married to Koolins by a Deed of that sort, that is not so apparent: whilst they live in the family house the obligation would remain on Kalli Prosad Holdar and his heirs to maintain them and their children, but to divide his estate in this way is to go beyond the obligation which the Hindoo law imposed on Kalli [81] Prosad Holdar. Again, the Court does not see the justice of considering the adopted Son a stranger, and of contrasting him in the position of a stranger with that of the Testator's Sisters. After the adoption, the adopted Son is no longer a stranger; he is the person who procures the salvation of his adopting Father, and, therefore, in the face of so great a benefit accruing to the Testator from the Son adopted, any permanent diminution of the property left to him, even to the amount of four times Rs. 85, equal to Rs. 340 a year, bears the semblance of injustice.”

On this it is to be observed, that the principal point upon which they differ from the Sudder Ameen is, the probability of the provision made for the Sisters, by giving them specific shares in the property, instead of giving them mere allowances for maintenance; and, it may be very true, as the learned Judges say, that these

Sisters being married to Koolin Brahmins, there would remain the obligation on Kalli Prosad Holdar, or his successors, to maintain them. The whole question was, however, raised before the Principal Sudder Ameen, who, as a Brahmin, is at least as likely as the Judges of the High Court to know what a Brahmin would be likely to do in those circumstances, and he has expressed an opinion, that the provision was not an unnatural one for the Testator to make in those circumstances. Again, it is no doubt true that greater power is given to the Mother than she would have naturally under the Hindoo law, and that the interest of the adopted Son is postponed, and that the disposition is altogether different from that which might have been made by a man who had in his mind the single object of leaving an adopted Son.

[82] It is possible, and it has occurred to their Lordships, considering that as there is evidence which points to the provisions of the Will having been discussed a day or two before its actual execution, and to the relations subsisting between the members of this family, there may have been something like a compromise in the Testator's mind, namely, that there may have been some pressure upon him on the part of his Mother to make a larger provision for his Sisters: while on the other hand, that he was anxious to carry out the principle, dear to every Hindoo, of leaving an adopted Son, and that the actual disposition may have been the result of some such a compromise. But their Lordships have to observe, that they are not dealing here with a question, whether a disposition has been obtained by any undue influence or under any pressure, but upon the issue, whether this document is a forgery or is the Will of the Testator.

Another point upon which the learned Judges of the High Court have intimated some dissent from the Principal Sudder Ameen was the credit to be given to two of the Witnesses examined, namely, the two young men, Denonath Holdar and Kohlas Chunder Banerjee. The Court observes, "We do not believe the statement of Denonath Holdar and Koylas Chunder Banerjee on this point. They were both Boys: no intelligible reason is given for their being at Kalli Prosad Holdar's House at such a time, and the evidence before us as to the duration of Kalli Prosad Holdar's sickness, as to his state two days before his death, and as to his state on the day of his death, even if it be credited, does not admit of our believing at the same time that he entered into those explanatory conversations with the Witnesses, which in their depositions [83] they detailed." The observation that is founded upon the age of these two Witnesses might have some force if this document were now produced for the first time and their names were found upon it as subscribing Witnesses. But the argument is all the other way, when it is considered that the document was beyond all question produced in 1838: because it is in the highest degree improbable that, if persons were concocting a forgery, they would call into their councils two Boys sixteen or seventeen years old, who would be manifestly, from their youth, not likely persons to be entrusted with the secret. They have given an explanation which seems plausible to the Principal Sudder Ameen, and seems plausible to their Lordships, for their presence on that occasion. The explanation is, that a message came to the Father of one of them to go to the House, that he was prevented by business from going to the House, and he said to his Son, "Will you go?" The Son met a companion, also apparently a relation of the family, and they went together. There may be some little exaggeration as to the amount of explanation given, but their Lordships see no reason, as the Principal Sudder Ameen saw no reason, why their statement that the Testator did actually acknowledge before them that the document was his Will, should be discredited.

Therefore, going through the whole of these two judgments, it appears to their Lordships that really the *ratio decidendi*, or at least the turning-point in the minds of the learned Judges, was the impression which they derived from the inspection of the letter "M" (for Munzoor, or confirmed). Now, that point was not taken for the first time before the High Court. The suggestion seems also to have been made in the [84] Court of the Principal Sudder Ameen, and he, as we understand his judgment, thought that there was nothing in it. Now, with great respect for the knowledge which the two learned Judges of the High Court possessed, as their Lordships doubt not, of the Bengalee language, their Lordships cannot but think that upon such a point as that, the native Judge, examining a letter in his own

alphabet, is more likely to be a competent Judge than the two European Judges. But independently of that, it appears to their Lordships to be a very unsafe ground of decision. The evidence as to the absolute prostration and insensibility of the Testator at the time has been discredited. No doubt the Appellant's own Witnesses state, that he put this letter, feeling too weak to write his name at full. But it is impossible, from the mere inspection of the letter, as it appears to their Lordships, to be able to predicate with any degree of certainty or accuracy, that he was too weak to make the impression with his pen which he is said to have made. It is impossible to say what momentary rally of strength might take place to do an act of such brevity as that; and, therefore, their Lordships are unable to give to that, which is after all merely the impression of these two Judges derived from actual inspection, the weight which has been given to it. They cannot but think (considering that the evidence, supported as it is by the presumptions to which reference has been made), on the whole greatly preponderates in favour of the genuineness of this instrument; that the mere appearance to the eyes of those Judges of that letter is sufficient to outweigh it; and, therefore, their Lordships, however great their respect for the judgment of the High [85] Court, feel that it is their duty in the present case to advise Her Majesty to allow this appeal, to reverse the judgment of the High Court, and to direct that in lieu thereof an Order be made dismissing the appeal to the High Court. The party having sued *in forma pauperis*, their Lordships will further recommend, that an Order be made dismissing the appeal to the High Court, with such costs, if any, as according to the practice of that Court are given to an Appellant suing *in forma pauperis*, and the repayment of any costs that have been paid by the Appellant; and their Lordships, considering that they are dealing with an heir-at-law questioning this Will, and supporting a judgment which has really been in his favour, setting aside the Will, are not disposed to make any Order as to the costs of this appeal.

[86] LALLA BUNSEEDHUR.—*Appellant*; THE GOVERNMENT OF BENGAL.—*Respondents* * [June 24, 26, 27, 1871].

On appeal from the Sudder Dewanny Adawlut at Agra, North-West Provinces.

A Treasurer of a Collectorate was found, on going into his accounts, to have been a party with others in embezzling Government moneys in his Collectorate. His defalcations ran over several years. A surety Bond had been given for the Collectors' acts, and the Bond was renewed three times by the same surety during the period the Treasurer was in office, but the surety never asked for the old Bonds to be delivered up when they were renewed. In an action by the Government against the Surety to recover the amount embezzled, held, that the renewal of the Bonds did not discharge the Surety from his liability under the first Bond, as the renewed Bonds were not in substitution of the first Bond.

The facts of this case sufficiently appear from the judgment.

The appeal was argued by Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant; and Mr. Forsyth, Q.C., Mr. C. Pollock, Q.C., and Mr. H. C. Merivale, for the Bengal Government.

Their Lordships' judgment was delivered by

The Right Hon. the Lord Justice Mellish.—This was an action brought on the part of the Government of Bengal against Lalla Bunseedhur, [87] who was a surety for Sreekishen Chowby the Treasurer of the Mirzapore Collectorate; and it was brought to recover a sum, with interest, of upwards of Rs. 60,000. The case on

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

the part of the Government was, that between the years 1843 and 1848 the Treasurer had been a party to the embezzlement of the sums of money in question. Now, the first defence that was relied upon was a defence in point of law. It appears that the surety Bonds were three times renewed. The Treasurer occupied that position for a period of eight years. The Bonds were not renewed every year,—they were three times renewed, and in the other years the Government did not renew the Bonds, but they made an inquiry into the sufficiency of the security. The first point that was argued on the part of the Appellant was, that by the renewal of the Bonds, each Bond, as it was renewed, was in fact a novation, so that no action could any longer be maintained upon the old Bond, but it must be taken that by an examination of the accounts, the Government had satisfied themselves that no fraud or embezzlement had been committed up to that time; and that though they did not give up the old Bond, yet, practically, the new Bond was to be taken in lieu and satisfaction of the old Bond: so that the surety only became responsible for the deficiencies which might take place subsequently to the giving of the new Bond. If that defence was correct, the consequence would be that there would be a defence to all except any deficiencies which might be proved subsequently to the giving of the last Bond. Their Lordships are of opinion that that defence cannot be maintained. It rests entirely upon this, that we are to infer that each new Bond was given in substitution for the old [88] one. The Sudder Court (consisting of Messrs. M. R. Gubbins and E. M. Wylly) say that, in their judgment, the new Bond was given probably under a misapprehension of what was the proper construction of the Orders of Government, which require that, from time to time—in fact, annually—there should be an examination into the sufficiency of the securities. They seem to have thought that made it necessary, or, at any rate, desirable, that new Bonds should be given; but, however that may be, the question simply is,—are we to infer that it was intended to discharge the old Bond, if, after the giving of the new Bond, a discovery was made, though unknown at the time, that frauds had been committed during the time that the old Bond was in existence? If, indeed, the Government had known of the frauds, that would raise a totally different question, for then, of course, they ought to have warned the surety, and not allowed him to go on by giving a new Bond. But that is not contended. It is not suggested that until the year 1848, when the discovery was made by one of the parties in the office making a statement to the Government, the Government had any suspicion whatever that any frauds were going on. The old Bonds were never given up. The surety did not ask for the old Bonds. There is nothing to show that he had any idea that he was discharged, or that he had a right to the old Bonds, and their Lordships think that the explanation given by the Sudder Court is the correct one; but whether it is correct or not, there is nothing to show that the Government intended to give up or abandon any claim that they had upon any of the Bonds. Then it was argued that, at any rate, the Government [89] having satisfied themselves, by their Collector, and by the examination which they made of the accounts, that no fraud had been committed, and that the accounts were correct, the new Bonds were given upon the faith of the accounts being correct, and that they are to be estopped from saying that the accounts were incorrect. There does not appear to their Lordships to be any ground for that argument. There must be such gross negligence as almost to amount to a participation in the fraud, before the fact of the Government examining into the accounts and not discovering the frauds sooner could operate as a discharge. The object of having securities is, that if secret embezzlements take place, the Government may have a security upon which they can rely.

Then with respect to the case itself. The mode in which the alleged frauds were committed is stated very clearly in the judgment of the Zillah Judge (Mr. James Lean). He puts it thus:—"The Government asserts, that the embezzlement occurred in this way, viz.,—the Treasurer received sums of money on account, revenue of villages, etc., which he did not pay into the Government Treasury, or enter into his Hindie Siaha; but, in connivance with the Siaha Navees and others, entered in the Persian Siaha as received by transfer, although there were no deposits on account of the said villages, etc., from which payments by transfer could be made, at the same time referring in the said Siaha, and also in the receipts he gave for the said sums to orders issued for payment by transfer from *bona fide* deposits

relating to other villages, etc., which payments again were made up from moneys paid into the Government Treasury in advance on account of other villages, etc., [90] which will be adverted to below. Lalla Bunseedhur, in his answer, does not positively deny that the sum sued for has not been embezzled; but he insists that Sreekishen Chowby never received the items forming that sum, or they would be in his Hindee Siaba; and, moreover, Irasals have not been adduced to show that the sums were sent to him to take charge of; and that, in short, the Persian Umlah and Tehseeldars are the Embezzlers, and not Sreekishen Chowby. I consider that the statement of the Government proved as to the amount embezzled."

Now, that being the sort of charge that was made, it was strongly argued on the part of the Appellant, that it was proved only by inadmissible evidence; and, indeed, it is on account of this allegation, that the charge was only supported by inadmissible evidence, that their Lordships have been induced to hear this case at such considerable length as they have done, because, if it had been simply an ordinary case in which it was a pure question of fact, which both the Courts below had agreed on, it would have been governed by the ordinary rule, that unless it could be clearly shown that the Courts below had made some plain mistake, the judgment ought to be affirmed. Now, it is alleged that they made a plain mistake in this way. That there was a great deal of inadmissible evidence, to which both the Courts below gave weight—not only evidence which was inadmissible by the law of England, but evidence which ought not, in fairness and justice, to be allowed to have any weight.

That alleged improper evidence consisted principally of this: When the alleged frauds were in the first instance discovered, the first thing which was [91] done was that the Collector went down to examine into the matter, and to examine everybody who could give any information upon the subject, to find out what the truth of the matter really was, and he took a great number of depositions, and no doubt examined those persons from whom he thought he could get information privately, when neither Sreekishen Chowby nor Lalla Bunseedhur were present. Now, certainly, if any substantial reliance had been placed upon those depositions—if this case could not be proved independently of them, their Lordships would have been disposed to think it would certainly have been wrong to place any weight upon their evidence. If they were alive (and there is nothing to show that any of them, except Sreekishen Chowby himself, were dead), they ought to have been called at the trial; and to rely upon an *ex parte* deposition of a Witness who might have been called and cross-examined at the trial, would not be a practice that their Lordships would at all agree with, or think that any weight should be given to their depositions. But, as respects Sreekishen Chowby himself, he was frequently examined; first he was examined by the Collector, and subsequently he was examined by the Magistrate, and then afterwards he was tried and found guilty; and subsequently an action being brought (the details of which it is unnecessary to go into at present), he was examined again, and then alleged that he was innocent. Now, their Lordships do not consider that his evidence ought necessarily to be entirely rejected. - it probably would not be satisfactory to support a case upon an admission made by him alone, if the other evidence was not sufficient to amount to strong evidence against him; but if there is strong evidence against him, then probably [92] the examinations (at any rate the examinations before the Collector) might be referred to for the purpose, at least, to see if he could give any satisfactory explanation of the charges which were made against him.

Then, as respects those depositions which their Lordships think inadmissible, they do not find, on carefully considering the judgments both of the Zillah Court and of the Sudder Court (certainly of the Sudder Court), and their Lordships are disposed to think of the Zillah Court also, that any reliance was placed upon them, and, therefore, they may be rejected. The real question is, therefore, first of all, taking the evidence which must be and everybody says is admissible, how does the matter stand? There are three things to be made out: first, that there was an embezzlement; second, that the sum embezzled amounted to the sum claimed; and third, that Sreekishen Chowby, the Treasurer, had a guilty knowledge of, and was a party to those embezzlements. Now, was there an embezzlement of the amount claimed? Upon that question there really was no serious dispute in the Courts

below. It is charged plainly in the plaint,—the answer does not in plain terms state there was no embezzlement at all. On the contrary, in the very first answer the substantial defence is, that if there was an embezzlement, Sreekishen Chowby was not a party to it. But it did not rest there. All the voluminous documents with which the Government supported their case, the Bill of discovery having been filed previously, were open to examination on the part of the Defendant.

Then Accountants were called, and they stated what the result of all the documents was; they stated [93] that they did show a deficiency in the accounts to the amount claimed, that is the only possible way in which a fraud of that kind can be proved, because it is quite impossible for the Court itself to go into every single item of such voluminous accounts. In this Country it is the practice to call in an Accountant, who goes through the Books; he makes a summary of the accounts, and the other side are left to question them, and this case was conducted in that way. Now, the Appellant appointed persons who were perfectly competent for their duty, he being himself a large and extensive Banker, and they appear to have been Clerks of his own, who themselves went through these accounts, and after they went through them, they were asked, did they want any more documents, was there anything that the Government could produce which they required? They said there was nothing more. They were examined. Their evidence has been read to their Lordships; and the result of that evidence is that an examination of all these documents tends to show that there was an embezzlement shown by these accounts to the amount stated. But the Appellant rests his defence upon this: he says these accounts do not make out that Sreekishen Chowby, the Treasurer, was a party to the embezzlement. The result come to, from an examination of the accounts, as he alleges, is, that they only show that the persons who kept the Persian accounts had been parties to the embezzlement, but that they do not show that the Treasurer had been a party to it.

The question, therefore, in their Lordships' opinion, is reduced to this: Is there satisfactory evidence that Sreekishen Chowby, the Treasurer, was a party to these embezzlements? and that also in a great measure [94] resolves itself into this: Is there satisfactory evidence that the sums in question were received in cash at the Treasury at all? for if they were received in cash, then, according to the ordinary course of business, they were handed over to the Treasurer himself: and inasmuch as the Persian Clerks never handled the money, it is impossible to see, if the money really was brought into the Treasury, how, by any manipulation of the accounts, the Persian Clerks, who had not got the money, could possibly carry out these frauds or embezzle the Government money without the knowledge and assistance of the Treasurer.

How then does the question stand as to the way in which the payments were made? The actual practice was this: the payments were either made in money or were made by transfer of deposits. When they were made in money from the village authorities, an authority to receive the money was procured to show that it was the intention of the person who had the money to pay in cash. He brought the money to the Treasurer. The practice was, that it was carried into the room, where the Treasurer was, and it is stated by one Witness, that somebody else was always there with him, and there the money was paid over. There was a receipt given, and there is produced a form of the receipt for such cash payment, and that formed his receipt. Then it is the duty of the Treasurer to see that that amount of money is entered in the Hindee account. Then it is also taken to the Persian Clerks, and they have to enter receipt of the money in the Persian Books, and then the receipt has also to be taken to some other Clerk, who enters it in the Dakhilla account-book, [95] and then the receipt (whether before or afterwards does not clearly appear) is signed by the Treasurer, and that is given to the person who brought the money. Then it would appear, that he takes it back to the village authorities, and in some cases the village authority also puts his name upon the receipt.

Now, when the money is paid by a transfer of deposits, then it appears that these deposits either may be in the Treasury itself, having been previously paid in cash, or they may be in some other Treasury, as at Benares, where it may be more convenient to the landowner to make his payment. If that is the case, an order

always has to be got from the Collector to authorize that transfer by way of deposit, and then that order appears to be brought to the office, and upon the authority of that order the transfer is made. Now, there are many of these cases. The Court below divided them into three lists, and for the present reference will only be made to the first class; that is, where the receipts were actually given. Now, in these cases, the forms of the receipts are set out in the record; and the first and the strongest evidence against the Treasurer is this: that the receipts are given in a form which, on the face of it, appears to be exclusively applicable to a payment in money; and looking at the form of the receipt, it is impossible to say that it does not, upon the face of it, purport to be a receipt for money. There is a number, and in the first column there is the name of the Mehal, and in the second column there is the name of the Malguzar on whose behalf the payment is made. Then there is the amount received, and the items in respect of which it is paid. Then there is the [96] date upon which the money was deposited, which plainly means the date of the payment, which is the 30th of March, 1844, upon this receipt which is now before us. Then there is the name of the person through whom the money was deposited, which also plainly means the name of the person who brought the money to the Treasury and paid it in; and then there is the date upon which the receipt was given, which is the 30th of March, 1844, being the same date as that upon which the amount was paid. This is written out in Persian, and purports to be an acknowledgment of the receipt of cash. It is signed at the bottom by the Treasurer himself, with a memorandum "Rs. 743. Received by transfer by a Perwannah, No. 2669," in the particular one to which we are referring.

There is perhaps some little difficulty, or, at least, their Lordships had some difficulty in the course of the argument, in discovering exactly what was the mode of giving a receipt when the payment really was made by a transfer. Although there is perhaps no direct evidence of what the form of it was when the payment was made into the Treasury by deposit, whether it was the Treasury at Mirzapore or the Treasury at Benares, no doubt some receipt, acknowledging that payment, must have been given. Several of the Witnesses who were examined upon the part of the Government stated, that no receipt at all was given when a deposit was transferred, at the time when the transfer was made. In the judgment of the Sudder Court, which appears to have been taken principally from the allegations in the plaint, which are not certainly specifically, if at all, denied by the answers, it is stated that at some time or other, [97] whether the practice was first introduced by this particular Treasurer, or whether it was introduced before, is not perfectly clear; but, at any rate, upon many occasions a receipt was given, but that alterations were made in the form of it, as one would suppose would be the case, as otherwise it would represent what was positively untrue; and that it would contain a reference in the body of it, not merely after the signature at the end, to show that it was merely a receipt for a transfer, and that no money was paid at all at the time when it was given. Therefore, the receipt forms the first evidence, and very strong evidence, against the Treasurer.

Then that is confirmed in a great variety of instances by evidence upon the part of the village authorities, the Canoongoes, who say that, as respects those villages, they have no deposit accounts,—that it was the ordinary practice to pay in cash. That, secondly, confirms the statement that the payment was in cash. Then there is no entry of a receipt in cash in the Hindee Siah, which would make it clear, and which in fact is not seriously denied, that if it was paid in cash, beyond all question the Treasurer was a party to the embezzlement. Then in the Persian Siah they are entered upon the day upon which the payment was made, and it is very important to observe, that they are entered as paid in cash. In examining the items it is quite plain, that in the body of the Siah they are entered as paid in cash; but, of course, if they had been summed up in the abstract of the day's proceedings as having been paid in cash, then the amount of cash in the Persian Siah would have differed from that in the Hindee Siah, and then when the Collector came to examine [98] the Books the fraud would have been discovered directly. Therefore, though they are stated in the body of the Persian Siah as received in cash, yet in the summing up they are not summed up in the cash column, but they are summed up as a part of those sums which were received by transfer of deposit. We also find

in these Persian Sialas that, day by day, not only is the ultimate balance signed by the Treasurer, but the pages are also signed. It is said, that he does not understand the Persian language; but there is no satisfactory evidence of this, and it is very improbable that the Persian Clerks should have dared to go on, day by day, making those false entries which the Treasurer could have discovered at any time.

Then, besides that, there was another Clerk, who kept a Book of receipts, called the Dakhilla accounts, in which nothing was entered except payments in cash, and in which we find these entries as being received in cash. Now, taking into consideration the evidence of the payments being received in cash, are we to believe that the Landowner, or his Agent, who brought the money, the village authorities, the Persian Clerks, the persons who kept the Dakhilla Books (of whose guilt there is no evidence whatever), were all combined to cheat the Treasurer, and that they should succeed during this long period of years in cheating the Treasurer, though at the very time they cheated him they brought these documents, day by day, to him for his signature, thus giving him an opportunity of detecting them?

Moreover, if one looks at the accounts kept at the time, it will be seen that there is no reference in them to the deposit accounts from which the sums [99] embezzled were fraudulently pretended to be taken. There is no reference to them in the Hindee Siala, or the Persian Siala, or in the Dakhilla Book. The only place in which you find any reference to them is in the receipts themselves in the handwriting of the Treasurer himself. There you find a reference to the alleged transfer, and that is not denied. It is admitted by the Accountants of the Defendant, that in reality these transfers were all false and fictitious, because in reality they were not transfers from the accounts of the Landowner who made the payments, but were in reality transfers from totally different accounts which had nothing to do with these particular receipts; but being afterwards, as it appears, made up in some other way, which it is not necessary to inquire into, the Courts below agreed in the belief that the money was really received in those cases, and their Lordships certainly do not see any ground at all for differing from that opinion.

This morning Mr. Forsyth has taken us through two selected instances, and we have examined and traced these two cases all through, so as to enable us to see what was the effect of the entries; and that which has been stated has been proved in these cases. We have not thought it necessary to go beyond that, nor is it necessary to consider in detail, whether there is sufficient evidence in those cases in which the entries are not produced, but only the copies of the receipts. Their Lordships must consider them as copies of the receipts, nor is it necessary to go into the detail of those cases where no receipts at all are produced, because it is quite clear that the whole of the frauds are upon one system from beginning to end; and when it is once shown and proved that [100] there were frauds to this amount, and how they were concocted and carried out, and when it is further shown clearly from certain instances, that there is evidence, beyond all question, that the Treasurer was a party to them, the inference is very strong indeed that he was a party to all the frauds. It never could be believed that some of the frauds were committed with the knowledge of the Treasurer, he receiving the money, and that the rest of the frauds were not practically committed in the same way.

Upon these grounds, therefore, their Lordships have come to the conclusion, that the judgment of the Court below was right, and that it was fully supported by the evidence, and hence they will recommend to Her Majesty that this appeal should be dismissed with costs.

[101] ANUNDOO MOYEE DOSSEE, and Others, —*Appellants*: DHONENDRO CHUNDER MOOKERJEE, and Others, —*Respondents* * [June 28, 29, 1871].

On Appeal from the High Court of Judicature at Fort William in Bengal.

The title of a judgment Creditor, or a Purchaser under a decree sale, is not on the same footing with respect to the law of limitation of suits, as that of a Mortgagor, or one claiming under an alienation from the Mortgagor [14 Moo. Ind. App. 111].

If a Purchaser under a decree sale has been in undisturbed possession for more than twelve years, without notice of a prior subsisting mortgage, and foreclosure sale made thereon, the Ben. Regs. of Limitation, III. of 1793, sect. 14: II. of 1805, sect. 3, cls. 2 and 3; and Act, No. XIV. of 1859, sect. 1, cl. 12, apply and are a bar to a suit against such Purchaser for possession, by parties claiming under the decree sale made in the foreclosure suit [14 Moo. Ind. App. 111].

A foreclosure decree only affects the interests of the parties to the suit [14 Moo. Ind. App. 109].

This was an ejectment suit brought by the Appellants, the Executrix and Executors of Mutty Lal Seal, deceased, for recovery of a 4 annas and 16 gundahs' share in Pergunnah Brahmon Bhomee, in Zillah Midnapore. The Appellants founded their claim on a mortgage, dated the 14th of October, 1841, alleged to have been executed by Sree Nath Mullick, also deceased, to Mutty Lal Seal and another.

The plaint filed in 1861 stated, that Mutty Lal Seal had purchased in a foreclosure suit brought against the representatives of Sree Nath Mullick at a sale under a decree made in November, 1852, with the sanction of the Master of the late Supreme Court at Calcutta, the above and other property, alleged to have been mortgaged to Mutty Lal Seal; and it was further stated, that Mutty Lal Seal had been put into possession of some of the property, but that the Defendants had not, on [102] various pretences, given possession of the remainder; and that as 1 anna and 12 gundahs of the 4 annas and 16 gundahs of Brahmon Bhomee had been sold for Government revenue, the Plaintiffs sued for the residue.

A written statement was put in on behalf of the Defendants, Mohesh Chunder Mookerjee, Sreeman Chunder Mookerjee, Sreemutty Dukheena Kally Debee, Mutty Lal Mookerjee, and Beharee Lal Mookerjee; in which they, amongst other things, submitted, that the 1 anna and 12 gundahs, share of Gokool Nath Mullick, was purchased at auction on the 27th of April, 1843, and the share of Sree Nath Mullick, viz., 1 anna and 12 gundahs, on the 26th of May, 1846, in the execution of a decree, and were since held by them; that twelve years since those dates had elapsed; and that the Plaintiffs could not prefer any objection to the possession of the Defendants, they having held the same in undisputed possession for more than twelve years before the institution of the plaint; and that the Plaintiffs' claim on such ground ought to be dismissed. They further submitted, that the proceedings in the late Supreme Court could not be used in any way as interfering with or lessening their rights, inasmuch as they were not parties to the suit for foreclosure. That at the date of Mutty Lal Seal's mortgage Bond, the 3 annas and 4 gundahs' share held by them, had been attached, and were afterwards sold in execution of the decree suit; and that Sree Nath Mullick had not the power of mortgaging such attached property, and that such alleged mortgage was, if made, invalid. That Sree Nath Mullick was not the proprietor of more than 1 anna and 12 gundahs of the Zemindary, and Gokool Nath Mullick owned 1 anna 12 gundahs out of 3 annas and 4 gundahs, held by the Defendants, and that Sree Nath Mullick had no [103] power even to mortgage such property, and that any claim under such alleged mortgage was inadmissible. And it was further submitted, that Mutty Lal Seal, though

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

cognisant of such sale under decree, did not make known to the Purchasers the existence of such mortgage, but concealed that fact. And lastly, that the Defendants claimed under a *bona fide* title, and were in possession under it; and that the Plaintiffs had instituted the suit after a long delay, and, therefore, had no right to maintain the same.

The other Defendants, Dhonendro Chunder Mookerjee, Jadubindro Mookerjee, and Ghonesham Mookerjee, as Executors of the late Juggut Chunder Mookerjee, also appeared, and put in their written statements, setting up the same objections as were made by the first-named Defendants.

The Plaintiffs in their written statement, in reply, stated amongst other things, that the mortgage relied on by them was made on the 14th of October, 1841, to their Testator; that the Defendants in their statements showed that under the sale in execution of decree they had purchased 3 annas and 4 gundahs' share out of the mortgaged properties; and that such sale took place subsequent to the date of the mortgage and the rights of the Defendants under the sale by the Supreme Court were destroyed. And they submitted, that as the Defendants only purchased the right of Sree Nath Mullick, their possession could not be held valid against the Plaintiffs, as the right of Sree Nath Mullick had terminated; and that the Defendants, therefore, could not avail themselves of the objection respecting limitation. And they further replied, that Sree Nath Mullick having acquired his own share of 1 anna 12 gundahs, and also the 1 anna and 12 gundahs' share of Gokool Nath [104] Mullick, agreeably to the agreement, and other shares under a Will, had mortgaged the same to the Plaintiffs' Testator.

The principal points in dispute between the parties raised in the Courts in India, and on appeal, were, first, whether the suit was barred by the Regulations of Limitation, the Defendants submitting that a 1 anna 12 gundas share of the property belonging to one Gokool Nath Mullick, a deceased Brother of Sree Nath Mullick, had been purchased by them after Gokool Nath Mullick's death, on the 27th of April, 1843, and that another share of like amount, belonging to Sree Nath Mullick, had been purchased by them on the 26th of May, 1846, both purchases being, as alleged, made at sales held in execution of money decrees; secondly, whether the decree of the Supreme Court was binding, as affecting the two shares, or either of them, by reason of the Defendants, as such Purchasers, not having been made parties to the foreclosure suit in which that decree was made; thirdly, whether the mortgage had been in fact, executed; and, lastly, whether the Defendants could, after the decree of the Supreme Court establishing the mortgage, dispute the mortgage.

The evidence produced did not satisfactorily establish the alleged mortgage of the 14th of October, 1841.

By the decree of the Zillah Judge, Mr. R. H. Russell, dated the 18th of July, 1862, it was decided, amongst other things, that the suit was not barred by the Regulations of Limitation; that the Defendants, the Purchasers of the property which had been mortgaged, stood in the same position as the Mortgagor, and that long possession did not bar the Plaintiffs' claim; that the decree of the late Supreme Court, and the sale thereunder, must be [105] held to be good as against the Mortgagor and those who stood in his place; that such decree established the mortgage, and the non-payment of the consideration-money for the same, and the Court accordingly decreed for the Plaintiffs' claim.

On a review of judgment, the same Judge, by a decree, dated the 19th of September 1862, held that though with respect to incumbrances subsequent to mortgage, the decree in the foreclosure suit would not bind subsequent incumbrancers prior to the filing of the Bill and not parties to the suit, yet that the decree did bind all Creditors by mortgage, or judgment, and Assignees of the equity of redemption, and he modified his former judgment, so far as to give the Plaintiffs a decree in respect of the share purchased at the second sale, subsequent to the filing of the Bill, and dismissed the suit as to the other share purchased previously.

On appeal, the High Court, the Justices Norman and Jackson presiding, by their final judgment, dated the 12th of September, 1864, decided that it was not proved to the satisfaction of the Court that the mortgage was a valid and subsisting security, or even in existence at all at the date of the death of Sree Nath Mullick, or at the time of the sales of the property in suit to the Defendants. And the Court

further held, that the Defendants, having brought the share in question subsequently to the filing of the Bill for foreclosure, were, as regarded that share, in the position of Purchasers *pendente lite*, and bound by the decree of the Supreme Court in the foreclosure suit; and, lastly, that the Plaintiffs' claim was barred by the Limitation Act, No. XIV. of 1859. The decree, thereupon, with reference to the last mentioned share, reversed the decree of the Zillah Judge, and dismissed the suit.

[106] The appeal was from this decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants.—First. We submit, that the High Court ought to have affirmed the last decree of the Zillah Judge, so far as it decided, that the decree in the foreclosure suit bound the Purchasers under the sale of the property which took place *pendente lite*. In *Wallace v. The Marquess of Dougal* (1 Dr. and Wal. 461, 457), the effect of *lis pendens* on a Purchaser, for valuable consideration is considered; and *The Bishop of Winchester v. Paine* (11 Ves. 194), is an authority that subsequent Mortgagees of the equity of redemption are bound by a decree of foreclosure, though not made parties to the suit. Fisher on the Law of Mortgage, p. 580 [2nd. Ed.]. The sale was made in a suit for foreclosure of a mortgage, and, as such suit was instituted prior to the sale under which the Defendants claim, they were bound by the decree in that suit in exactly the same manner as if they had been parties to the suit. The Court was wrong in opening the question of the mortgage transaction between Sree Nath Mullick and Mutty Lal Seal, which had been established and carried out by the decree of the Supreme Court and the subsequent sale thereunder to the latter. Macpherson's Law of Mortgage, p. 196 [5th Ed.]. The evidence of the due execution of the mortgage was sufficient.

Secondly: the Defendants brought at the execution sales in 1843 and 1846 only the right, title, and interest of the judgment Debtors in whom previously to the year 1841 the two shares purchased were then vested, but they had mortgaged the same, with the rest of the 4 annas, 16 gundas, as one entire estate, to Mutty Lal Seal, which mortgage was registered in 1842.

[107] Lastly: the High Court wrongly decided, that the suit was barred by limitation under Act, No. XIV. of 1859, sect. 1, cl. 12, as the cause of action did not accrue to Mutty Lal Seal, from whom the Appellants derive title, until he became Purchaser of the property under the decree of the Supreme Court in the foreclosure suit, when he first became entitled to claim and enter upon possession of the estate.

Sir R. Baggallay, Q.C., Mr. J. Cochrane, and Mr. Pontifex, for the Respondents.—There was no proof of the alleged mortgage of the 14th of October, 1841, relied on by the Appellants. [The Lord Justice James: Their Lordships are of opinion, that there is not sufficient evidence of the mortgage, therefore, the foreclosure decree founded thereon, as affects third parties, is not sustainable.] Even if such a mortgage really existed, the present suit of the Appellants is barred by their not having proceeded for the recovery of the lands in the plaint mentioned within the twelve years' adverse possession when the cause of action arose, as prescribed by sect. 14 of Ben. Reg. III. of 1793, II. of 1805, sect. 3, cls. 2 and 3, and Act, No. XIV. of 1859, sect. 1, cl. 12. *Prannath Roy Choudry v. Rookea Begum* (7 Moore's Ind. App. Cases, 323); *Maharajah Koonur Baboo Nitrasur Singh v. Baboo Nund Lal Singh* (8 Moore's Ind. App. Cases, 199); *Dabee Koomar Bose v. Roy Bykunt Nath Chowdree* (16 S. D. Dec. 1853, 210); *Baboo Sheosukhe v. Baboo Brinead Singh* (*ibid.* 21); *Punchanun Bose v. Roy Bykunt Nath Chowdree* (*ibid.* 546).

[108] Secondly, Mutty Lal Seal having stood by and allowed the Respondents to purchase the property without having given notice of, or even alluded to the existence of his pretended mortgage, the Appellants cannot now be allowed to impugn their titles as Purchasers.

Thirdly, the Appellants have no right to recover the property in suit, inasmuch as the several executed attachments gave a primary lien on the property itself as against execution of decree in respect to a third party, *Unnopoorna Dassea v. Ganga Narain Paul* (2 W. R. 296); *Gobindnath Sandyal v. Ram Coomoor Ghose* (6 W. R. 21); Act, No. VIII. of 1859, sects. 240, 266.

Judgment was pronounced by

The Right Hon. the Lord Justice James. In this case their Lordships are of opinion, that the judgment and decree of the High Court in India must be affirmed.

The case has been argued at some length, and several important questions of law and of practice have been discussed before their Lordships. The suit itself, looking at the plaint, scarcely seems to raise any of those questions. The suit is based entirely upon the title of a person who alleges that he purchased under a decree for sale, which decree was made on the 15th of November, 1852. The contention before their Lordships at first was, that that sale was made in a suit for foreclosure of a mortgage, and that that suit for foreclosure having been instituted prior to a sale under which the Defendants claimed, the Defendants are bound by that decree for sale in exactly the same manner as if they were parties to the foreclosure suit.

[109] Their Lordships are of opinion, that there is no foundation whatever for the claim so put, that the case to which they have been referred to, *The Bishop of Winchester v. Paine* (11 Ves. 194, 201), has really no relation to a case of this kind. That case merely determines this, that where there is a suit for foreclosure and the Mortgagor, a Defendant to that suit, makes a voluntary alienation, pending the suit, of any part of his interest in the equity of redemption, a Purchaser will not be allowed afterwards to institute a new suit for a new foreclosure, the ground being, that if that were permitted, proceedings in a foreclosure suit would be endless, because every day a fresh alienation might be made in some parts of the proceedings. But that was simply a foreclosure suit, and the subsequent Mortgagee would be barred from instituting any new suit in the Court of Chancery for the purpose of enforcing the equity of redemption. But no suit of foreclosure ever proceeded actively, or ever was made to work actively, against a party who was not before the Court. That case simply decides, that subsequent Mortgagees of an equity of redemption are bound by a foreclosure suit. This, however, was not a foreclosure decree. It was a decree for sale, and a decree for sale made in the Supreme Court at Calcutta had no effect whatever *in rem*, as it had no effect whatever over the property in the Mofussil. The decree for sale was merely a decree, in substance, that the parties to the suit should concur in conveying and selling the property to a Purchaser, and no such decree for sale could have any operation whatever upon the title of persons in the Mofussil who were not parties to the suit. Therefore, it appears to their Lordships that the view of the case presented [110] to them based upon the case of *The Bishop of Winchester v. Paine* [11 Ves. 194, 201], has really no application to the subject matter of this suit.

But the Courts below did go into the title anterior to the sale, and upon an investigation of that title the High Court came to a conclusion in favour of the Respondents. Their Lordships think it right, therefore, to some extent to go into the matters which were so discussed in the Courts below.

Now, one of the questions, and the most important question in their Lordships' judgment, conclusive with regard to the matter which was raised, was this: whether the title of the Defendants was anterior to the title of the Mortgagee and was anterior to his mortgage? Their Lordships are satisfied upon the evidence, that before the mortgage was made, which is the foundation of the Plaintiffs' title, whether it was made in October, 1841, or whether it came into existence some time between that and the date of the registration of the mortgage, which is the only thing before them, that is to say, the registration in May, 1842 (whichever date be taken), at the time when that Deed was executed, the property in question was actually attached under a decree of the Court, and under a sale in pursuance of that original decree, and of that execution, the title of the Defendants accrued: and their Lordships are of opinion, that the title of the Defendants, independently of the Regulations of Limitations, is paramount and superior to the title under the Mortgagee.

As a great deal of argument has been addressed to their Lordships upon that question in respect of the Regulations of Limitations, their Lordships think it right to add that, in their judgment, if the attachment under which the title of the Defendants was derived [111] had been posterior to the mortgage, still the Regulations of Limitations would have been a conclusive bar. Their Lordships think that the title of a judgment Creditor, or a Purchaser under a judgment decree, cannot

be put on the same footing as the title of a Mortgagor, or of a person claiming under a voluntary alienation from the Mortgagor. They are of opinion, that the possession of a Purchaser, under such circumstances, is really not the possession of a person holding in priority of the Mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the Mortgagee. The possession, which the Purchaser supposed he acquired, was a possession as Owner. He thought he was acquiring the absolute title to the property, and that he was in possession as absolute Owner. Their Lordships are assuming that no notice was proved of the existence of the mortgage title given to, or acquired by, the Purchaser; and there being no such notice, they are of opinion, that the possession of the Purchaser was the possession of a person claiming to be Owner. Under these circumstances they are of opinion, that if the title of the Mortgagee to enter by reason of a default having occurred before, had accrued, and if the Purchaser under such a title had been in possession for twelve years, believing himself to be *bona fide* Owner, under a claim to the ownership of the property, and not being in possession in any way as Mortgagor or under the Mortgagor, then in accordance with the cases, several of which have been cited to their Lordships, and probably were cited in India, according to the principle of those cases, which their Lordships adopt, they are of opinion, that the suit to disturb the possession of such [112] a Purchaser ought to be brought within the twelve years after the commencement of his possession.

Their Lordships, on the whole, are of opinion, that the judgment of the Court below is correct, and they will humbly recommend Her Majesty that the appeal be dismissed with costs.

MUSSUMAT THUKRAIN SOOKRAJ KOOWAR,—*Appellant*; GOVERNMENT, BABOO AJEET SING, and Others,—*Respondents* * [July 1 and 3, 1871].

On appeal from the Court of the Financial Commissioner of Oude.

In Oude, before its annexation to the British rule, a Rajah was a Talookdar of a large Talook. A younger branch of his family had a separate Mehal in the possession of A., wholly distinct from and independent of the Talook the Rajah possessed as representing the elder branch of the family. The Oude Government, for fiscal purposes, included A.'s Mehal with the Rajah's Talook so that the Rajah as the elder branch of the family represented A.'s Mehal at the Court at Lucknow, notwithstanding that A. remained in undisturbed possession as absolute Owner, paying through the Rajah for his Mehal a proportion of the jumma fixed on the Talook. This relation between the Rajah and A. subsisted up to the time of the annexation of Oude by the British Government. While the Government was making a settlement with the Landowners, and A. was about to apply for a distinct settlement of his Mehal, he, and after him his Widow, was induced by the Rajah not to do so, the Rajah in Letters fully recognizing A.'s absolute right to the Mehal. After the suppression of the rebellion in Oude, and the Government had recognized the Talookdary tenure with its rights, a provisional settlement of the Talook including A.'s Mehal, was made with the Rajah; but before a Sunnud was granted to him, Government confiscated half his estate for concealment of Arms. The Rajah suppressed the fact of the trust relation of the Mehal of A., and contrived that it should be included in the half part of the estate the Government had confiscated; which Mehal the Government as a reward granted to Oude loyalists. A.'s Widow brought a suit against the Government and the Grantees for the restoration of the Mehal and a settlement. The Financial Commissioner held that as the Rajah was the registered Owner of the Mehal of A., included in his Talook, it had been properly

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forfeited. Such finding reversed on appeal, on the ground that A. was the acknowledged *cestui que* trust of the Rajah, and that A.'s Widow, as equitable Owner was not affected as between her and the Government by the act of confiscation of half the Rajah's Talook.

In this case the appeal was brought from a decree of the Financial Commissioner of Oude, which reversed the Orders of the Commissioner of Fyzabad, [113] and of the Deputy Commissioner of Gondah, and dismissed the Appellant's claim. The Orders and decree were made in a suit instituted by the Appellant to obtain a settlement with her, under the law then in force in Oude, of an estate called Deotaha, in the District of Gondah, and province of Oude.

There was no dispute as to the facts of the case, and the only question was as to the effect on the Appellant's previous admitted rights under a subsequent settlement of the lands in question which had been made with the Talookdar, a relative of the Appellant, and of certain orders of Government, relating generally to the land settlement of Oude.

The facts were these:—

The Appellant was the childless Widow and heiress of one Kalee Pershad Singh, who died in 1856, about the time of the annexation of Oude by the East India Company. Kalee Pershad Singh was the representative of the younger branch of his family, the representative of the elder branch being Kissen Dutt Singh, the Rajah of Bhinga.

The two branches had long been wholly separate in estate, Kalee Pershad Singh being possessed down to his death of the estate called Deotaha, and the Rajah of the Talook of Bhinga. The Deotaha estate [114] had been originally acquired about the year 1798, after the separation of the two branches, by Juggut Singh, the Father-in-law of the Appellant, and had been held by him from the native Government of Oude under a separate and independent kabooleat as Talookdar of the estate.

Juggut Singh died about the year 1831, leaving a Widow and an adopted Son, the before-named Kalee Pershad Singh, who remained in the same independent possession of the estate until about the year 1836, when, in consequence of the exactions and oppressions of the Officers of the King of Oude charged with the administration of the District, the younger branch for their own protection, arranged to hold their estates in nominal subordination to the elder branch and to have them included in the kabooleat under which the Rajah of Bhinga held his estates from the Government of Oude. Under this arrangement the revenue charged on Deotaha was paid to the State through the Rajah of Bhinga, instead of direct as before, but in all other respects the management and enjoyment of the estate of Deotaha remained with Kalee Pershad Singh as it had previously been.

By two Letters, dated the 7th of February, 1856, and the 14th of January, 1859, it appeared, that Kalee Pershad Singh, just before his death, probably in consequence of his being relieved, by the annexation which was then declared, from fear of future exaction, had contemplated applying for a direct settlement of his Mehal, and that the Appellant in 1859 had entertained the same intention, but they were dissuaded therefrom by the Rajah of Bhinga, who, in those Letters fully acknowledged their right so to do, [115] but suggested that, as they were both old, they would do better to leave the protection of their interests to him. The result was that the Appellant, after her Husband's death, did not apply for a direct settlement with her of the Deotaha estate, but allowed matters to continue as before. No Sunnud was granted to the Rajah of Bhinga or kabooleat taken from him embracing the Deotaha estate, but it appeared that a summary settlement was made with him in 1858-9, which included the Deotaha estate, but no disturbance of the Appellant's enjoyment of that estate took place.

On the 20th of June, 1859, in consequence of the discovery of some concealed Guns in the premises of the Rajah, an Order was issued for the confiscation of one-half of his estates.

The Rajah, it appeared, was allowed to select the moiety which he would prefer to part with, and he accordingly pointed out for confiscation the entire Mehal of the Appellant, which was thereupon declared confiscated, together with 138 villages

belonging to the Rajah's own estate, required with the Deotaha estate to make up the half of the lands included in the summary settlement with the Rajah.

Immediately on the Appellant learning the fraud practised on her, she, on the 29th of August, 1859, put in a petition of objection, on which an Order was recorded, that as the Deotaha estate had been given by Government to one Shahrada Shaa Deo Singh, no Order could be passed on the petition. An appeal from this Order of rejection met with no better success, but as in the meantime it appeared to have been decided not to give the Deotaha estate to the Shahrada, a different reason was given, namely, that though formerly the property of Juggut Singh, it had [116] been for some years included in the kabooleat of Kissen Dutt Singh, whose estate had been confiscated.

After this, orders were first issued for settlement in supercession of Shahrada, with the Mukkudums (or heads of the villages), and afterwards, notwithstanding the Appellant's petitions, by an Order, dated the 21st of October, 1859, forty-two out of forty-six of the Appellant's villages of the Deotaha estate were given away by the Government of Oude to loyal Grantees. Of the remaining four, three were at first settled with Appellant, but afterwards the settlement was cancelled, and the Appellant, without imputation on her loyalty, or inquiry as to her complaints, was stripped of the last fragment of her estate and reduced to entire poverty.

On the 10th of October, 1859, Orders were issued by the Governor-General confirming the settlement made with the Talookdars.

For some time after the confiscation, it appeared that the Appellant had not been allowed to take legal proceedings for the assertion of her right. On the 22nd of November, 1864, the Deputy Commissioner, in pursuance of an Order of the Commissioner of the same date, called on the Pergunnah Canoongoe, for "a full report of the history of the Deotaha estate," and, on the 25th of January following, he embodied the report so obtained in a memorandum, which he forwarded to the Commissioner of Fyzabad. Mr. Simpson, the then Commissioner of Fyzabad, sent it on to the Financial Commissioner, with an expression of opinion that, as the Deotaha estate had been included in the settlement of the Rajah of Bhinga, the Appellant's claim was barred. After inquiries by the Government, the Appellant [117] obtained permission to sue, and accordingly, on the 21st of July, 1865, filed a plaint in the Court of the Financial Commissioner of Oude against the Government and the Grantees to obtain a settlement of the estate of Deotaha.

The Deputy Commissioner, Mr. J. S. Ross, having taken evidence as to the Plaintiff's statements, and having satisfied himself of the truth of them, on the 29th of August, 1865, delivered his judgment, which concluded in these terms:—"Under these circumstances, I considered it proved, that from the 13th of February, 1844, to the year of annexation, the Plaintiff's Husband, Kalee Pershad Singh, enjoyed the proprietary right in the Deotaha Illaqua, only paying the Government jumma to the Talookdar of Bhinga," and, therefore, recorded a decree in her favour, under rules in force for the settlement of the estate (a), plus 5 per cent. on the Government jumma, payable to the Talookdar of Bhinga for cost of collection.

There does not appear to have been any appeal or objection to this judgment, but on the 7th of September, 1863, the case was remitted by the Commissioner of Fyzabad, in order to have the statements of the Defendants more formally taken and their cases tried separately, and additional inquiries made, which appeared to the Commissioner necessary to elicit the material facts.

In accordance with this Order, the same Deputy Commissioner took up first the Appellant's case against one of the Respondents, Surubjeet Singh, in respect of village Assoogpore, one of the villages of [118] the Deotaha estate, granted to him. The Deputy Commissioner in his proceedings referred to various receipts and a Firman filed, which showed that Juggut Singh and Kalee Pershad Singh had paid the Oude Government the revenue of the Deotaha estate at various times, and he recorded that "Surubjeet Singh appears by Agent, Salar Khan, but has nothing to say apparently in refutation of the documents produced." He ended his minute

(a) The rules or minutes here referred to appear to be those made by the Chief Commissioner of Oude, to which the force of law was given by Act, No. XXVI. of 1866. See Schedule to Act.

thus:—"This additional inquiry has, I think, only tended to confirm the opinion formed of the case when submitting my report of the estate, dated the 25th of January, 1865, and my subsequent finding, dated the 29th of August, 1865, and, therefore, recapitulation seems uncalled for. The only modification of my finding that seems called for, is, that as the Rajah of Bhinga estate was not covered by a Sunnud, the Plaintiff seems entitled to the settlement of the estate direct from the Government."

From this Order Surubjeet Singh appealed to the Commissioner, Mr. H. S. Reed, who on the 22nd of August, 1866, remitted the case again to the Deputy Commissioner, to inquire as to certain Hindce Letters, alleged by the Appellant to be material and not sufficiently inquired into by the Deputy Commissioner, and to have further oral evidence taken as to who had received the rents of the Deotaha estate. The Commissioner went very fully into the evidence, and agreed fully with the finding as to the Deotaha estate having been the property of the Appellant, and as to the hardship of her case.

The Deputy Commissioner, Mr. J. S. Ross, upon the remand, having taken the evidence directed and gone into the inquiry as to the alleged Letters, concluded his observations on the further evidence by [119] saying: "I, therefore, see no valid grounds for altering my opinion originally expressed with regard to the settlement of the village with the Respondent," and forwarded the file to the Commissioner.

The Commissioner, Mr. H. S. Reed, on the 27th of March, 1867, took up the appeal again, went into the fresh evidence returned by the Deputy Commissioner, and dismissed the appeal, and thereby confirmed the original Order of the Lower Court of the 29th of August, 1865.

No appeal from the judgment of the Commissioner appeared to have been preferred to the Financial Commissioner under the provisions of Act, No. XXVI. of 1865. After the time had elapsed for appeal against the decree of the Commissioner, the Deputy Commissioner of Gondah brought the matter to the notice of the Officiating Commissioner of Fyzabad, Mr. Carnegie, who was acting temporarily in the absence of Mr. H. S. Reed, the Commissioner who had passed the decree on appeal, and recommended that the Appellant should be put in possession of the Deotaha villages. Mr. Carnegie objected to the execution of the decree, assigned various errors in it, and referred the matter, with his observations, to the Financial Commissioner, who referred the matter back for the consideration of Mr. H. S. Reed, who, on the 25th of October, 1867, addressed a memorandum of observations on Mr. Carnegie's strictures to the Financial Commissioner, in which he upheld his former judgment, and pointed out the wrong done to the Appellant and the irregularity of the suggestion made to quash the decrees of two Courts which had jurisdiction over the case, after the time for appeal [120] had passed, and on the ground suggested by Mr. Carnegie.

The Financial Commissioner, Mr. R. H. Davies, on the 4th of December, 1867, passed the following Order and decree:—"The Financial Commissioner is of opinion, that plea 3, viz., that the summary settlement 1858-59, having been made with the Rajah of Bhinga, the decrees of the Lower Courts, awarding the full proprietary rights to Thukrain Sookraj Koowar, militates against the Government Letters or Orders of the 10th of October, 1859, must be held to be good. The Rajah, under those Orders, became the full proprietor, and any rights formerly engaged by his relations were thereby annulled. Therefore, even if it were clearly proved, as held by the Lower Court, that Thukrain Sookraj Koowar was the true proprietor up to the summary settlements, and that she afterwards continued in possession of her right without disturbance by the Rajah, still, as her title, if she had one, was transferred to the Rajah, she cannot now plead it successfully. But, although the Courts decreed full proprietary right to her, her original claim was to a sub-settlement as under proprietor. It remains to decide, whether this can be maintained. It is to be observed, that the villages in dispute were not conferred on the Rajah by Sunnud, for they were confiscated before a Sunnud had been issued, owing to the Rajah's concealment of Cannon. Thukrain Sookraj Koowar, therefore, can only claim the benefit of any Order given in her favour in the Letter of the 10th of October, 1859. But the Letter, unfortunately,

contains no clause in favour of any parties, except inferior Zemindars and village occupants, amongst whom Thuk-[121]-rain Sookraj Koowar cannot be classed. Furthermore, her claim to the sub-settlement is barred also by the interpretation given in paragraph 7 of the Chief Commissioner's minute on Act, No. XXVI. of 1866, which identifies 'under proprietary right' with the right of a person who was in possession of the proprietary right at the time the village was incorporated in the Talook. Under this definition, no relative of a Talookdar, however long he may have held full apparent hereditary and proprietary possession of a Mehal within a Talook, can obtain a sub-settlement, unless it can be shown that the Mehal in question has been held at some interval under distinct revenue engagements with the native Government," and decreed that the Orders of the Lower Courts be reversed, and the claim of the Appellant to both the proprietary rights and sub-settlement of Mouzah Assookpore, Illaka Deotaha, dismissed.

A review of the Financial Commissioner's Order on various grounds, including the absence of appeal in due time against the decree of the Court below, was applied for and refused. Afterwards permission to appeal to Her Majesty in Council was granted. The appeal from the Order of the 4th of December, 1867, now came on for hearing.

Sir R. Palmer, Q.C., and Mr. Doyme, for the Appellant.—We submit, that the Financial Commissioner was wrong in holding, that the Letters or Orders of the 10th of October, 1859, vested in the Rajah lands which had been previously confiscated by the Government, or that the effect of those Orders or of the settlement made with him, was to prejudice or affect any subordinate interests in any portion of the lands included in his [122] settlement. There is nothing either in the Act, No. XXVI. of 1866, or in the rules, dated the 20th of August, 1866 (see Schedule to Act), made by the Chief Commissioner of Oude hostile to the Appellant's claim, which really falls within both the letter and equity of that Act, and of the interpretation put upon it by the Chief Commissioner. The Orders of the Lower Court were correct, and, we contend, that the Appellant is entitled to a settlement of the Deotaha estate, and that there has been no annulment of her previous admitted rights, by reason either of the settlement made with the Rajah of Bhinga, who stood in relation of Trustee for her, or the orders of Government in respect of this Mehal.

Mr. Forsyth, Q.C., and Mr. H. C. Merivale, for the Government, contended, first, that the confiscation and grant of the Deotaha estate to Oude loyalists were acts of State (Proclamation of Lord Canning, of the 30th of April, 1858), and deprived the Appellant of any right of property she might have had as regarded her proprietary rights, the settlement being made with the Rajah of Bhinga, and that the Appellant, therefore, could not question the Government's right in a civil proceeding. Secondly, as to the sub-proprietary interest, that the Appellant was not in a position in law to claim a sub-settlement, as the Deotaha estate was formally incorporated with the Bhinga Talook, and held Benamee, and as the Rajah, the ostensible Owner, consented to its being disposed of, even to the prejudice of the real Owner, the latter could not be allowed to object, *Brajonath Ghose v. Koylash Chunder Bannerjee* (9 W. R. 593); and further, that the Rajah [123] was the registered Owner, and the Deotaha estate was selected by himself for the half part of his Talook to meet the confiscation.

Their Lordships, without calling for a reply, pronounced judgment by

The Right Hon. The Lord Justice James.—The Plaintiff, the Appellant, is the Widow and heir of a deceased Oude nobleman, the representative of the cadet branch, as the Rajah of Bhinga is the representative of the elder branch of a great Oude family. The Rajah was the Talookdar of a great Talook. The younger branch had their separate ancestral estate, the Gowa estate, wholly distinct from and independent of the Talook of the elder branch. But many years ago it was, in the then state of things in Oude, thought desirable that both estates should be, as to their relations with the Oude Government, united in one great Talookdary, the head of the elder branch representing the whole, whether in submission or in resistance to the exactions of the Court of Lucknow does not appear; the younger branch continuing, however, in undisturbed and absolute possession as the proprietor of its own villages, and paying only its proportion of the jumma assessed on the whole.

This was the state of things at the time of the annexation of Oude by the British power. While the British authorities were in course of making the settlement of their new acquisition, the Husband of the Appellant was minded to apply for a distinct settlement with himself, there being no longer the motive, as he thought, for covering himself with the name and protection of the Rajah of Blanga. He apparently thought that under [124] British law and British rule his estate would be as safe as the domain of the most powerful Talookdar.

The Rajah, however, wrote to dissuade him from this step in a letter in which, while desiring to retain the nominal Talookdary of the whole, he acknowledges in the clearest terms the right of his relation, and pledges himself that the possession of the Mehal by the latter shall be respected and safe.

Before anything was done, the great outbreak in Oude took place. After it was subdued, the arrangements for a settlement were resumed. In the meantime the Plaintiff's Husband had died; the Rajah hearing that the Widow, the Plaintiff, was of the same mind as her Husband, and desirous of placing herself immediately under the British Sircar, wrote her a Letter similar to the one he had formerly addressed to her Husband.

The summary or provisional settlement was made with the Rajah: but before the Rajah had obtained his regular settlement, and the Sumud which would have been his formal grant, he incurred the grave displeasure of the authorities, some Arms being found concealed by him, and an Order went forth confiscating half his estate. The Rajah concealed from the Government Official the real ownership of the Appellant's villages, and contrived that they should be taken to satisfy in part the Order of confiscation. The Appellant naturally remonstrated and petitioned, but in vain; she petitioned again, and again her second petition, like the first, was unheeded. At length, however, she succeeded in obtaining a hearing. She was told to bring, and did bring, her suit for the restitution of her villages and a settlement. The case was investigated with a care which cannot [125] be too highly praised, and the Assistant Commissioner, acting as Judge, pronounced in the Lady's favour, that she was entitled to have the villages settled with her as a subordinate tenure to the Talook. From this decision, an appeal was presented to the Deputy Commissioner, who, thinking that there were some technical deficiencies in respect of some of the details, desired a still further and fuller investigation. The result was, that the Assistant Commissioner re-stated his former conclusion and judgment, but with a modification that the settlement was to be made with her directly, and not as a sub-proprietor; and the Deputy Commissioner, who had evidently taken great pains with the case, affirmed that decision.

The matter should have rested there. It appears, however, that the Appellant's villages had been included in the grants to Oude loyalists, in reward for their loyal services to the State, and it was thought that it would be very embarrassing if the Grantees were to be obliged to give up the subject of their grants to the rightful Owner; and, accordingly, a further appeal was made to the Chief Commissioner, who reversed the decrees of the subordinate Officers, and the poor Widow was thereby left stripped of her whole property. From this decree the present appeal is brought.

It has been attempted to be justified on the legislation which existed in Oude on the effect of the new settlement, and on the well-known Letters of the Governor General in Council, addressed to the Land-owners of Oude, the one announcing the confiscation of existing tenures, and making a *tabula rasa*, the other the Letter of grace and restoration. It is [126] contended, that the effect of the settlement with the Rajah under the second Letter was to make him the absolute Owner of the whole estate, including what had been the Appellant's village.

Their Lordships are satisfied that that legislation and that Letter have no such effect. The object and meaning of that Letter are well known and very clear. Soon after the annexation, it was suggested that the true and normal proprietorship of land in Oude was that ownership by village communities which had been discovered or established in the North-West Provinces, and that the alleged Talookdary and Zemindary rights were simply a recent usurpation due to the violence and fraud which had marked the last years of the Oude monarchy; that at all events many of the individual Talookdars and Zemindars had by violence and fraud or the corruption of the Government possessed themselves of other people's estates.

The old question, moreover, was further mooted whether a Zemindar was really an hereditary Landlord or only a Government functionary.

The Talookdars and Zemindars were threatened with an universal *quo warranto*.

It was to announce the abandonment of this policy, and to quiet men's titles and possessions, that the Letter was written. It said, in substance, we acknowledge the Talookdary tenure—we acknowledge that the tenure does confer an hereditary lordship descendible in fee simple, and we will not allow the existing titles to be disturbed by old dormant claims. At the same time we preserve, in like manner, all the rights of your subordinate Zemindars and Ryots, whose rights and the rights of persons entitled to Seer and Nanka you shall respect as [127] we respect yours. For that purpose and to that extent an absolute title was given to the person who was settled with as Talookdar, with the fullest powers of alienation, and consequently of binding his right by contract, so that effect may be given to the rights of persons not claiming adversely to the registered title, but claiming, by agreement with him an old estate, consistently with that title. In English language, it gave the registered Talookdar the absolute legal title as against the State and against adverse Claimants to the Talookdary; but it did not relieve the Talookdar from any equitable rights to which he might have subjected himself with a view to the completion of the settlement by his own valid agreement. In this case the Appellant was the acknowledged *cestui que* trust of the registered Talookdar, who had bound himself expressly in writing that he would respect her rights if she permitted him to be alone so registered.

It would be a scandal to any legislation if it arbitrarily and without any assignable reason swept away such rights; and in this very painful case it is at all events agreeable to their Lordships to find that no such scandal attaches to the Laws or Regulations or Government Acts in force in Oude; and that the cruel wrong of which this Lady has been the victim is due to the misapprehension of the law by the Commissioner.

It is almost superfluous to observe that the Lady being clearly, as she was, the equitable Owner, the decree of confiscation against her Trustee could on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a [128] sentence which, in effect, made her the sufferer for his offence.

Their Lordships are, therefore, of opinion, and will recommend, that the judgment of the Financial Commissioner be reversed, and that the judgment of the Deputy Commissioner, affirming the decision of the Assistant Commissioner, be affirmed.

The Appellant will have her costs of this appeal, and also the costs of the proceedings in both the Courts below.

Their Lordships cannot but express a hope that, by an act of prompt justice and a liberal estimate of what is due to this Lady, the Government will relieve her from further litigation. She had two decisions in her favour carefully and correctly adjudged, which, as they were consistent with the plainest principles of justice, it should have been the effort of an appellate Tribunal, unless the law controlled it, to maintain.

[See *Hyder Hossain v. Mahomed Hossain*, 1872, 14 Moo. Ind. App. 404.]

[129] FUTTEH CHUND SAHOO.—Appellant; LEELUMBER SINGH DOSS and others,—Respondents * [July 3 and 4, 1871].

On appeal from the High Court of Judicature at Fort William, Bengal.

The provisions of sect. 49 of the Registration Act, No. XX. of 1866, are imperative, and admit of no instrument being received in evidence in a civil suit, without

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

being registered: registration being compulsory, by cl. 2, sect. 17, of that Act [14 Moo. Ind. App. 131].

Semble: Under the 84th sect. of the Registration Act, the District Judge, if a *prima facie* case of execution of documents falling under sects. 17 or 18, is made out to his satisfaction, has power to direct the instrument to be registered: leaving the parties to try the question of forgery or non-forgery in a regular suit [14 Moo. Ind. App. 132].

This was a suit for specific performance of an agreement for sale of real estate, instituted by the Appellant against the Respondents. The object of the suit was to obtain a decree for the execution of a Deed of absolute sale, founded on an alleged agreement between the Appellant and Respondents, with an Order for registration and possession of the land the subject of the suit. The only question raised by the appeal was, whether an unregistered agreement could be received in evidence under the Registration Act, No. XX. of 1866, cl. 2, sect. 17, and sect. 49.

The Principal Sudder Ameen (Baboo Norotum Mullick) admitted the agreement as evidence, and decreed in the Appellant's favour. On appeal a Division [130] Bench of the High Court, consisting of the Justices Kemp and Phear, held that the agreement was an instrument within the meaning of cl. 2, sect. 17, of the Act, No. XX. of 1866, and that according to the provision of sect. 49 of that Act, it was not receivable in evidence in civil proceedings in any Court, unless it was registered according to the provisions of that Act. Hence the present appeal, which was argued by

Mr. J. D. Bell, for the Appellant, and Mr. Doyne, for the Respondents.

At the conclusion of the argument, judgment was delivered by

The Right Hon. Sir James Colville.—In this case, the Appellant brought his suit, which was in the nature of a Bill for specific performance, claiming to have the contract entered into by the instrument in question carried out, and, on the footing of that, a Deed of absolute sale executed; and he added that the suit was also for issuing "an Order for its registration." Their Lordships understand those words to import a prayer, that the Deed of absolute sale, when executed, might be ordered to be registered; and not to point to the registration of the instrument upon which the suit was brought. This prayer was probably inserted, with a view to meet the difficulties which it was apprehended might be occasioned by the prior registration of the Defendant's Deed of Sale of a date subsequent to that of the instrument on which the Appellant sued. The Court of First instance found that this instrument was not one which the Registration Act, then in force, required to be registered, [131] admitted it accordingly in evidence, and upon the merits, made a decree in favour of the Plaintiff. The case then went by appeal to the High Court, and the objection was there taken that the instrument being one which the Registration Act requires to be registered, and which had not been registered, it was not receivable in evidence, and that, therefore, there was no foundation for the Plaintiff's suit. The High Court entertained that objection, and the decision of the Court below was accordingly reversed, and the suit dismissed with costs. The appeal before us is against that decision.

It appears to their Lordships that, although this case is undoubtedly an extremely hard one, they are bound to affirm the decree of the High Court. The Registration Act, No. XX. of 1866, recently passed in India, is extremely stringent. Their Lordships have, in the first place, no doubt whatever, that the instrument in question is one which, by cl. 2 of section 17 of that Act, is required to be registered: that it is an instrument acknowledging the payment of the consideration money for what was to be ultimately an absolute sale of the property in question, and what in equity would operate as a sale of the property. The forty-ninth section of the Registration Act says, that no document that has not been registered under the Act (supposing it is one which ought to be registered), is receivable in evidence. The procedure which the Act prescribes is of this kind: The party seeking to register a document is, under the thirty-sixth section, to go first before the Registrar, or, as in this case, a Sub-Registrar. If the Sub-Registrar refuses to register the document, there is then an appeal from his refusal, upon whatever reasons it is

[132] founded, to the Registrar, the next higher Officer, and if that person confirms the Order refusing the registration, the eighty-fourth section gives to the party aggrieved the power of going by petition to the District Judge. In the present case the Sub-Registrar and afterwards the Registrar refused to register the instrument, because the Respondent, by whom it purported to have been executed, denied that he had executed it. It has been argued, that the Act affords no means for trying such an issue as was thus raised; and consequently, that unless the unregistered instrument be admitted in evidence in a regular suit wherein the fact of its execution could be tried, the right of the party claiming under it would be defeated by the false and dishonest denial of his own signature by the opposite party. Their Lordships, however, looking to the words of the eighty-fourth section, and the form of the petition given in the schedule, and in particular to the fourth paragraph of that form, which contains the words "the said C. D. appeared personally before the said Sub-Registrar and falsely denied the execution of such instrument," think that the Zillah Judge would have jurisdiction to determine such a question. Power is expressly given to him to summon the parties, and their Lordships imagine, that there must also be power to summon Witnesses, if examination of Witnesses should be necessary. How the Zillah Judges may deal with this statutory jurisdiction their Lordships are unable to say. It seems, however, reasonable to suppose, that if they say they saw that a *prima facie* case of execution of the Deed was made out, they would direct the document to be registered, and refer the parties to try the question of forgery or non-forgery in a [133] regular suit. Such a decision would not finally bind the rights of the party denying the execution of the document; and, on the other hand, it would not preclude the opposite party from proving in a less summary proceeding that the denial was false. Their Lordships must assume, in the absence of any proof to the contrary, that the Judges exercise this jurisdiction in a reasonable and proper manner.

Well, then, how do the facts stand upon this case? The Appellant went before the Sub-Registrar, and then he appealed to the Registrar. He then, unfortunately for himself, through bad advice or some other cause, omitted to proceed as the Act directs under the eighty-fourth section, in which case he might have obtained the registration of the Deed of agreement in the way before suggested, or brought a suit relying on a non-registered Deed. He failed to pursue the remedies given him by that section of the Act, or at least to exhaust those remedies. It seems impossible to their Lordships, under these circumstances, to say that, acting under the provisions of a very useful, though stringent Act, the Judges of the High Court have miscarried in ruling that the instrument, not having been registered, was inadmissible in evidence, and that the Plaintiff's suit had on that ground wholly failed. Their Lordships feel that this may be a very hard case; they would willingly have relieved the party if they could, but to make any special Order, such as that suggested by Mr. Bell, seems to their Lordships to be beyond the functions and province of an appellate Court. It may be that, the Appellant may be able partially to obtain relief, since part of the consideration money seems to be [134] still in his hands. Their Lordships, however, dealing with this appeal, have but one course before them, which is humbly to recommend Her Majesty to dismiss the appeal with costs.

[See *Reasut Hossein v. Hadjee Abdoollah*, 1876, L.R. 3 Ind. App. 226.]

OUKUR PERSHAD BUSTOOREE.—*Appellant*: MUSSAMUT FOOLCOOMAREE BEBEE,—*Respondent* * [July 1, 1871].

On appeal from the High Court of Judicature at Fort William in Bengal

Action by a Firm against an Agent of the Firm, who received a *puckah*, or *del credere* commission, on the goods of the Principals sold by their Agent. The last item in the account between the Principals and Agent, in their dealings, accrued more than three years from the commencement of the suit. Held, on the construction of the Limitation of suits Act, No. XIV, of 1859, that as the action was for breach of contract, it fell within the words "for breach of contract" in cl. 9, sect. 1, and that, sect. 8 of that Act, which related to suits for balances of accounts current, did not apply.

The Appellant, as Manager of the business of the firm of Seeta Ram Salgram, carrying on trade at Zeagunge in the City of Moorshedabad, instituted the suit, out of which this appeal arose, against the Respondent in July, 1863, in the Court of the Principal Sudder Ameen of Moorshedabad, to recover the sum of Rs. 16,051: 11: 10, as due in respect of various sales of Cotton belonging to the Plaintiff, and which the plaint alleged was sold by the Defendant as a *del credere* Agent; and as to which liability the plaint alleged, that two statements of account had taken place with the Respondent's Gomastah, the first on the 1st Assin, 65 September, 1858, and the second on the 15th Kartick, 69—October, 62, by the latter of which the sum sued for was shown to be due.

The Respondent, by her written statement, denied the Plaintiff's allegations as to there being any *del credere* contract with the Plaintiff as alleged, or any adjustment of account, or any authority given to the Gomastah so to adjust. She stated, that the commission which her Firm had always received from the Appellant was one from Rs. 10 to Rs. 12: 8, on each 100 maunds of Cotton, being the commission usually paid for ordinary agency, without liability for the proceeds of sale, while the commission in case of taking a *del credere* liability was from Rs. 18: 12, to Rs. 22: 8, per 100 maunds.

The cause of action as raised by the plaint, being upon an account stated before the filing of the plaint, limitation was not pleaded to the plaint: but upon the settlement of issues the Plaintiff abandoned that frame of the case, and then stated, that he sought adjustment of the accounts from the Court, and did not sue on an account stated: whereupon the Defendant pleaded limitation, and accordingly the first issue was as to limitation, the others being on the merits as to the nature of the contract between the parties and as to the sum remaining due from the Respondent to the Appellant. The Plaintiff's Pleader also stated that, "affairs had gone on according to custom; and that there was no written contract between the Mahajun and Aurtidars."

The Appellant examined Witnesses before the Principal Sudder Ameen. The effect of their evidence upon the different sorts of agency, namely, the *Puckah* or *del credere* and *Kutchu Aurti*, or irresponsible agency, was that the commission in the former was about Rs. 12, and the latter 18 to Rs. 20.

The Respondent also examined Witnesses; all of whom except one Witness were unconnected with either party, and, speaking from their experience as Dealers and Brokers in the Cotton trade in Zeagunge deposed that the rate of commission admittedly paid by the Appellant was ordinarily paid for *Kutchu Aurti*, and that in his transactions with various of the Witnesses as Purchasers, the Appellant was in the habit of receiving payment direct. The Respondent filed receipts to show the practice referred to in her written statement, and decrees obtained by the Appellant in various suits brought by him against Purchasers of Cotton, also extracts from the Respondent's account Book for the years from 1264 to 1268, to show that no entries were there made of any liability existing such as the Appellant asserted.

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

On this evidence, the Principal Sudder Ameen, (Degumber Biswas), on the 31st of December, 1864, delivered judgment, and dismissed the Appellant's suit with costs. He held that limitation did not bar the suit, as the dealings had been carried on up to the year before the institution of the suit. On the merits, the Principal Sudder Ameen held, that the evidence had wholly disproved the Appellant's [137] case and established that of the Respondent; that the bringing of suits by the Aurtidar in some instances was quite consistent with the practice of taking receipts from constituents and then suing as alleged by the Respondent, and that the Appellant had wholly failed to prove the adjustment, unsigned as it was, by any of the Respondent's servants.

From this judgment the Appellant appealed to the High Court, relying chiefly on the ground that he had proved his case generally as to the character of the transactions and as to the adjustments.

On the 23rd of June, 1865, a Division Bench of the High Court, composed of Messrs. Steer and Morgan, remanded the case for a new trial and a further investigation, and directed both parties to produce further evidence, and the Respondent to produce her Books and servants for examination as to the adjustment of accounts.

The reasons given in the judgment for this remand were, that the Aurtidarry transactions between the two Firms extended over a period of upwards of seventy years, and the dispute which had recently arose between them, and which had led to the suit, was one which there ought to be no real difficulty in deciding, for there must have been ample materials to show the terms on which the Defendant, the Aurtidar, acted for the Plaintiff, the Beparee. That the rate of commission payable to the former (Rs. 12: 8) was not in dispute; evidence having been given to show that a higher rate (from Rs. 18 to Rs. 20, or thereabouts) was usually charged by Aurtidars where they took upon themselves the whole responsibility of the sale and forthwith account for the proceeds to the Beparee; but that this was not the precise footing on which business was [138] transacted between the parties to the suit. That it was shown that a commission, varying from Rs. 6 to Rs. 10 or Rs. 12, was payable to Aurtidars where they undertake no responsibility whatsoever. That the contest in the case was, whether the Aurtidary was of the Kutchra description, as the Defendant alleged, or was Puckah, involving some liability on every sale, and a liability to pay at the expiration of the period of credit (30 days) allowed to Purchasers, or if not then, at any time afterwards when any outstanding remained unpaid by the Purchasers to the Plaintiff. That it is not put that the Defendant was liable only in case the amount was irrecoverable from the Purchasers by the Beparees. That it was certain, that the Plaintiff retained the right to sue the Purchasers, and also that, under certain circumstances, at least, the Aurtidar (the Defendant) had likewise a right to sue the Purchasers, and the Court concluded in these terms. "We think that the Plaintiff has established such a case as requires the Defendant to rebut it: she has only to produce the accounts, and the truth or falseness of the Plaintiff's case may, probably, be shown at once. If they show that there is nothing whatever due to the Plaintiff, or that the balance due to the Plaintiff is not anything like the sum claimed, there will be reason to conclude that the story of an adjustment and a settlement on the basis of the account filed by the Plaintiff is false. We think the Plaintiff has made out a case,—if not a complete case, at least a *prima facie* one."

The question of limitation of suit was not considered by the Court on this occasion.

The case having gone back to the same Principal Sudder Ameen for re-trial, the Appellant examined [139] further Witnesses, and also gave in evidence his own deposition. Upon the question of the amount of commission he put in two Letters, purporting to be from the Respondent's Firm, one of which, dated the 3rd Pous, Sumbut 1915, admitted a balance as due to the Appellant of Rs. 18,909: 6: 9 upon adjustment.

The Respondent examined her Dewan and other Witnesses.

On the 30th December, 1865, the Principal Sudder Ameen who had delivered the previous judgment dismissing the Appellant's suit, pronounced his second judgment, and decreed the Appellant the whole amount of his claim. He refused to allow the question of limitation to be re-opened.

From this judgment the Respondent appealed to the High Court on the ground, *inter alia*, that the Principal Sudder Ameen was wrong in refusing to try the plea of limitation.

On the 24th of January, 1867, the appeal was heard before a Division Bench of the High Court, composed of the Chief Justice, Sir Barnes Peacock, and Mr. Justice Jackson. The Chief Justice delivered judgment, dismissing the Plaintiff's suit on the issue as to limitation alone, deciding that it was not a case falling within sect. 8 of Act, No. XIV. of 1859, which relates to suits for balances of accounts current between Merchants and Traders who have had mutual dealings, as the Respondent's contention was, that of a mere Agent, and that if it did so fall it was equally barred; but that the case fell within sect. 1, cl. 9, of that Act.

The appeal was from this decree.

Mr. Leith, for the Appellant.—Although the High Court was right in deciding [140] that there was an engagement on the part of the Respondent, the Aurtidar, that he would sell the Appellant's Cotton, and that he would guarantee the Purchasers, the Court was wrong in deciding that the case fell within cl. 9, sect. 1, of Act, No. XIV. of 1859, on the ground that it was a suit for the breach of a contract within the meaning of that clause, and that, therefore, the period of limitation was three years from the date of such breach of contract. The Court ought to have decided that it was a suit for a balance of account on an account current between Merchants and Traders who have had mutual dealings within the 8th section of that Act, *Webber v. Tirill* (2 Saund., 127), *Catling v. Skoulding* (6 Term Rep., 189), *Cranch v. Kirkman* (Peake's N.P., 164; see Note, *ib.*), *Martin v. Delbar* (1 Lev., 298), and not treated it as a suit for breach of contract, or for damages in respect thereof, *Roghooburdial Mundur v. Christian* (3 W.R., 123). There is no reference made in section 8 to the three years' limitation, provided by cl. 9 of sect. 1. That being so, the suit, being for a balance of account, necessarily falls within the general provisions contained in cl. 16 of sect. 1, which enacts, that all suits for which no other limitation is by the Act expressly provided; the period of six years from the time the cause of action arose the right to sue accrues, *Gopal Chunder Shaha v. Sinaes* (8 W.R., 4), *Ramjay Dey v. Srinath Sing* (2 Ben. Law Rep., App. Jur., 170). Here the present suit was brought within six years when the cause of action provided by sect. 8 arose.

Mr. Doyne, for the Respondent.—It is clear from the pleadings, first, that the Appellant admitted that the commission he paid the Respon-[141]-dent was Rs. 11 : 8, and no more, the Chootki being a commission paid by the Purchasers; and secondly, that the Respondent became liable immediately on sale of the Cotton for the proceeds, after deduction of commission. With respect to the plea of limitation, after the abandonment of the allegation as to account stated, the burthen was on the Appellant to show why under Act, No. XIV. of 1859, cl. 1, sect. 9, he had not sued within three years from the accruing of any item of the debt alleged by him to be due from the Respondent. On the merits it is insisted, that according to the custom of the trade, an Aurtidar receiving a commission of Rs. 11 : 2 per hundred maunds would be liable for net sale price as if he were the Purchaser himself.

Judgment was reserved, and now delivered by

The Right Hon. The Lord Justice Mellish (July 17, 1871).—This was a suit brought by the Appellant, who was the Manager of a Factory in Moorshedabad, against the Respondent, who carried on an old established business of Broker, to recover a sum of Rs. 16,051 and interest, alleged to be due on the balance of an account. The Defendant had for several years sold the goods of the Plaintiff's Firm, and according to the finding of the Principal Sudder Ameen, the correctness of which was not disputed before us, had received a Puckah or del credere commission, which made her liable to the Plaintiff for all goods sold which were not paid for by the Purchasers. As there was no proof that any part of the price of the goods in respect of which this suit was brought had been received by the Defendant, the claim against the Defendant was only supported upon the ground that as she received a del [142] credere commission, she was liable for the price of all goods sold by her for the Plaintiff. It was admitted, that the cause of action for the last item in the account had accrued more than three years, but that there were

items in the account which had occurred within six years from the commencement of the suit. The Act of Limitation of suits was pleaded, and the sole question to be determined is, whether under the circumstances, previously stated, the suit is barred by the Act of Limitation of suits, No. XIV. of 1859. The High Court held, that the case came within cl. 9 of the first section, as a suit brought for breach of a contract, and the Chief Justice in giving judgment says, "Although no express contract was proved to have been entered into between the parties, still their dealings were evidence from which it might properly be assumed they had agreed to carry on business on the terms we find them carrying on. It was an engagement on the part of the Defendant that she would sell the Plaintiff's Cotton, and that she would guarantee the Purchasers. There was a liability on the part of the Defendant not arising from a wrong, but a liability arising out of an engagement which she must be assumed to have entered into with the Plaintiff. It, therefore, falls within cl. 9 of section 1. It is a suit for breach of contract not in writing." It was urged before us on the part of the Appellant that the High Court had put a wrong construction on the words "breach of contract," as used in the clause; that these words are not there used for the purpose of distinguishing actions founded on contract from actions founded on tort, but for the purpose of distinguishing actions to recover unliquidated damages for breach of contract, from actions to recover debts, and that the enumeration in the clause itself and in the 8th clause of several debts with respect to which the period of limitation is to be three years, proves that it could not have been intended to make the limitation for all debts three years under the words "breach of contract," and that the present suit was, in substance, a suit to recover a debt or liquidated sum of money, and that the period of limitation was six years under the 16th clause of section 1. Several cases were cited from the Indian Courts, and it appears from them that much difference of opinion has prevailed among the Judges in India respecting the proper construction to be put on the words "for the breach of any contract" in the 9th clause of sect. 1. Their Lordships do not think it necessary or advisable that they should attempt on the present occasion to lay down what is the proper construction of these words as applicable to all cases. It is sufficient to say, that it appears impossible to them to put so narrow a construction upon them as not to include the case now before them. The real Debtors for the price of the goods sold are the Purchasers of the goods, and the Broker is only sued upon her collateral undertaking that in consideration of the commission paid to her she will pay the price of the goods if the Purchaser fails to do so. An action in such an undertaking is an action on an express contract, and the sums which can be recovered under it are damages for a breach of contract.

Their Lordships, therefore, are of opinion, that the judgment of the High Court was correct, and they will recommend to Her Majesty that the appeal should be dismissed, with costs.

[144] BROJONATH KOONDHOO CHOWDRY and Others,—*Appellants*; KHELUT CHUNDER GHOSE,—*Respondent* * [July 4, 1871].

On appeal from the High Court of Judicature at Fort William, Bengal.

A mortgage made in 1845 in the English form, contained a proviso for redemption, and for the Mortgagor continuing in possession until default in payment, in which event the mortgage Deed gave a right of entry to the Mortgagee. Default was made in payment of the mortgage money by the Mortgagor, but no steps were taken by the Mortgagee to obtain possession. In 1849 the Mortgagor sold part of the mortgaged estate, and the Purchaser

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entered into possession and registered his title. The Assignee of the Mortgagee afterwards brought a suit for foreclosure to which the Purchaser was not made a party, and in the year 1862 obtained a decree for foreclosure. In a suit brought by the Assignee of the Mortgagee against the Purchaser for possession of that part of the estate so purchased by him from the Mortgagor, held, by the Judicial Committee, affirming the judgment of the High Court at Calcutta, that as the Mortgagor after default, and the Purchaser under him, had been in possession for more than twelve years before the suit for possession was instituted, the Limitation of suits Act, No. XIV. of 1859, sect. 1, cl. 12, was a bar to the suit.

The question in this appeal was one of limitation of suit, under Act, No. XIV. of 1859. The Appellants were the possessors of a decree of foreclosure of an estate belonging to one Unnoda Persaud Roy, and by him mortgaged by two Deeds made in the English form, in 1840 and 1845, with the usual proviso for redemption, and also providing for the Mortgagor remaining in possession, until default, when a right of entry was given to the Mortgagee.

[145] Unnoda Persaud Roy, the Mortgagee, remained in possession notwithstanding that default was made in payment of the mortgage money, and sold a portion of the mortgaged estate to Gooroochurn Sein, to whom the property was conveyed, and his name registered. The Respondent was a Purchaser from Gooroochurn Sein. On the 27th of August, 1863, more than twelve years after the sale by the Mortgagor, the Appellants, and others, filed their plaint in the Court of the Principal Sudder Ameen of Zillah Hooghly, against Unnoda Persaud Roy, the original Mortgagor, Gooroochurn Sein, the Purchaser, and the Respondent, for foreclosure of the mortgage. The plaint contained an allegation, that Unnoda Persaud Roy had, while the lands sued for were under mortgage, fraudulently sold them to Gooroochurn Sein, without the knowledge of the Mortgagee, and that the Plaintiffs had not come to the knowledge of such a sale, and possession being held thereunder until August, 1863, at which time they insisted the cause of action accrued. The Principal Sudder Ameen, by his decree, dated the 8th of March, 1864, decided in favour of the Plaintiffs, and ordered possession of the land sued for to be given to them, with costs. In his judgment the Sudder Ameen held, that the Plaintiffs' (the Appellants) claim was not barred by limitation, as the right of possession only accrued from the date of the decree in the foreclosure suit. The Respondent appealed from this decision to the High Court of Judicature at Calcutta, and after various proceedings, that Court, consisting of the Chief Justice, Sir Barnes Peacock, and Mr. Justice Jackson, by their final judgment, reversed the decree of the Principal Sudder Ameen, and held that the Appellants' suit was barred by [146] limitation, as under the mortgage Deed of the 4th of October, 1845, the Mortgagee was bound to have sued and recovered possession of the mortgaged estate, on default being made in payment of the mortgage debt at the date due, namely, the 4th of April, 1848, and that his cause of action having accrued on that date, and the suit not having been brought until nearly fourteen years afterwards, the Appellants were barred by adverse possession, under Act, No. XIV. of 1859, sect. 1, cl. 12.

From this decree the present appeal was brought.

Sir R. Palmer, Q.C., and Mr. Doyne, for the Appellants, argued, that the High Court was wrong in holding, that the possession of the Mortgagor and his Vendee was, from the time of default in payment of the mortgage money, adverse to the Mortgagee or his Assignees, the Appellants. That there was no adverse possession prior to the Respondent's decree of foreclosure in 1862, and, therefore, that the suit was not barred by the Limitation of suits Act, No. XIV. of 1859, sect. 1, cl. 12.

Mr. J. D. Bell, for the Respondent, contended, first, that the sale to the Respondent was a *bona fide* purchase for value, and that he, not being a party, was not affected by the proceedings in the foreclosure suit; and, secondly, that the claim of the Appellants, as Assignees of the original Mortgagee, was barred by the Limitation of suits Act, No. XIV. of 1859, sect. 1, cl. 12, more than twelve years having elapsed from the date within which a [147] suit to recover possession of immoveable property could be brought under that Act.

In addition to Act, No. XIV. of 1859, sect. 1, cl. 12, above referred to, Ben. Reg.

III. of 1793, sect. 14, *Prannath Roy Chowdry v. Rookea Begum* (7 Moore's Ind. App. Cases, 323), and Macpherson's Civil Proc. [Ed. 1871], Appx. p. cciii., citing Sel. Rep., v. 7, p. 45, referring to S. D. 1857, p. 1816, were cited and referred to.

Judgment was reserved, and now delivered by

The Right Hon. the Lord Justice James (July 17, 1871).—In this case the only question to be decided is, whether the High Court was justified in holding that the suit was barred by the Act of Limitations.

The Plaintiffs were Assignees of a Mortgagee, originally a puisne Mortgagee, but who had acquired the rights of the first Mortgagee, as afterwards stated.

The Defendant was the Purchaser from the Assignee in solvency, of a person who had purchased the property in question from the Mortgagor. The original purchase from the Mortgagor was upwards of twelve years before the commencement of this suit, followed by registration and mutation of names in the Collector's Book, the Order for which was made on the 15th of January, 1850, and possession.

At the time of the sale the property was subject to a mortgage, made in the form of the English mortgage, with the usual proviso for redemption, and a proviso that the Mortgagor should continue in possession until default, and on default an express right of entry was given to the Mortgagee.

[148] More than twelve years before the commencement of this suit such default was made.

After the sale under which the Defendant claims, the first Mortgagee instituted a suit for foreclosure in the late Supreme Court of Calcutta. This suit proceeded to a foreclosure *nisi* on the 11th of December, 1850, and which was made absolute on the 9th of February, 1852.

The Plaintiff in that suit, however, procured that foreclosure to be opened, paid off the first Mortgagee, took a transfer of his mortgage, and then proceeded himself to foreclose the Mortgagor, and obtained his final decree for foreclosure on the 15th of July, 1862.

To these foreclosure proceedings the Purchaser of the property in question was not made a party, and it was of course held by the High Court that he was in no wise affected by those proceedings.

Having foreclosed his mortgage, the Appellants commenced the suit against the Defendant, who pleaded his twelve years' possession in bar. The plaint was filed on the 27th of August, 1863.

The High Court has held that bar to be sufficient. Their Lordships do not doubt that such decision was correct. It was contended before them that so long as the mortgage security was a subsisting security, and dealt with as such, time did not run as between the Mortgagee, who was content to rest on his security, and the Mortgagor, who was permitted to remain in possession, and persons claiming under him; and it was also contended, that until the foreclosure put an end to the security it was a subsisting security, and that it was then, and not till then, that time began to run. It was further contended, that the Defendant, who derived his title under a pur-[149]-chase from the Mortgagor, could not be in a more favourable position than the Mortgagor himself.

The foreclosure proceedings did not affect the Defendant, or the property in question, and it is difficult to see how a right of entry or cause of action against one man, in respect of his property, could be either lost or gained by proceedings against another man in respect of his property.

As against the Defendant the Plaintiff has acquired no right, except that which was conveyed to him by his securities.

The right under the mortgage Deed was to obtain possession of the land, and the cause of action accrued when default was made.

The words of section 1, cl. 12, of the Limitation of suits Act, No. XIV. of 1859, are—

"To suits for the recovery of immoveable property or of any interest in immoveable property, to which no other provision of this Act applies, the period of twelve years from the time the cause of action arose."

To this there is by sect. 6 one exception in respect of mortgages, which is this:—

"In suits in the Courts established by Royal Charter by a Mortgagee to recover

from the Mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt.

This exception does not apply to the present case, and where there is an express exception so limited to one special case of mortgage, it might plausibly be argued that it cannot be extended to any other case, even in the case of the original Mortgagor [150] himself continuing in possession and paying interest to the Mortgagee.

The judgment of the High Court appears to be, that the bar extends even to such a case when not provided for by that section. The ruling, however, was not necessary for the determination of this suit.

It may, however, have been deemed necessary to introduce the exception stated above, in order to put mortgages in the English form, when put in suit in the Supreme Court, which was generally governed by English law, upon the same footing as that in which English mortgages are under the existing Statutes of Limitation, and their Lordships, dealing with suits upon mortgages in the Native Courts of India, might, in the simple case of a Mortgagee and his Mortgagor being permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession, and that a new cause of action and right of entry accrued when that permission ceased. No such question, however, arises in the present case, for it is impossible to hold that the Defendant, the Purchaser, was holding or supposed that he was holding by the permission of the Mortgagee; and when both things concur—possession by such a holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old—it is impossible to say that such a possession is not protected by the Law of Limitations.

Therefore, without expressing an opinion, whether the broader and more general rule laid down in the judgment of the High Court can be supported, their Lordships have no doubt that the decision in this case is correct.

[151] It has been pressed on their Lordships that the decision will destroy the value of mortgage securities in India. Their Lordships do not share in that apprehension. It may be, and probably is, better that Mortgagees keeping their securities locked up in their strong Boxes, and allowing the Mortgagor to be the ostensible Owner in possession for a long series of years, should occasionally, as in this case, find themselves deprived of portions, more or less small, of the mortgaged property, than that *bona fide* Purchasers and persons claiming under them, after many years' possession, and perhaps much expenditure, should be evicted under a mortgage title perhaps half a century old, because somebody has been paying interest on the mortgage money. In the present case an actual mutation of the names took place, and a very slight degree of vigilance would have enabled the Mortgagee to assert his title earlier.

Their Lordships will recommend that the judgment be affirmed, and the appeal dismissed with costs.

[152] HURRYHUR MOOKHOPADHYA.—*Appellant*: MADUB CHUNDER BABOO and Another.—*Respondents*. NOBOKISHTO MOOKERJEE.—*Appellant*: KOYLASCHUNDRO BUTTACHARJEE and Others.—*Respondents** [July 4 and 5, 1871].

Review of the Ben. Regs. relating to Lakhiraj tenures, within the Provinces included by the Perpetual Settlement. Construction of Act, No. X. of 1859, sect. 28, in respect to the operation of the law of limitation in suits brought under Ben. Regs. XIX. of 1793, sect. 10, and II. of 1819, sect. 30, for resumption and assessment of lands as mal, or rent-paying lands, held as Lakhiraj [14 Moo. Ind. App. 164, *et seq.*].

* Present: Members of the Judicial Committee. The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

A Plaintiff in a suit for resumption of land as part of his mal zemindary for assessment, is bound in the first instance to prove a *prima facie* case (1) the payment of rent since 1790, or (2) that the land formed part of the mal assets of the estate at the Decennial Settlement. When such a *prima facie* case is made out, the *onus probandi* is shifted on the Defendant, who, to exempt himself from assessment, must show that his tenure existed rent free before the 1st of December, 1790 [14 Moo. Ind. App. 170].

These appeals raised the same question; namely, on whom the *onus* of proof lie in suits by a Zemindar, or Putneedar, for resumption of rent-free tenures.

In the first appeal the Appellant filed his plaint in the Court of the Collector of Hooghly, alleging it to be instituted under the 30th sect. of Ben. Reg. II. of 1819, to uphold his mal rights under the Decen-[153]-nial Settlement, to 92 beegahs, 13 cottahs, and 13 chittacks of mal land, in the village of Juggutbubhuleporo, which lay within and formed part of the Appellant's zemindary and putnee talook, which the Defendants (the Respondents) and others were holding as Lakhiraj. The plaint referred to a previous suit under Act, No. X. of 1859, sect. 28, in the Deputy Collector's Court. The Respondent, Goo-roo Buksh, by his answer, claimed the lands sued for, except a small portion, as Lakhiraj, and relied on the decision of the Collector in the suit under Act, No. X. of 1859, as a final adjudication.

After taking evidence, the Principal Sudder Ameen (Ramnarain Roy), on the 9th of April, 1863, by his judgment, held that the documents relied on by the Respondents to prove their Lakhiraj title were not shown to be genuine or applicable to the lands in suit, and decreed in favour of the Appellant in respect of all the lands sought to be assessed, except about two beegahs.

On appeal from this decree the Respondents relied on the limitation of suit and proof of their Lakhiraj title. A division Bench of the High Court, composed of Messrs. Steer and Kemp, on the 14th of March, 1864, dismissed the appeal.

A petition for review was presented, principally on the ground that, as the Appellant, in his plaint, had stated that the disputed lands were his mal lands, and, as he alleged, the Respondents' title to them had accrued after 1790, the High Court had erred in throwing the *onus* of proof on the Respondents.

The review of judgment was heard before Messrs. Kemp and Glover, who admitted the review on one point only, namely, whether the *onus* had not been [154] wrongly thrown, with reference to the full Bench decision in *Sonaton Ghose v. Moulvie Abdool Turrub* (2 W.R. 205), which case, the High Court held, applied, and that the *onus* was on the Zemindar, and not on the Lakhirajdar, and that as the *onus* being on the Zemindar, the present Appellant, permission was given to amend his plaint, and to prove that the land was mal, by showing that he had received rent for the same. The suit was, therefore, remanded to the Lower Court for that purpose. The first appeal was brought from this decree remitting the suit.

In the second appeal the suit was brought by the Appellant, Nobokishto Mookerjee, against the Respondents. In his plaint he alleged himself to be the Durputneedar of a village named Nusseerbattee, and that the Defendants (the Respondents) were in possession of 18 beegahs, 13½ cottahs of land, for which they refused to pay him rent, on the ground that they held it as Lakhiraj from a date previous to December, 1790, and alleged that they had not been able to show their title, wherefore he claimed the right to assess the lands under Ben. Regs. XIX. of 1793 and II. of 1819, sect. 30, and other Acts in force.

The Respondents, by their answers, asserted first their Lakhiraj rights, and secondly relied on the limitation of suit. They put in evidence various grants to establish their Lakhiraj rights of dates previous to the Decennial Settlement. As to part of the lands, they insisted that they were not situate in the Appellant's talook.

By the decree of the Principal Sudder Ameen of Hooghly (Nuzzeervodeen Mahmud), dated the 9th of July, 1863, the Appellant's suit was dismissed, on the [155] ground that the Respondents had proved a valid Lakhiraj title, existing before the Perpetual Settlement, and that the suit was barred by limitation.

On appeal, Mr. J. E. S. Lillie, the Judge of Hooghly Court, on the 21st of June,

1864, by his judgment, modified the decree of the Principal Sudder Ameen, and decreed for the Appellant all the lands in suit, except Bulramporo.

From this decision the Respondents appealed specially to the High Court, principally on the ground, that the *onus probandi* had been thrown on the wrong side, and that the Plaintiff ought to have been called upon to substantiate his allegations before the Defendants could be required to prove their plea.

On the 13th of April, 1865, a Division Bench of the High Court, composed of Messrs. Seton-Karr and Campbell, delivered judgment, to the effect, that the *onus* having been misplaced, the case was to be remitted to the First Court, with reference to the principles laid down in case 268 of 1864 (a).

(a) *KHELUT CHUNDER GHOSE V. POORNO CHUNDER ROY* [March 27, 1865].

The judgment of Messrs. Loch and Seton-Karr, in the case No. 268 of 1864, *Khelut Chunder Ghose v. Poorno Chunder Roy*, above referred to, is from its importance, here set out:—

“ The Plaintiffs state that they seek to resume 33 beegahs 11 cottahs 12 gundahs of invalid Lakhiraj land in the possession of the Defendants, situated within the limits of Mouzah Sulkea, appertaining to their Zemindary, Pergunnah Paekan, Zillah Hooghly. The suit is brought under the provisions of sect. 30, Reg. II. of 1819. The Defendant pleads that the suit is barred by limitation, as he and his predecessors have held possession of these lands, rent free, from a period anterior to the assumption of the Dewanny by the late East India Company, that the lands are known as the ‘Feelkhana,’ and were granted by the Nawab Nazim of Bengal to Santee Ram Singh of Jorasanko; that they were inherited by his Son, and the property descended to his family, and it was last sold, in execution of a decree of the Supreme Court, on 7th of May, 1855, and purchased by the Defendant (the Appellant) now in possession. The Lower Court found for the Plaintiffs, holding that the Defendant had failed to prove the validity of his tenure; and the Judge gave a decree for resumption, declaring the lands to pertain to the mal lands of the Plaintiff’s mehal. An appeal was preferred by the Defendant, the hearing of which was differed till the result of a reference to a Bench of seven Judges, in the case of *Sonaton Ghose and others*, special appeal No. 869, and of *Hceramonee Debya*, special appeals Nos. 1290, and 1291, was made known. The reasons for this reference may be shortly stated. Previous to the enactment of Act, No. X. of 1859, suits for the resumption and assessment of land held on invalid Lakhiraj title, whether under sect. 30, Reg. II. of 1819, or sect. 10, Reg. XIX. of 1793, used to be brought indiscriminately either in the Civil Court or before the Collector. It was very questionable, under the law as it then stood, whether the Collector had any jurisdiction in cases under sect. 10, Reg. XIX. of 1793, which related to lands alienated from a permanently settled estate subsequent to the 1st of December, 1790. But whether the law, correctly interpreted, admitted this jurisdiction or not, the hearing of such cases, as if they were brought under the provision of Reg. II. of 1819, by the Collector, had grown into a custom; and by the provisions of sec. 28, Act, No. X. of 1859, the jurisdiction of the Collector was distinctly extended to these cases. By the ruling of a Full Bench, in the case of *Bishumber Misser*, bearing date the 18th of March, 1863, it was held, that cases thus tried by the Collector were suits, and not summary Orders; and a further question then arose, whether the Legislature, when creating this new jurisdiction in the Collector, intended to take away the jurisdiction over such suits from the Civil Courts, and vest it solely in the Collector. Another point had to be considered. The provisions of sect. 28, Act, No. X. of 1859, had introduced the law of limitation as barring the hearing of suits under sect. 10, Reg. XIX. of 1793, unless instituted within twelve years from the date that the Plaintiff’s right of action accrued. But that law which remained unrepealed declared, that no length of possession should give validity to such grants. If then there were a concurrent jurisdiction in the Civil Court and the Collector, it was evident that in suits brought in the Civil Courts, limitation would not apply, while in suits before the Collector the suit would be subject to a law of limitation. It was further argued, that one object of sect. 28 of Act, No. X. of 1859, was to draw a clear distinction between suits under sec. 10, Reg. XIX. of 1793, and suits under sect. 30, Reg. II. 1819, that the latter law related only

[156] Application was made for leave to appeal to Her Majesty in Council, though under the appealable [157] value, and the High Court, under the powers of the 39th sect. of the Letters Patent, in consequence of [158] the importance of the question raised, and, as the case was a representative one and would govern twenty-eight other analogous cases, leave was granted.

[159] No appearance was put in for the Respondents in either appeals, and they were consequently heard *ex parte*.

Sir R. Palmer, Q.C., and Mr. Doyne, for the Appellant in the first appeal, argued, first, that it was not contested in the suit, that the lands formed part of the Appellant's Decennially settled estate, and, secondly, that the burthen of proof of exemption from assessment was on the Respondents, the Lakhirajdars, and not the Appellant, the Zemindar.

[160] In the second appeal, Mr. Doyne, who appeared for the Appellant, insisted, first, that the lands claimed by the Appellant as mal were sufficiently proved to form part of the Decennially settled Talook of Nusseerbattee, and secondly, that the Respondents failed to get rid of the effect of such proofs by establishing, as to such lands, a Lakhiraj title of a date previous to December, 1790.

Ben. Regs. XIX. of 1793, sect. 10; II. of 1819, sect. 30; Act, No. X. of 1859, sect. 28; *Heeree Monee Dabee v. Koonj Baharee Holdar* (2 W.R. 207), *Somaton Ghose v. Moulrie Abdool Turrub* (2 W.R. 205), and *Khelut Chunder Ghose v. Poorno*

to lands held as rent-free at or before the 1st of December, 1790, and that a suit brought by a Zemindar under the provisions of sect. 30, Reg. II. of 1819, was an admission on his part of the existence of the tenure in 1790, and such admission was sufficient to bar his suit, unless he were an auction Purchaser at a sale for arrears of Government revenue. Owing, however, to the very confused state in which plaints were usually drawn up, the Plaintiff claiming to resume the lands as forming part of his permanently settled estate, which was a suit under sect. 10, Reg. XIX. 1793, and as invalid Lakhiraj under the provisions of sect. 30, Reg. II. 1819, it was difficult to know upon whom the *onus* of proof should be thrown. When the Plaintiff came with a distinct allegation, that the lands were part of his permanently settled estate, and had been subsequently separated from it by the Defendants, who held it as Lakhiraj, it appeared but reasonable, that the Plaintiff should start his case as in ordinary suits; but when he came in to resume, under sect. 30, Reg. II. 1819, that the burden should be on the Defendants. The practice, however, had been otherwise, and the burden of proof had always been thrown on the party claiming to hold as Lakhirajdar, not to prove the validity of his title, but to show that the tenure was in existence as Lakhiraj previous to the 1st December, 1790, before he could plead limitation. These were some of the reasons which rendered a reference to a Full Bench of seven Judges necessary; and the determination of the Court may be given under the following heads:—

First, that prior to the enactment of Reg. II. of 1819, the Civil Courts were competent under their ordinary jurisdiction to try suits from possession under sect. 10 of Reg. XIX. 1793.

Second, that Reg. II of 1819 related only to suits for resumption of Lakhiraj existing prior to 1790, and that sect. 30 of Reg. II. 1819 did not extend the jurisdiction of Collectors to suits under sect. 10, Reg. XIX. 1793, and that from the time that law came into operation there was a concurrent jurisdiction in the Civil Courts, and in the Collector to try those cases.

Fourth, that where proceedings have been instituted before the 31st of December, 1861 (*viz.*, before the new law of limitation came into operation), to enforce a right under sect. 10, Reg. XIX. of 1793, in the ordinary Civil Courts, the law of limitation does not apply.

Fifth, that as sect. 10, Reg. XIX. of 1793, applies only to grants made since 1st of December, 1790 the *onus* of proving that the case falls within sect. 10, or, in other words, that the grant was made since 1st of December, 1790, and that the case is not affected by the law of limitation, rests with the Plaintiff. He must prove that the land held by the Defendant, and which the Defendant claims to be Lakhiraj, is part of the Mal land of the Plaintiff, and must show that it was assessed with the Public revenue at the time of the Decennial Settlement. If he proves this fact,

Chunder Roy, case No. 268 of 1864 (*ante* [14 Moo. Ind. App.], p. 155), were referred to and commented upon.

The consideration of the appeals having been reserved, their Lordships' judgment in both cases was now delivered by

The Right Hon. Sir William Colvile (July 18, 1871).—This appeal, and that of *Hurryghur Mookhopadhyaya v. Madub Chunder Baboo*, were lately argued *ex parte* before this Committee. The principal question involved in them is common to both, but inasmuch as in each some subordinate point peculiar to it was also raised, their Lordships will deal with them separately. They propose to take first the appeal of *Nobokishto*, though the last argued, because that record contains a judgment pronounced on the 27th of March, 1865, in a third case, No. 268, of 1864, wherein the High Court stated fully the grounds upon which the ruling impugned by both these appeals is founded.

[161] This suit was instituted by the Appellant as a *Durputneedar*. Its object was to obtain a declaration that certain lands which the Respondents claimed to hold as *Lakhiraj* land were so held by them under an invalid title; that they were the *mal* lands of the Appellant, liable, as such, to pay rent to him, and to have them assessed accordingly. The suit was originally brought before the Collector, but under the provisions of an Act of the Bengal Council, No. VII. of 1862, was afterwards transferred to the Principal Sudder Ameen of *Zillah Hooghly*. The

it may be presumed that the rights under which the Defendant claims to hold as *Lakhiraj*, commenced subsequently to the 1st of December 1790, unless the Defendant give satisfactory evidence to the contrary. If the Plaintiff fail to give the necessary proof, the issue as to limitation must be found for the Defendant.

Sixth, in cases Nos. 1290 and 1291 it was held by the Full Bench that a suit alleged to be brought under sect. 30, Reg. II. of 1819, must be assumed to refer only to a *Lakhiraj* created prior to the 1st December, 1790, and is necessarily not one to which the rule created by sect. 10, Reg. XIX. of 1793, of exemption from limitation, applies.

Seventh, that looking at the past practice of the Courts, and the peculiar circumstances under which the suits now before the Court have been brought, it was held, that if a Plaintiff have erred in stating that his suit is brought under sect. 30, Reg. II. of 1819, and wishes to amend his plaint, he may be allowed to do so by striking out the allegation that the suit is brought under sect. 30.

Eighth, that if the Plaintiff amend his plaint he must comply with the provisions of clause 3, sect. 26, Act, No. VIII. of 1859, by stating when his cause of action accrued, and if the cause of action accrued beyond the period ordinarily allowed by any law for commencing such a suit, the ground upon which exemption from the law is claimed.

The above, therefore, are the rules as gathered from the decisions of the High Court in the cases of *Sonatun Ghose*, Appellant, No. 869, *Heeramonee Debya*, Appellant, No. 1290, by which the Lower Courts should be guided for the future in disposing of resumption suits. In all cases now pending in the Courts below the parties should be allowed to amend their pleadings with reference to the above rules. We would further observe, that the cases referred to the Full Bench were instituted previous to the coming in operation of Act, No. XIV. of 1859. That law came into operation after the 31st of December, 1861. In all suits instituted subsequent to that date the effect of c. 14, sect. 1 of Act, No. XIV. of 1859, on the Plaintiff's suit must be taken into consideration.

We remand this case to the Lower Court to enable the Plaintiff to amend his plaint, if so minded, according to the rules laid down, and we direct the Lower Court to replace the suit, after the amendment has been made, on its own file, and to proceed with it as if the plaint had originally been presented in its amended form. The Court will permit the Defendant to file a fresh answer, and also allow the parties sufficient time to bring forward any further evidence they may wish to adduce."

For the judgments of the Bench of seven Judges referred to, see 2 Weekly Reporter, pp. 91, 205.

plaint expressly stated, that the suit was brought under the 1st clause of section 30 of Regulation II. of 1819. Their Lordships need not consider particularly the provisions of that enactment. It is only material to observe, that in suits brought under it by a Zemindar, or one to whom the Zemindar's rights have been transferred, the whole burthen of proving the nature and commencement of his title was understood to be thrown upon the Defendant, the Lakhirajdar, whom the Plaintiff, who disputes the validity of the tenure, might compel to produce the Sunnuds and other ancient documents upon which such title rested. The sole proof of title which the Defendant could require, in the first instance, from the Plaintiff was that the lands in question were within the ambit of his zemindary or putnee, as the case might be. This issue the Respondents in the present case did raise, and successfully raise, as to part of the land. As to the rest of the land, the only issue, except that of limitation, was, whether it was the Respondents' valid rent-free land or not, the whole burthen of proof on this issue being cast on them.

The Principal Sudder Ameen, the Judge of the Court [162] of First Instance, found that of the land in suit, 2 beegahs and 1 cottah were not within the Appellant's putnee; that as to 12 beegahs and 14 $\frac{3}{4}$ cottahs, other part of that land, the Respondents had proved, by certain ancient documents, that they had held and enjoyed them as rent-free lands from long before the 1st of December, 1790, and that, consequently, the claim to assess them was barred by limitation. The residue, being 3 beegahs and 17 $\frac{3}{4}$ cottahs, he held liable to assessment. Both parties appealed against this decision to the Zillah Judge, who, on the 21st of June, 1864, confirmed the decree of the Principal Sudder Ameen, so far as it related to the 2 beegahs and 1 cottah, but reversed it as to the rest of the land, making as to that a decree in favour of the Appellant's claim. The grounds of his decision were, that the documents produced by the Respondents were untrustworthy, and, therefore, that they had failed to prove either a valid title to hold the land rent-free, or that the land, having been held rent-free for a period commencing before the 1st of December, 1790, the Appellant's right to assess them was barred by limitation.

The Respondent then preferred a special appeal to the High Court. Of the grounds stated for the appeal it is only necessary to notice the third and the fourth. The third is, that the suit being brought, though improperly, under section 30, Ben. Reg. II. of 1819, was admittedly barred by limitation. The fourth, that the *onus probandi* had been improperly thrown upon the Defendants. On the 13th of April, 1865, the High Court remanded this suit, with five others, which it treated as being in the same category, to the Court of First Instance, stating only that "the *onus* having been misplaced, these cases must go back to [163] the First Court with reference to the principles laid down in case No. 268 of 1864."

Before considering the propriety of this remand, which is the principal question raised by the appeal, it will be convenient to complete the history of this particular case. The Appellant went again before the Principal Sudder Ameen, amending his plaint pursuant to the Order of remand by striking out all reference to the Reg. II. of 1819, and making it a plaint for the resumption of land fraudulently made Lakhiraj after the 1st of December, 1790, and, therefore, falling within the 10th section of Regulation XIX. of 1793. The Principal Sudder Ameen thereupon framed fresh issues, the first of them being, whether the land in dispute ever formed a portion of mal land at the time of the Government settlement, and whether at any subsequent time it had been fraudulently made rent-free; and on the 13th of September, 1865, he dismissed the suit upon the ground, that the Plaintiff, the Appellant, had produced no documents or evidence in the suit, and had thereby failed to support the burthen of proof which this issue cast upon him. The Appellant afterwards, in August, 1865, obtained from the High Court a very special leave to appeal to Her Majesty in Council, on the ground that this suit, though the subject-matter of it was far below the appealable value, was one of a large class in which similar remands had been made. Their Lordships will assume that this leave to appeal was properly granted, and that the object of the appeal, or at least its principal object, is to test the correctness of the principle on which remands in this and similar cases have been directed, and the burthen [164] of proof to some extent cast on the Plaintiff in suits of this nature.

In order to do this, it is necessary shortly to review the law relating to Lakhiraj

tenures within the Provinces embraced by the Perpetual Settlement, and some recent decisions of the High Court of Calcutta concerning it.

The foundation of that law is well known to be Regulation XIX. of 1793. That Regulation, after affirming in the strongest terms the *prima facie*, or, so to speak, Common law right of the ruling Power to a certain proportion of the produce of every beegah; after declaring all Lakhiraj tenures to be exceptional and in contravention of that right: that many of the existing tenures of that kind were invalid, but that all, whether valid or invalid, had been excluded from the Decennial Settlement; and that the jumma assessed upon the estates of individuals under that Settlement was to be considered as exclusive and independent of all Lakhiraj trade, whether exempted from the Khiraj, or public revenue, with or without due authority; proceeded thus to deal with the then subsisting Lakhiraj tenures. It divided them into two classes, viz., those created by Grants made previous to the 12th of August, 1765, the date of the Grant of the Dewanny to the East India Company, and those created by Grants made between that date and the 1st of December, 1790. The former by the second section, were, subject to certain conditions, declared to be valid. The latter, with certain exceptions, and subject to certain conditions, were, by the third section, declared to be invalid; and, as such, to be resumable and subject to [165] future assessment. The Regulation then went on to sub-divide the invalid and resumable tenures into two classes, viz., those which comprised lands not exceeding 100 beegahs, and those which comprised lands in excess of that quantity. The revenue which might thereafter be assessed on the former was declared to belong to the Zemindar or Talookdar, within whose estate the lands were situate. The revenue which might thereafter be assessed on lands falling within the latter class was declared to belong to the Government. And thus the power of bringing a resumption suit to impeach a Lakhiraj tenure existing at the date of the Decennial Settlement, and to have revenue or rent assessed thereon came to belong to the Government, or to private proprietors, according to the quantity of land comprised in such tenure. Having thus dealt with all the Lakhiraj tenures then subsisting, the Regulation proceeded to legislate against the future conversion of any rent-paying lands comprised in the Decennial Settlement into rent-free lands. This was done by the 10th section, which is in these terms:—

“All Grants for holding land exempt from the payment of revenue, whether exceeding or under 100 beegahs, that may have been made since the 1st of December, 1790, or that may be hereafter made, by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter considered to give validity to any such Grant, either with regard to the property in the soil or the rents of it. And every person who now possesses, or may succeed to the proprietary right in any estate or dependent Talook, or who holds, or may hereafter hold, any estate or de-[166]-pendent Talook, in farm of Government, or of the proprietor, or any other person, and every Officer of Government appointed to make the collections from any estate or Talook held khas, is authorized and required to collect the rents from such lands at the rate of the Pergunnah, and to dispossess the Grantee of the proprietary right in the land, and to re-annex it to the estate or Talook in which it may be situated, without making previous application to a Court of Judicature, or sending previous or subsequent notice of the dispossession or annexation to any Officer of Government; nor shall any such proprietor, Farmer, or dependent Talookdar be liable to an increase of assessment on account of such Grants, which he may resume and annul during the term of the engagements that he may be under for the payment of the revenue of such estate or Talook when the Grant may be so resumed and annulled. The Managers of the estates of disqualified proprietors, and of joint undivided estates, are authorized and required to exercise, on behalf of the proprietors, the powers vested in proprietors by this section.”

It is obvious that this enactment relates solely to lands which, on the 1st of December, 1790, were mal or rent-paying lands; that it treats the Grant of a rent-free tenure in such lands not as voidable, but as absolutely void; that it reserves to the Government no right in such lands unless they happened to be held

klhas; and that it positively declared, that no length of possession should give validity to any such Grant. It further expressly authorized the Landowner to dispossess the Grantee by the high hand, without having recourse to the machinery provided by other sections of the Regu-[167]-lation for the resumption or assessment of resumable Lakhiraj tenures; or to any other legal proceeding.

The machinery provided for resumption suits by the Regulation of 1793 was modified by several subsequent Regulations, and in particular by the Regulation II. of 1819, which has been already mentioned. And in process of time Landowners seeking to enforce their rights under the 10th section of that Regulation seem to have found it expedient to do so by means of legal proceedings rather than in the summary manner authorized by that enactment. An important distinction was, however, established by judicial decisions between a suit to enforce a claim under this 10th section, and ordinary resumption suits, whether brought by Government or individual proprietors under the earlier sections of the Regulation. Whatever doubts may at one time have existed, it became unquestionable, after the decision of this Committee in the case of the Maharajah of Burdwan (4 Moore's Ind. App. Cases, 466), that the right of the Government to resume a voidable Lakhiraj tenure comprising more than 100 beegahs was subject to the sixty years' limitation; and that by parity of reasoning the right of a Zemindar to resume a voidable Lakhiraj tenure, comprising less than 100 beegahs, was subject to the twelve years' limitation. On the other hand, the Courts construing the Regulation of Limitation in connection with that part of sect. 10 of Regulation XIX. of 1793, which says, that no length of possession shall give validity to such a Grant, came (whether on sound principles or not it is immaterial here to consider) to the conclusion, that the claim of a Landowner under this section was [168] subject to no limitation. Notwithstanding, however, these distinctions between the two rights, and between the suits to enforce them, a loose practice seems to have sprung up, under which Landowners claiming the right to assess lands held and enjoyed rent-free brought their suits generally under Regulation II. of 1819, without specifying whether they were seeking to enforce the right given to them by the 7th and 9th sections of Regulation XIX. of 1793, or that given to them by the 10th section. The result was that the stringent provisions of Regulation II. of 1819, and of the other Regulations *in pari materia*, were indiscriminately applied; and that in all cases the burthen was cast upon the Defendant of proving, by the production of ancient documents, that his tenure existed before the 1st of December, 1790. If he established this he would probably succeed, whether his ancient Lakhiraj tenure was voidable or not, the suit, unless the Plaintiff happened to be an auction Purchaser at a Government sale, being barred by limitation.

So stood the law and practice until Act, No. X. of 1859 was passed. The 28th section of that Act repealed so much of the 10th section of Regulation XIX. of 1793 as authorized the Landowner summarily to dispossess the Grantee of a rent-free tenure; it provided, that every Landowner who should desire to assess any such land, or to dispossess the Grantee, should take proceedings before the Collector, which were to be dealt with as a suit under that Act; and it fixed a period within which such suits were to be brought.

Between the passing of this Act and the beginning of the year 1865, the Courts of Bengal seem to have [169] been somewhat divided upon several questions touching the proper mode of enforcing the claims of Zemindars and other Landowners, under the 10th section of Regulation XIX. of 1793; and some, at least, of such questions were finally referred for adjudication by a full Bench, consisting of seven Judges of the High Court, in the appeal of *Sonatun Ghose v. Moulvie Abdool Turrub*. This case, which was numbered No. 869 of 1864, was decided on the 25th of January, 1865, and is reported in 2 Weekly Reporter, p. 91. The Judges were divided in opinion, each delivering a separate judgment, in which the law on the subject was elaborately reviewed. But the following was the final judgment of the Court. All the Judges held, that before the passing of Regulation II. of 1819 the Civil Courts under their ordinary jurisdiction were competent to entertain regular suits by Zemindars for the declaration of their rights to resume revenue illegally alienated subsequent to 1790, and for possession of the land held rent-free under grants or titles which had their origin subsequently to the 1st of December in that year. Four

of the Judges against three held, that such suits were unaffected by the passing of Regulation II. of 1819, section 30, of which the proper operation was limited to suits for the resumption of Lakhiraj, existing prior to the 1st of December, 1790. And four of the Judges against three held, that the jurisdiction of the ordinary Civil Courts to try the suit was not taken away or affected by the 28th section of Act, No. X. of 1859.

The second of these rulings is, that which is most material to the decision of the present appeal: the necessary consequence of it being that a suit to [170] enforce a claim arising under the 10th section of Regulation, XIX. of 1793, if brought under the 30th section of Regulation II. of 1819, in order to get the benefit of the procedure there prescribed, is improperly framed.

The same case came again before a full Bench of seven Judges, somewhat differently composed, on the 22nd of February, 1865. They unanimously held, that they were bound by the decision of the 25th of January, 1865, so far as it went. But they further decided, that the regular suit which, notwithstanding the 28th section of Act, No. X. of 1859, might still be brought to assess or resume invalid Lakhiraj, created since the 1st of December, 1790, was not subject to limitation; and further, that in every fresh suit it lay upon the Plaintiff to prove that the case was one falling within the 10th section of Reg. XIX. of 1793. And the Court added, "He must prove his allegation, that the land held by the Defendant, and which he claims to be Lakhiraj, is part of the mal land of the Plaintiff. If he prove that fact, and show that it was assessed to the public revenue at the time of the Decennial Settlement, it may be presumed that the right under which the Defendant claims to hold as Lakhiraj commenced subsequently to the 1st of December, 1790, unless the Defendant gives satisfactory evidence to the contrary." In another case, *Sonatan Ghose v. Moulvie Abdool Turrah*, decided the same day by the same Judges (2 W.R. p. 207), they adhered to the ruling in No. 869 of 1864, to the effect, that section 30 of Reg. II. of 1819 related only to suits for resumption of Lakhiraj created prior to the 1st of December, 1790, and held that, as a consequence of that ruling, every [171] suit alleged to be brought under section 30 was necessarily not one to which the rule created by section 10, Reg. XIX. of 1793, of exemption from limitation, applies. They further decided, that the Plaintiff, having erred in stating that the suit was brought under section 30 of Reg. II. of 1819, should, if he wished to do so, be allowed to amend his plaint, and that, in such case, the cause should be remanded for re-trial; but that if the Plaintiff did amend his plaint, he must show on the face of it, as required by the Law of procedure, when his cause of action accrued, and if it accrued beyond the period ordinarily allowed by any law for commencing such a suit, upon what ground an exemption was claimed.

There has been, so far as their Lordships are aware, no appeal from these decisions of a full Bench of the High Court. They have since given the law to the Division Benches of that Court: and the Order of remand, of which the present appeal complains, is one of many which have been made in accordance with them. The judgment in the case of *Khelut Chunder Ghose v. Poorno Chunder Roy* (see case *ante*, [14 Moo. Ind. App.], note, p. 155), No. 268 of 1864, is, in fact, only a recapitulation of what had been decided and laid down in one or other of the above-mentioned decisions of the full Bench.

No attempt was made at the Bar to impugn the correctness of the first decision in No. 869 of 1864. It must be held, therefore, to be settled law that the provisions of the 30th section of Reg. II. of 1819 do not apply to such a suit as the Appellant's, and the only questions which the appeal raises are whether, this being so, the High Court has been [172] right in remanding this and other suits similarly circumstanced for re-trial; whether on such a re-trial the burthen of proof should be cast in the degree in which the High Court cast it on the Plaintiff; and lastly, whether there is anything in this particular case which renders such an order of remand, though otherwise correct, improper.

Their Lordships are very clearly of opinion, that the remand for re-trial upon an amended plaint was not only correct, but an indulgence to the Plaintiff, whose suit, if not so remanded, ought to have been dismissed. The invocation of the 30th section of Reg. II. of 1819 is not mere matter of form to be rejected as surplusage. The effect of it is to cause the case to be tried according to the procedure and pro-

sumption prescribed by that enactment, and the enactments *in pari materia*, greatly to the advantage of the Plaintiff, and consequently to the prejudice of the Defendant. It follows that, if the procedure was not applicable to the case, there had been a miscarriage.

Again, their Lordships think that no just exception can be taken to the ruling of the High Court touching the burthen of proof which in such cases the Plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the Plaintiff to prove a *prima facie* case. His case is, that his mal land has, since 1790, been converted into Lakhiraj. He is surely bound to give some evidence that his land was once mal. The High Court, in the judgment already considered, has not laid down that he must do this in any particular way. He may do it by proving payment of rent [173] at some time since 1790, or by documentary or other proof that the land in question formed part of the mal assets of the estate at the Decennial Settlement. His *prima facie* case once proved, the burthen of proof is shifted on the Defendant, who must make out that his tenure existed before December, 1790.

It may be objected that the result of this ruling may be that Plaintiffs will sometimes fail, where under the former and looser practice they would have succeeded in assessing or resuming the land. But this can only happen by reason of the inability of the Plaintiff to give *prima facie* proof of the fact which is the foundation of his title; a circumstance not likely to occur unless the Defendants, or those from whom they claim, have been long in possession of the tenure impeached. Nor is it in their Lordships' opinion, to be regretted if, in such cases, effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption suits under the Regulations, which have now been decided to be inapplicable to suits of this nature, and by relieving Defendants from a burthen which every year made it more difficult to support.

The only other point to be decided on this appeal is, whether there is any peculiarity in this case which ought to take it out of the general rule. Their Lordships are of opinion that there is not. Mr. Doyne argued that the Defendants had admitted that the lands in question, with the exception of the small quantity no longer claimed, were within the Appel-[174]-lant's estate. But such an admission is obviously not sufficient to meet the burthen of proof thrown upon the Plaintiff. It was at most an admission that the lands were within the ambit of the estate, not that they had ever been mal lands. In fact, the Defendants strenuously asserted the contrary. The Appellant, therefore, having failed to give any evidence on the second trial in support of his amended plaint, the decree dismissing his suit was right.

In the other appeal, that of *Hurryhar Mookhopadya v. Madab Chunder Baboo*, the suit was also, on the face of it, brought under section 30 of Ben. Reg. II. of 1819, though to enforce a claim under section 10 of Reg. XIX. of 1793. In fact, in this case there was a preliminary proceeding under the 28th section of Act, No. X. of 1859. The Defendants (the Respondents) undertook to prove that their tenures existed before December, 1790. The Principal Sudder Ameen decided, on the 9th of April, 1863, that they had failed to do so, and decreed in favour of the Appellant. That decree was affirmed on appeal by a Division branch of the High Court on the 14th of March, 1864. An application for a review of judgment was made on the 10th of June, 1864, on the ground, amongst others, that the Appellant having stated that the lands were his mal lands, the Court had erred in throwing the *onus* of proof on the Defendants. The review was admitted on this ground; and on the 24th of August, 1865, the Court made an Order in these terms:—"A notice will issue to the other side, when the case will be argued, whether or not [175] our decision, which has been overruled by a subsequent ruling of the full Bench, should not be altered;" and on the 6th of September, 1867, the Court made the second Order for a remand, saying, "the *onus* being on the Zemindar, he will be permitted to amend his plaint; and he will have to prove that the land is mal by showing that he has received rent for the same."

Their Lordships conceive that, subject to the point which will be subsequently noticed, the question, whether this remand was correct must be governed by their decision on the other appeal. They do not think that the Order is vitiated by the speci-

fication of one amongst the various methods by which the Plaintiff might prove his case. They do not conceive that the High Court really meant to limit him to that kind of proof. It was, however, argued by Sir Roundell Palmer that the remand of this particular case was improper, because the suit had already been finally decided in the Appellant's favour, and ought not to have been admitted to a review, in order to give the Defendants the benefit of what had been decided in other cases after such final judgment had passed. Their Lordships, however, observe that the application for a review seems to have been regularly made within ninety days of the date of the decree sought to be reviewed, pursuant to sect. 377 of the Code of Procedure, and this being so, their Lordships conceive that it was competent to the High Court to delay, if they did delay, their final decision on that application until the law on which so much doubt existed had been settled by the judgments of the full Bench of the High Court, which have been already noticed. [176] Therefore, in this case also, their Lordships think that the final Order of the High Court was correct. They will, accordingly, humbly advise Her Majesty to dismiss both appeals. As the Respondents have not appeared on either, it is unnecessary to say anything about costs.

KOOR GOOLAB SING, and Others.—*Appellants*: RAO KURUN SING. —*Respondent* * [July 10, 11, 1871].

On appeal from the Sudder Dewanny Adawlut, Agra, North-West Provinces.

Lunacy by Hindoo Law is a bar to succession. On the death of D. his Widow succeeded, according to the Mitaashara. By Deeds of gift and sale she and her Husband's Mother alienated part of her Husband's estate. R., the fifth in descent from the common ancestor of D., whose Father was dead, brought a suit as Guardian of his Grandfather, a lunatic, against the alienees and D.'s Mother, the heir of D.'s Widow, then deceased, to set aside the alienations of the inheritance, and for possession. The Courts in India set aside the alienations as having been made without such necessity as is required by Hindoo Law. Such decree affirmed on appeal.

At the time of the institution of the suit D.'s Mother was alive:—Held, that R. as the next presumable reversioner, was entitled to sue to preserve the estate, and that it was not a fatal objection to the suit that she died before decree in a suit so framed, as it was only a matter of form, not affecting the merits.

Whether a Sister can succeed by inheritance her Brother, according to the law received in the North-West Provinces, *Quære?* [14 Moo. Ind. App. 195].

Such point not having been raised by the issues in the suit, the Judicial Committee refused to decide the question [14 Moo. Ind. App. 194].

This appeal was brought from a decree of the late Sudder Dewanny Court of the North-West [177] Provinces, Agra, which affirmed a decision of the Court of the Principal Sudder Ameen of Allyghur, whereby possession of seventeen villages and other real property, in that District and Bolundshahr, was decreed to the Respondent.

The circumstances which gave rise to the appeal were as follows:—

The property in question was the separate estate of Rao Dhuleep Sing, who inherited it from his Father, Kooshal Sing. The common ancestor of the family from whom the Respondent and the deceased Rao Dhuleep Sing descended was one Oomed Sing. He had three Sons, Sewa Sing, Bulwunt Sing, and Hurnam Sing. Sewa Sing died childless; Bulwunt Sing had two Sons, Goolab Sing and Badam Sing. Goolab Sing had a Son, Inderjeet Sing, the Father of the Respondent. Badam Sing died childless; Hurnam Sing had a Son, Kooshal Sing, who had a Son, Rao Dhuleep Sing, by his Wife, Toolsa Koor, which Son, Rao Dhuleep Sing, was the Husband of Koondun Koor. Rao Dhuleep Sing died childless in 1846.

* Present.—Members of the Judicial Committee—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor. The Right Hon. Sir Lawrence Peel.

On the demise of Rao Dhuleep Sing, his Widow, Koondun Koorer, and his Mother, Toolsa Koorer, were in default of his Sons, Grandsons, and Great-grandsons in the male line, registered as joint co-heirs of the deceased in the revenue department. On the 5th of August, 1856, Koondun Koorer conveyed by Deed of gift three villages to her Brother's Son, Koorer Goolab Sing, the first Appellant. In 1856, Toolsa Koorer conveyed by Deed of gift a village to her Husband's Sister's Son, Douhut Sing, the third Appellant, and her Nephew, Buldeo Sing, the second Appellant. After Koondun Koorer's death, [178] in the year 1856, Toolsa Koorer and Koorer Goolab Sing were recognised as her heirs by the revenue authorities, and on the 31st of January, 1857, Toolsa Koorer and Koorer Goolab Sing executed an agreement by which Toolsa Koorer retained three of the villages, and Koorer Goolab Sing the remainder of his Aunt's landed property. On the 3rd of June, and 22nd of September, 1859, Koorer Goolab Sing sold two of the villages to Thakoor Chundun Sing, the fourth Appellant, and on the 15th of December, 1860, Toolsa Koorer conveyed by Deed of gift the remainder of her portion of the estate to Douhut Sing and Buldeo Sing. On the 25th of April those parties sold a village to Joogul Kishore, who was made one of the Defendants in the original suit, but was not an Appellant in this appeal. Toolsa Koorer was also made another of the Defendants in the original suit.

In the year 1861, the Respondent filed a suit on his own account, and as Guardian and protector of Rao Goolab Sing, his Grandfather, a lunatic, against the Appellants and Toolsa Koorer and Joogul Kishore, to recover possession of the property alienated by Koondun Koorer, the Widow, and Toolsa Koorer, the Mother of Rao Dhuleep Sing. By this suit the Plaintiff sought to establish his title as nearest male heir in succession to Rao Dhuleep Sing, after his Mother's death, if he should survive her, and to recover possession of the lands alienated partly by Deeds of gift and partly by Deeds of sale. The points raised by the Defendants in their answers were, first, that the Plaintiff's claim was totally groundless, and was, moreover, barred by lapse of time.

Shortly after the institution of the suit, the Defendant, Toolsa Koorer, died.

[179] The issues tried in the suit were, first, from what date the cause of action was to be reckoned, and whether the suit was barred by lapse of time? Second, whether the estate was a divided estate, and if so, had the Widow of Rao Dhuleep Sing power to alienate such divided property? Third, was the Plaintiff removed from the common ancestor by five generations, and if so, was the right of a member of the family so far removed from the ancestor to inherit by succession recognized by the Shasturs? Fourth, were the alienations made by Koondun Koorer to strangers valid *quoad* the Plaintiff? Fifth, with reference to the Plaintiff's statement that on the death of Koondun Koorer, Koorer Goolab Sing and Toolsa Koorer divided the property between them, under the authority of a Will alleged to have been left by Koondun Koorer: whether such Will was valid? A further issue was added, whether the Plaintiff, Rao Kurun Sing, could sue on behalf of his Grandfather, Koorer Goolab Sing, he not having obtained a certificate of administration in respect of his Grandfather's interest, under Act, No. XXXV. of 1858?

The Court of First instance referred the points of law raised in the case to the Hindoo Law Officer of the Agra Sudder Court, who, by his answers to the interrogatories, gave it as his opinion, founded on the doctrines of the Mitacshara, first, that the Widow was the exclusive proprietor during her life; and, secondly, that alienation by her to strangers, while any next of kin in a near or remote degree of relationship were living, was invalid; and, thirdly, that according to the Shasturs, relationship was not limited to a fixed number of generations, but that it was a maxim that a relation of a remote degree should not inherit while [180] there was one of a nearer degree, as in the instances of a Father, Grandfather, and Great-grandfather, called "Pind Blagees," and collateral to them the three "Daip Blagees," and that these six persons were of that degree of kindred called "Sapindas," those relations who come next "Sagoturs," and the rule was, that while there are descendants of the Father, the descendants of the Grandfather were not entitled to inherit, and that the same rule held good among the "Sagoturs," as while there is a relation of the seventh degree, one of the eighth degree could not inherit. Fourthly, that the Widow could not convey away the property by Deed of gift or Will, and was only entitled to maintenance out of the estate.

The Principal Sudder Ameen (Rai Debidial) pronounced judgment on the 21st of

November, 1861, and ruled in accordance with this opinion on all the issues in favour of the Plaintiff, holding that the Widow was incompetent to alienate her Husband's estate, that the alienations were invalid, and that the Plaintiff, after her death, was entitled to succeed thereto as next heir, upon the authority of *Ganpat Singh v. Ranee Chowbasee*, 29th of July, 1850, and *Ranee Koop Koor v. Rao Anthoo Ram*, 13th of August, 1850, on the ground, that Rao Goolab Sing was the nearest next of kin of Rao Dhuleep Sing, but being disqualified by reason of lunacy, and his Son dead, the Plaintiff was entitled, in the absence of any nearer legal heir, to succeed as heir-at-law in succession to Rao Dhuleep Sing: and further held that the claim was not barred by limitation.

The Appellants appealed to the late Sudder Dewanny Adawlut at Agra, and filed their grounds or reasons of appeal, the substance of which is [181] referred to in the following judgment of the Agra Court.

The hearing of the appeal took place on the 22nd of June, 1863, before a Division Bench consisting of Messrs. Edwards and Pearson, two of the Judges of that Court.

The material part of the judgment of the Court was in these terms:—"Of the grounds or reasons of appeal, the first, fifth, sixth, and seventh, which were either not advanced or not supported in the Court below, are not here seriously insisted on: the first is manifestly untenable. The provisions of Act, No. XXXV. of 1858, have not been applied in the case of Rao Goolab Sing, but his Grandson, as his nearest relation and natural Guardian, is not in consequence precluded from suing on his behalf, and still less, from suing on his own behalf. As to the fifth, it is admitted that there is no proof on the records of Rao Kurun Sing having represented himself in any previous civil or revenue proceedings as the heir by adoption of his great-uncle, Pudum Sing. As to the sixth, it is obvious and sufficient to remark that the Plaintiff is free to dispute or redeem, as he may choose, the alleged mortgages, and that it was not incumbent on him to raise any questions about them in the present suit. It is not pretended that there is any proof on the record of the seventh plea. As regards the second, we entertain no doubt that the exposition of the Hindoo Law by which the Principal Sudder Ameen has been guided in his decision is correct. It coincides entirely with the view taken of the subject in Macnaghten's Hindoo Law, Vol. I. pp. 19, 20. The third plea, inasmuch as it is a reiteration of the allegation made in the Court below [182] that the Plaintiff is too far removed in relationship from Rao Dhuleep Sing to inherit his estate, must be disallowed by us as it was by the Principal Sudder Ameen. Both the Plaintiff and his Grandfather are Sapindas of a near degree of relationship, and fully entitled to inherit in their turn. But it appears to us, looking to the order of succession according to the law current in these Provinces, indicated in pages 32 and 33 of the same volume of the above-mentioned work, that the Plaintiff was somewhat premature in claiming the property in suit before Toolsa Koor's death. It is stated by Macnaghten that, after the Widow, in default of Daughters, the Mother ranks next in order of succession. After the latter, it is clear, in this case, that the succession devolved on the Plaintiff's Grandfather, and by reason of his present disqualification on himself. He may, therefore, have erred in asserting his cause of action to have arisen on the death of Koondun Koor, and an objection on this score to his suit might have been urged by Toolsa Koor, who was alive when the suit was instituted, and was impleaded in it by some plausibility. But it is to be remembered, that in fact, she had acquired only a small portion of Rao Dhuleep Sing's estate in succession of her Daughter-in-law, having previously obtained a larger portion thereof as a co-heir after her Son's death; and, moreover, she had partially relinquished her own right of inheritance by permitting Koor Goolab Sing to inherit the remaining portion thereof as Koondun Koor's heir. However, no such objection as might have been offered to the suit on the ground now noticed by us was made in the first instance, and if any such objection was in [183] effect, it was neutralized almost immediately after the institution of the suit, by Toolsa Koor's death. Under the circumstances, it would not be conducive to any of the ends of justice if we were at this stage of the case to dismiss the claim as improperly brought, and to require the Plaintiff to sue afresh as next heir after Toolsa Koor, instead of after Koondun Koor, and we deem such a course to be altogether unnecessary. There remains only for consideration the fourth plea, which, in the terms in which it is put by the Appellants, will not bear a moment's scrutiny. Rao Dhuleep Sing's Widow and

Mother having a prior right of inheritance as compared with that of the Plaintiff and his Grandfather, it follows, that the right of the latter had no actual existence during the lifetime of those two Ladies. It is absurd to contend that a suit which has been shown to have been instituted rather in anticipation of the proper time than otherwise, was brought so late as to be barred by the Limitation of suits Act. But although the claim for property could not have been brought at an earlier date, it is argued, that he was bound to have sued before for a declaration of the invalidity of the alienations which he now impugns. Such a suit might, perhaps, if brought by his Father in virtue of his contingent right and interest in the property, have been entertained, but we hold, that the cause of action afforded of those alienations more strictly and more urgently arose when the contingent became an actual right and interest. Furthermore, we observe that the suit which was instituted on the 4th of May, 1861, is quite within twelve years, reckoned even from the 22nd of June, 1849, the date of the Ikrarnamah by which Rao Dhuleep Sing's [184] Widow accepted his Mother as co-sharer in the estate, and that all the other transfers impugned were subsequent to that date. Accordingly, we dismiss the appeal with costs.

The appeal was from this decree.

Sir R. Palmer, Q.C., and Mr. T. Prichard, for the Appellants.—We submit, first, that the Respondent was not entitled to sue on behalf of his Grandfather, or to succeed in the suit without establishing a title in himself, which he did not do; and, secondly, as between the parties to the suit, that the Respondent failed to show any title preferable to the title set up by the Appellants. By the Hindoo Law, where there is no Daughter or Daughter's Son, the Mother comes next in succession to the Widow. Strange's Manual of Hindoo Law, ch. xi. sect. 309. The line of nearer Sapindas stops with the Great-grandfather's Great-great-grandson. Strange's Manual of Hindoo Law, ch. xi. sect. 309; Stoke's Hindoo Law, p. 447, note Menu, ch. ix. 186; Colebrooke's Dig., vol. ii. sect. 435, p. 568 [3rd Ed.], where kindred are enumerated. Macnaghten's Hindoo Law, p. 36 [5th Ed. by H. H. Wilson]. Sisters' Sons are included in the line of succession. Mitacshara, ch. ii. sect. v. par. 3; Stoke's Hindoo Law, p. 447, note, where it is shown that this is the opinion of the Indian Jurists, Nanda Pandita, Balam-Bhatta, Kamalakara, and the Author of the Viyavahara Mayucha (Stoke, p. 447), and is also so acknowledged in the untranslated text of the Nirayasinthee and the Dharmasinthee, where the Sister's Son is expressly mentioned in the list of those entitled to offer the [185] funeral cake. The passage in Colebrooke quoted by Stoke in note I, p. 444, that "this opinion is controverted by Kamalakara and the Viyavahara Mayucha," is not whether the Sister's Son does inherit or not, but which come first, the Sister or Brother's Son; so that this opinion rests on the authority of the Mitacshara, namely, of Yajnyawalkya, Nanda Pandita, Balam-Bhatta, Kamalakara, the Viyavahara Mayucha, the Nirayasinthee, and the Dharmasinthee. The Sanscrit dual comprises both masculine and feminine. The word translated "Brethern" means Sister as well as Brother, just as "Fathers" or "Parents" include Mother. By many Commentators the Mother is held to be more nearly related than the Father; a Daughter's Son being admitted as heir in the School of Hindoo Law recognized in the North-Western Provinces to succeed, and on the same principle a Sister's Son is entitled to be admitted.

Secondly, Lunatics are excluded from inheritance by the Mitacshara, ch. ii. sect. 10; Daya-Krama-Sangraha, ch. iii.; Stoke's Hindoo Law, pp. 455, 500; and the Respondent ought to have acted under the provisions of Act, No. XXXV. of 1858, sects. 8, 9, 10.

Thirdly, a Plaintiff can only succeed by proving his own title, which has not been done in this case, and not by the defect in the Defendant's title, *Ram Rutton Rae v. Furrook-oon-nissa Begum* (4 Moore's Ind. App. Cases, 233), *Jowala Buksh v. Dharum Sing* (10 Moore's Ind. App. Cases, 511).

Mr. Leith, and Mr. Thomas, for the Respondent.—First, the rule of succession by the Hindoo Law is laid [186] down by Macnaghten, Prin. of Hindoo Law, pp. 32, 33, and, as stated in the judgment of the Court below, is the received interpretation of Hindoo Law, and the acknowledged rules acted on by Courts in India; therefore, the ingenious suggestion attempted by the Appellants to alter such received rules of succession cannot be entertained: it would subvert the admitted law. But even if the objection that the title of the Respondent was from Rao Dhuleep Sing's

Mother was well founded, it could not be entertained now; such an objection was not taken in the Court below on the pleadings. By the Hindoo Law in force in the North-Western Provinces, the Widow, firstly, and on her death the Mother, secondly, of Rao Dhuleep Sing were his heirs in succession, each taking successively an estate in the property left by him determinable on death, and without any general powers of alienation beyond the term of their natural lives; therefore, the alienations sought by the suit to be set aside, so far as they purported to convey or absolutely assign an interest in the property beyond life estates, were invalid and inoperative by Hindoo Law as against the Respondent, who, at the death of the survivor of them, became the heir-at-law of Rao Dhuleep Sing in the place of Rao Goolab Sing, he being a lunatic and incapable of inheriting. The fact of his suing before Rao Dhuleep Sing's Mother's death did not affect his title to sue, which, as a presumptive reversioner to preserve the estate, he had a right to do. *Raj Lukhee Dabee v. Gokool Chunder Chowdry* (13 Moore's Ind. App. Cases, 209). As in the case of an adopted Son, the estate of a Widow who adopts him becomes the property of the Son adopted, *Mussumat Soolukhna v. Ramdoolal Pandah* (1 Rattigan's Sel. Cases in Hindoo Law, 8).

[187] Secondly, the suit was not barred by the Regulations or Act of Limitation, as the right and title of the Respondent as heir-at-law to possession did not accrue until the survivor of Toolsa Kooer, the Mother of Dhuleep Sing, and the period of limitation calculated from the happening of that event had not arrived when the suit was instituted, and indeed before the expiration of twelve years from the date of the earliest of the alienations set aside by the Courts in India.

For judgment in this appeal, see joint judgment in the next case [14 Moo. Ind. App.], p. 192.

RAO KURUN SING,—Appellant: NAWAB MAHOMED FYZ ALI KHAN, and Others,—Respondents * [July 11, 1871].

On appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

R. brought a suit against certain parties in possession and the tenant for life to set aside the alienations made by the Widow of D. and her Mother-in-law, who, on the death of the Widow, was in possession as the Widow's heir. R. afterwards brought another suit against the Mortgagees in possession claiming under the Widow to set aside the mortgage which formed part of the lands he sued for in the previous suit, as having been made by a Hindoo Widow, who, in the circumstances, had no power to charge the estate of her deceased Husband. Held, that the two suits being against different persons, of a distinct nature, and for different relief, sect. 7 of Act, No. VIII. of 1855, did not apply, as it was not a splitting suit or the same cause of action [14 Moo. Ind. App. 197-199].

Held further, in the absence of proof showing the legal necessity, that the Widow had no power by Hindoo Law to charge or mortgage the estate of her deceased Husband so as to effect the inheritance [14 Moo. Ind. App. 199 *et seq.*].

This suit was instituted by the Appellant as heir-at-law of Rao Dhuleep Sing, and as Guardian of Rao [188] Goolab Sing, his Grandfather, a lunatic, against the Respondents. The suit was brought to recover possession of the two Mouzahs of Dohailee Bajrudhee and Madogurh, in Talooka Burowlee, which were in the possession of the Defendants under a mortgage Deed, and to set aside the mortgage, as being in excess of the legal powers of the Mortgagors to grant, and which deed was executed by Toolsa Kooer, the Mother, and Koondun Kooer, the Widow, both deceased, of Dhuleep Sing, who was the proprietor up to the time of his death of the Mouzahs, and whose Widow was his heir, as he had died childless; and, as such Widow and

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Hon. the Lord Justice Mellish.

heir, she became solely entitled to the Mouzahs, and to the possession and enjoyment of the same during her natural life.

Toolsa Kooer survived her Daughter-in-law, on whose death she succeeded to the Mouzahs, as Mother and heir of Dhuleep Sing, and so became entitled solely to the possession and enjoyment thereof during the period of her natural life.

The questions arising in the appeal were as follows:—

First, as to the construction and application to the facts of this case of section 7 (a), Act, No. VIII. [189] of 1859: whether the omission by the Appellant of the claim made in the present suit from a former suit instituted by him against altogether different parties ought to be considered as bringing this suit within the provision contained in that section, so as to be affected by the bar thereby created, such former suit being instituted by him to establish his right of inheritance, in succession to Rao Dhuleep Sing, to certain Mouzahs which had belonged to the latter, including incidentally the two Mouzahs, the subject of the present suit, was also brought to set aside certain other and distinct alienations made by the Widow and Mother of Rao Dhuleep Sing, by other and distinct Deeds of sale and mortgage of other Mouzahs than those the subject of the present suit, and in favour of other parties as Vendees and Mortgagees from those mentioned in the Mortgage, the subject of the present suit.

Secondly, whether the circumstances justified the mortgage of the family estate by the Widow and her Mother-in-law.

By the decree of the Principal Sudder Ameen of the Zillah Court of Allyghur (Moulvee Syud Ahmud Khan), it was decided, with reference to the above questions, in favour of the Appellant. The judgment was as follows:—

“I am of opinion, that section 7, Act, No. VIII. of 1859, does not apply to the Plaintiff's claim. His former suit was brought by right of inheritance against the parties who considered themselves as heirs of Koondun Kooer and Toolsa Kooer, or as donees. The suit, therefore, required no decision in opposition to the Mortgagees of the property of Koondun Kooer and Toolsa Kooer, whilst the present claim is based on the ground that the aliena-[190]-tion made by them in the shape of mortgage is invalid under the Hindoo Law. It is quite a different claim, and bears no relation whatever to the previous one. Certainly the Plaintiff could have included these Defendants also in the former suit, and obtained a decision with regard to the cancellation of the disputed mortgage; but his not having done so does not warrant the relinquishment of his claim, as provided in sect. 7 of Act, No. VIII. of 1859. It is true, that the Plaintiff had in his former suit included the claim for the cancellation of several alienations other than the one now under consideration; but from this it does not follow that he admitted the alienation now in dispute. On the contrary, he never admitted it to be valid. In my opinion, the Plaintiff was even competent first to obtain a decree only for right of inheritance, and then to sue each transferee separately for the avoidance of the illegal transfer made in his favour, because a claim for inheritance is quite distinct from that for avoidance of transfers. In short, the Plaintiff not having included this claim in his former one does not preclude him from bringing this suit.” The decree then went into the merits, and decided the suit in favour of the Appellant, setting aside the mortgage made by the parties under the circumstances in the plaint mentioned, and decreed possession of the two Mouzahs therein mentioned to the Appellant, as male heir in succession to Rao Dhuleep Sing.

Upon appeal to the late Sudder Dewanny Adawlut, at Agra, that Court took notice only of the plea, whether the suit was barred by section 7 of Act, No. VIII. of 1859; and the appeal having been referred to a full Bench composed of Messrs. Roberts, [191] Pearson, Spankie, and Turnbull, it was decided (Mr. Justice Pearson dissenting) that the suit could not be maintained, and was barred by the 7th section of the above Act.

(a) This section enacts that “every suit shall include the whole of the claim arising out of the cause of action, but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained.”

From this decree the present appeal was brought.

Mr. Leith, for the Appellant.—The claim of the Appellant in the former suit and the cause of action differed altogether from the claim and cause of action sought to be established in the present suit. The Defendants in the former suit were different parties, and separate from the Defendants in this suit; therefore, the non-joinder of the specific claim now sued for with the claim of heirship and possession in the former suit, ought not, on the true construction of sect. 7 of the Act, No. VIII. of 1859, to have been considered as a splitting suit, so as to create a bar by that section, and the **Sudder Court was wrong in so construing that section.**

Sir R. Palmer, Q.C., and Mr. Pritchard, for the Respondents. The validity of the mortgage was admitted by one who claims to be a nearer heir than the Appellant to Rao Dhuleep Sing. The alienation of the villages by the Widows was valid by the Hindoo Law, *Cavalry Fundata Narrainapah v. The Collector of Masulipatam* (11 Moore's Ind. App. Cases, 619), at all events, if the whole mortgage for Rs. 13,000 cannot be supported, yet it was good *pro tanto*, as it was advanced to the extent of Rs. 3000 to save the estate from Government sale for arrears of revenue. The power of a Hindoo Widow to sell or mortgage her [192] deceased Husband's estate, in such circumstances, is recognized in the Revenue, Civil and Criminal Cases (Wyman), No. 1664, 10th January, 1867, *Full Chand Lall v. Raghoband Sahayr*. This was clearly a splitting suit by sect. 7 of Act, No. VIII. of 1859, as the remedy now sought could have been obtained in the former suit by making the Mortgagees parties, and that section operates as a bar to this suit. *Agra High Court Reports*, No. 540 of 1867, p. 109.

Mr. Leith, in reply.

Their Lordships' judgment in both appeals was delivered by

The Right Hon. Sir James Colville.—Their Lordships, in delivering their judgment in these two cases, will begin with that which was first argued, namely, the case of "*Koor Goolab Sing v. Rao Kurun Sing*" [14 Moo. Ind. App. 176].

The Plaintiff in the suit and the Respondent in this appeal sued in the Zillah Court of Allyghur, in the North-Western Provinces, as heir of one Rao Dhuleep Sing, to set aside certain alienations of the immoveable estate that had been Rao Dhuleep Sing's up to the time of his death, made by his Widow, who succeeded to the estate as his heir. The Defendants were respectively the persons claiming under these alienations, and the Mother of Rao Dhuleep Sing, who had concurred in them. The Mother survived the Widow, and was entitled, at the death of the latter, to succeed as heiress to her Son, Rao Dhuleep Sing. The Zillah Court decreed the suit in favour of the Plaintiff. At the date of the decree the Mother was dead, but [193] she was alive at the time of the commencement of the suit.

The Plaintiff and Rao Dhuleep Sing descended from a common ancestor. The Plaintiff was fifth in degree, counting from that ancestor. In his line was his Grandfather, who still lived, but was a lunatic at the time of the institution of the suit, and at the time of Rao Dhuleep Sing's death. The Plaintiff's Father was then dead. On appeal to the late Sudder Dewanny Adawlut at Agra, that Court affirmed the decree. From that decision this appeal is now brought.

On the argument of the appeal, nothing was addressed to the Court on the facts to show that these alienations were valid, but the whole argument was addressed to the competency of the Plaintiff to question them. The learned Counsel for the Appellant objected, that at the time of the suit the Plaintiff was not entitled to the possession, and that the suit was one for possession, that he sued as Guardian of his Grandfather, and that he was not duly so constituted, and lastly, that he had shown no title as heir.

As to the first objection, the answer is, that this suit in its main object was brought to set aside certain alienations, and that as the nearest reversioner at the time when they took place was charged as concurring in them, the next presumable reversioner was entitled to question them, and the pendency of her life was not a fatal objection to the institution of the suit so far. And, as it appeared, that when the decree gave him possession, he was then entitled to possession, the objection on this point resolved itself into one of form, not affecting the real merits of the case.

As to the second objection, there are two answers [194] to it; first, that the

Grandfather was not the heir, but the Plaintiff, and that if the latter had been obliged to sue on the Grandfather's title, the objection also would have been one of form, and not affecting the merits of the case. The objection to the Plaintiff's title as heir, which was taken in the Court below, on the ground of its remoteness from the common ancestor, was plainly untenable, and was not here insisted on. This objection, as taken below, necessarily assumes the Plaintiff to be claiming as heir to the Son, and to urge on the hearing of the appeal for the first time, that the real title of heirship must be derived from the Mother, and not from the Son, was to start a new ground of objection to title, which the Plaintiff had had no opportunity of meeting in the Court below. The same objection also applied to the argument which was addressed to their Lordships, that a Sister may inherit to a Brother, and that that line of descent through the assumed Sister from the Brother was not exhausted by the Plaintiff's proof. To admit such a line of argument would be also to expose the Plaintiff to objections which, had they been raised below, might have been answered from what was known to be the law of the District, and by the want of proof that the person claiming to be the Son of a Sister, did in fact, stand in that relation to the *praepositus*. It will be found from the judgment of the Sudder Court, that what the Court understood to be the questions raised before them, and the sole issues raised, were, first, "Should the Plaintiff's cause of action be held to have arisen on the death of Rao Dhuleep Sing or of Koondon Kooer, and is the suit within time or not? Second, Was Koondon Kooer competent or [195] not to alienate the property in question? Third, Is the Plaintiff so nearly related as to be entitled to inherit?"

Again, the argument at the Bar that the Plaintiff was not the heir, but that the person who appears in the pedigree, and who was a Defendant on the Record, was a nearer heir of Rao Dhuleep Sing, depends first upon proof that Rao Dhuleep Sing was the Sister's Son, and next, of course, upon the point of law whether the Sister's Son is capable of inheriting. That it is by no means clear that Rao Dhuleep Sing was the Sister's Son, would appear from the statement which precedes the judgment of the Sudder Court, in which the Judges say that "in 1856, Mussumat Toolsa," that is the Mother, "is said to have likewise executed a Hibbanamah, bestowing Mouzah Mohood Khara on her Husband's Sister's Son, Doolut, and her own Nephew, Buldeo," there treating Doolut not as the Sister's Son, but, in fact, as the Aunt's Son. There was, therefore, no real proof before the Court of the relationship of this party to the *praepositus*, and if there had been such a proof, then, inasmuch as the point was not taken in the Court below, there was nothing whatever to show that the law would not have been as it is contended to be, namely, that that person was not entitled, under the law of the Mitacschara, to inherit. There was nothing to show that the interpretation of the ancient text of the law on which Mr. Prichard relied, even assuming the relationship to be made out, did obtain in the North-West Provinces, and there is every reason to suppose from what has taken place in this case, that it has not been received there. The silence of the Defendant, supposing him to be in that degree of relation-[196]-ship which it asserted he was, and of the Court on this point, would be inexplicable on any other hypothesis. Moreover, it is clear that the Sister and her descendants find no place in the tables of succession, according to the law of the Mitacschara, which have been framed by several persons of authority, and in particular by that eminent Hindoo lawyer, the late Prossunno Coomar Tagore. The learned Counsel for the Appellant seemed indeed to concede this, and to admit that the exclusion did prevail in fact: but he contended, that it had its origin in error, and pleaded for a return to what he contended was the correct interpretation of the texts, founding himself chiefly on the authority of Balani-Bhatta. But it is entirely opposed to the spirit of the Hindoo customs to allow the words of the law to control its long received interpretation, as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the Country, and it seems to their Lordships that it would be extremely mischievous to disturb upon points taken here for the first time any such course of decision.

Their Lordships, therefore, see no ground whatever for disturbing the decisions of the Courts below in this case, and will humbly advise Her Majesty to dismiss the appeal with costs.

In the other case [14 Moo. Ind. App. 187] two questions were raised, the first upon the decree of the High Court, which dismissed the suit of the Plaintiff, the Appellant, in this case, upon the ground that the case fell within the 7th section of Act, No. VIII. of 1859, which says that "every suit shall include the whole of the claim arising out of the cause of action, but a Plain-[197]-tiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a Plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

Their Lordships think that the true test of the proper application of this section to any particular case must be, whether there has been a splitting of the cause of action; and it is, therefore, necessary to consider what in each of these two suits was the cause of action, and whether the second suit can be said to have been brought upon a splitting of that cause of action.

Now, the first suit, as has already been shown, was brought against various Defendants to impeach certain alienations made by the Widow and Mother of Rao Dhuleep Sing. They were alienations by which the inheritance, subject to the interests of those persons, was transferred to certain foster-sons, or near relations, or dependants of the two Ladies so as to exclude the remoter heirs. The suit with which their Lordships are now dealing was brought to set aside a mortgage which had been granted by those Ladies to the Respondent's ancestor in this case before the alienations which were the subject of the other suit. It no doubt appears in the description of the property, which was the subject of the first suit, that three of the villages forming part of that property were subject to the mortgage now in question, and the name of the Mortgagee is mentioned. But it appears to their Lordships that the causes of action in the two cases were essentially different: in the one case the Widow and Mother, assuming an absolute power of disposition, had granted the inheritance in portions of the estate to the Defendants in the first [198] suit. In the other case, the issue was, whether they had duly exercised the limited power which belong to a Hindoo female having a Hindoo female's right of inheritance in the estate, of charging the estate for certain defined purposes.

The only ground upon which it can be plausibly contended, that these two claims against distinct persons and of a very distinct nature really form part of one cause of action, is founded upon the circumstance that in the first suit the Defendant sued for the possession of the lands, the argument being that the Mortgagees being parties then in possession, the suit for possession of the lands ought to have contained a prayer for setting aside the mortgages. It is, however, to be observed that the suit, though in form a suit for the possession, was not properly brought, and could not properly be brought, at the time it was first instituted for that purpose. The prayer for possession was, if things had remained as they were when the suit was first instituted, one which could not have been granted. But the substance of the suit really was, as has been stated in the judgment delivered in the other appeal, to have those alienations of the inheritance, which, if not impeached, would have been fatal to the claim of the Plaintiff as reversionary heir, set aside and declared invalid. That object was, as their Lordships think, perfectly distinct from that which is the object of the present suit, which is to have these mortgages declared invalid, as against the person who has in the former suit established his title to the possession of the estate as heir, on the ground that they were securities, which those who granted them had not the power to grant as incumbrances upon the inheritance.

That being so, their Lordships have next to con-[199]-sider whether, the decree of the Sudder Court being incorrect upon the sole point on which it proceeded, there are sufficient grounds before them for affirming the decree of the Principal Sudder Ameen.

The case made is that this mortgage was granted by the Widow and Mother, and that it was not within the power of a Hindoo Widow to grant it, the money not being raised for any of those purposes for which the Widow is allowed to pledge the estate. In such a case, whatever be the precise degree of proof required from those who rely upon the mortgage, there is no doubt that those who take such a security from a person, having only a limited power to grant it, are bound to show, *prima facie* at least, that the money was raised for a legitimate purpose. The

Defendants plead that "The real circumstances of the case stand thus:—Mussumat Koondun Kooer and Toolsa Kooer, the heirs in possession of the entire property left by Rao Dhuleep Sing, borrowed Rs. 13,000 from our ancestor, under the necessity of liquidating the debt due from the deceased, and that incurred on account of his funeral ceremonies performed for the benefit of his soul, and in lieu of this sum they mortgaged the three villages in dispute to him, and thus saved the property." Upon that pleading it is to be remarked, that no distinction is made between any of the items making up the Rs. 13,000, that the Defendants pledged themselves to the borrowing of the whole sum for the purposes therein mentioned, and that in those purposes it is not very distinctly stated, that any part of the mortgage money was borrowed for the purpose of saving the estate by paying an arrear of Government revenue. The case made at the Bar to-day, however, is that the mortgage is at all events partially good, inasmuch as Rs. 3000, part of the [200] claim was unquestionably borrowed for the purpose of saving the estate from a Government sale.

In all these cases it is to be expected, that those who have to support the affirmative of such a case, should give some clear testimony by Witnesses as to the nature of the transaction; and it is very remarkable that in this case the oral testimony on the part of the Plaintiff is so entirely worthless that neither of the learned Counsel for the Appellant thought fit to refer to it. That some evidence as to the nature of the transaction might have been given one would have supposed, because although the Respondents are the children or remoter descendants of the original Mortgagee, still, in those proceedings which have been relied upon as showing what the nature of the transaction was, and in particular as to the alleged Bond for Rs. 3000, it is stated that it was taken in the name of Kullyan Doss, Cashier of the Respondent's ancestor. Kullyan Doss is not proved to be dead, nor is the absence of his testimony at all accounted for. There is really no evidence from any trustworthy person whatever employed in the family of the Defendants, as to what the real transaction was. In lieu of that, we are referred to the various proceedings which have been read and relied upon by Sir Roundell Palmer. But what is the documentary evidence, if evidence it can be called, as to the Rs. 3000, which is in fact the only item on which any substantial question seems to arise? It is to be found in a plaint filed in a suit brought by the Mortgagee against the Widow and the Mother of Rao Dhuleep Sing, seeking to be maintained in possession as Mortgagee. The account that it gives of the transaction is this:—"The Plaintiff files a regular suit in this Court against Mus-[201]-sumat Toolsa Kooer, the Mother, and Koondun Kooer, the Widow of Rao Dhuleep Sing, the proprietors of Pergunnah Burowlee, to be maintained in possession as Mortgagee, by insertion of his name as such in the revenue records of this District, and by allowing him to pay the Government revenue in respect of Mouzah Fuzulpoor, in Pergunnah Burowlee, assessed at Rs. 506, and to recover Rs. 328, the interest up to the end of the month of Jeith, 1254 Fusly, as well as Rs. 242, the mesne profits for the rainy season crop for 1255 Fusly, which the Defendant has forcibly realized from the lessees of the village, notwithstanding her having already given up its possession to the Plaintiff, according to the terms of the registered deed of mortgage, dated the 30th of July, 1846, engrossed on stamp paper, which is the basis of this action. Total value of suit, Rs. 1076. He founds his claim on the assertion that on the demise of Rao Dhuleep Sing, the proprietor of the Talook of Burowlee, the aforesaid Defendants became his heirs; and as Owners of the entire Talook and all other property left by him, and in the certificates of death filed in the revenue department in respect to every one of the villages forming the zemindary of the deceased, the names of the Ladies were entered as his successors." That mutation of names took place, as is shown by the proceeding of that date, on the 22nd of February, 1847; and on the face of the proceeding as well as by evidence which has been given in the cause, it appears that the proceeding was one which followed upon certain litigation between the Widow, who was the immediate heir according to the Hindoo law, and the Mother, who contested her title, which at last ended in a compromise, whereby one took two-thirds and the [202] other one-third of the estate. This plaint goes on to state:—"They then, for the payment of the Government revenue, asked the Plaintiff for a loan, and, according to their request, he lent them Rs. 3000." Certainly the

inference one would draw from this statement is that the loan was a joint transaction, that it was subsequent in date to the determination of the litigation by the compromise, and the insertion of the names of the two Ladies, as the registered Owners of the Talook.

Then, again, this Deed which is said to have been executed by them, and to have been registered on the 3rd of August, 1846, which is a date not quite reconcilable with what has just been said, or with what one would infer, is not produced. Neither that nor the mortgage Deed for Rs. 13,000 has been produced. And their Lordships, looking at this documentary evidence on which the Respondents rely, and contrasting it with the account given by the Witnesses for the Appellant, think that the case deposed to by the Witnesses for the Appellant, to whom credit was given, by the Principal Sudder Ameen, is far more likely than anything which has been alleged on the other side, to be a true account of the real transaction. They are clearly of opinion, that the Respondents have failed to support that burden of proof which the law casts upon them, of showing that the mortgage was given in any part for the purposes, for which the Widow was entitled to pledge the estate.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal be allowed, that the decree of the High Court be reversed, and that in lieu thereof a decree be made dismissing the appeal to the Sudder Court and affirming the decree of the [203] Zillah Court, with costs. The Appellant in this suit, and the Respondent in the other suit, must have the costs of both the appeals.

MOONSHEE AMEER ALI.—*Appellant*: MAHARANEE INDERJEET SINGH, BABOO RAMKISHEN SINGH, RANEE ASMODHEE KOOR, RANEE SOONETH KOOR, RUN BAHADOOR SINGH, MOODEYDHUR SINGH, LALL NARAIN SINGH and DEOPUTTEE NARAIN SINGH,—*Respondents* * [July 15, 1871].

On appeal from the High Court of Judicature at Fort William, Bengal.

The High Court at Calcutta, at the instance of the Appellant's Counsel, agreed to confine the decision of that Court to one point, with an undertaking that no appeal to Her Majesty in Council should be made from the decree. Notwithstanding such undertaking, an appeal was brought to England. The High Court certified in the record the undertaking. Held, by the Judicial Committee, on a preliminary objection being taken to the hearing, on the ground of the incompetency of the appeal, that such undertaking precluded an appeal [14 Moo. Ind. App. 206].

As the Respondents had not applied in the first instance to dismiss on that ground, but had allowed the case to proceed to the hearing of the appeal, costs *nomine expensarum* only, were allowed [14 Moo. Ind. App. 208].

In this appeal the suit was brought in the Court of the Civil Judge of Zillah Behar by Baboo Bischen Singh, Baboo Lall Narain Singh and Baboo Deoputtee Narain Singh and the Appellant, the first three parties claiming to be entitled as heirs to the estates belonging to the Tickarce Raj. The Appellant [204] claimed as Purchaser of one-eighth portion of the rights of the other Plaintiffs in the property in suit.

The suit purported to be instituted under a Vakeeletnamah appointing a Pleader by virtue of a Mookternamah, or power of attorney, alleged to have been executed by the first Plaintiff, Baboo Bischen Singh.

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor, —The Right Hon. Sir Lawrence Peel.

The main question was, whether Baboo Bischen Singh, whose name appeared as the first Plaintiff in the suit, had executed the power of Attorney under which the suit had been instituted in his name. The other points raised were, whether he and his co-Plaintiffs Lall Narain and Deoputtee Narain Singh were heirs in reversion to the last Rajah of Tickaree, whose Widows three of the Respondents were, and as to Ranee Sooneth Koor, whether her deceased Husband had given her power to adopt a Son.

Mr. R. J. Richardson, the Judge of Behar, held that the Mookternamah was sufficient authority for the institution of the suit, on the ground that although that instrument was not attested by Baboo Bischen Singh in person, yet by virtue of his Son having verified the plaint, it was *prima facie* genuine and valid, but he held that the Plaintiffs, Baboo Bischen Singh, Lall Narain Singh, and Deoputtee Narain Singh, had not proved their heirship, and dismissed the suit.

On an appeal to the High Court in the name of Baboo Bischen Singh and the other Plaintiffs from this decree, a preliminary objection was taken by the Respondents that there was no proof of the Mookternamah alleged to have been executed by Baboo Bischen Singh, either to institute the suit or to prefer the appeal, and the High Court adjourned [205] the appeal to enable that fact to be proved, and on the case coming again before the Court, the Counsel for the Appellant, in the presence of and with the approval of the Son of the Appellant, who was acting for him in the conduct of the appeal before the High Court, stated that if the Court would confine the judgment to the validity of the Mookternamah alone, the Appellant would undertake not to appeal from the Court's judgment to Her Majesty in Council.

On the 12th of June, 1866, the High Court, consisting of the Chief Justice, Sir Barnes Peacock, and Justices Bayley and Jackson, gave judgment in the appeal reversing the decree of the Judge of Behar, holding that the Mookternamah was a fabrication document.

From this decision, notwithstanding the Appellant's undertaking, he appealed to Her Majesty in Council. The other Plaintiffs refused to join in the appeal. With the transcript of the record, the High Court forwarded a certificate, to the effect, that in deciding the appeal, the question was limited to the validity of the Mookternamah, and that decision was made on the understanding that it was to be final, and the Appellant was not to appeal to Her Majesty in Council.

On the appeal being called on:—

Sir R. Palmer, Q.C., and Mr. Doyne, for the first three Respondents, objected to the *locus standi* of the Appellant, and the competency of the appeal, as the Appellant's Counsel had given an undertaking in the High Court which precluded the Appellant from appealing to Her Majesty in Council upon the only ground he [206] asked the decision of the Judicial Committee, such appeal being contrary to good faith and the undertaking of the Appellant's Counsel.

Mr. J. D. Bell, for the Respondent, Ranee Asmodhee Koor, in the same interest.

Mr. Leith for the Appellant, insisted on his right to appeal, which he submitted was not shut out by the undertaking by Counsel in India, as on the merits the Appellant's interest as Purchaser had not been determined.

The Right Hon. the Lord Justice James.—Their Lordships are of opinion, that the preliminary objection taken to the hearing of this appeal ought to prevail. The certificate of the High Court of Fort William in Bengal is to the effect, that in consideration of the Court deciding the appeal before them upon one point only, that is, the validity of the Mookternamah, the Counsel for the Appellant, in the presence and with the consent of the son and Agent of the Appellant, stated to the Court that he would not appeal from the decision as to the validity of the Mookternamah. Their Lordships, upon consideration, find that there was really very good and sufficient consideration for such an agreement on the part of Counsel, as part of the conduct of the case, because the result was this, and a very important result to the parties, that by obtaining the decision upon the validity of the Mookternamah alone, the case became a case not decided against Baboo Bischen Singh, the party in whose right the Appellant was suing. If the case had been [207] heard by the High Court, and upon appeal the merits had been gone into, and the whole matter

determined upon as in a suit by Baboo Bischen Singh and others, Baboo Bischen Singh and the persons claiming under him would not have been precluded from appealing to this Court, but might, on the other hand, have had two successive decisions against them upon questions of fact going to the merits of the case. But confining it to the decision upon the Mookternamah, it was really substituting a nonsuit for an adverse verdict, leaving it open to Baboo Bischen Singh and the Appellant himself, if he can get a new and genuine document in his favour, to bring a fresh suit. That being so, it was clearly a valid agreement on the part of Counsel not to appeal, and there is no doubt that it was done with the actual consent of the Son and representative of the Appellant. The appeal is brought in violation of good faith, and their Lordships feel that they ought not to entertain an appeal so brought where the real merits of the case have been withdrawn from the Court below.

But their Lordships have had some difficulty in determining what should be done with regard to costs. Now, their Lordships feel that where a certificate of this kind comes over with the record, and must, therefore, be known to both parties, it was the duty of each party to have made an application to the Registrar, who would at once have brought the matter to the attention of their Lordships, and taken their Lordships' directions as to what ought to be done with a record so constituted before any expense had been incurred in preparing cases, or in delivering Briefs for the hearing. It was wrong of both parties to proceed with an expensive litigation in the face of [208] this certificate without its being brought, either through the Registrar or by an application at their Lordships' Bar, to their attention. Disposing of it upon this preliminary, but still very serious, objection, their Lordships feel that they ought not to give all the costs as if the case had been fully heard upon the appeal, but still they think the Appellant ought not to escape a very considerable portion of the costs which have been incurred. They think, therefore, that this is a case in which they may use the power with which they are invested, to give a sum of money *nomine expensarum*, and, therefore, they will humbly recommend Her Majesty to dismiss the appeal, allowing to each of the three Respondents the sum of fifty guineas for the costs of the dismissal of the appeal.

[209] ALBERT BIRMINGHAM MILLER, Official Assignee of the Court for the relief of Insolvent Debtors at Calcutta. *Appellant*: THOMAS BARLOW,—*Respondent* * [July 12 and 13, 1871].

On appeal from the High Court of Judicature at Calcutta.

A Firm, though insolvent, may part with or put an end to a current speculation, the result of which is still uncertain, on the best terms procurable, without any imputation of fraud: so also, the abandonment of a speculation whilst the result is uncertain may be both honest and politic, as it entirely differs from undue preference of one Creditor to others after a debt has been incurred [14 Moo. Ind. App. 231-2].

Proceedings were taken under the Indian Insolvent Act, 11th and 12th Viet. c. 21, and the proceeds of certain goods claimed by the Official Assignee, paid by the Assignee into the Bank of Bengal. In a suit brought in the High Court at Calcutta, by A. against the Official Assignee, claiming the proceeds of the goods paid into the Insolvent Court:—Held, on the Court making a decree in favour of the Plaintiff, that the High Court, being a Court of Law and Equity, had power to award interest on the amount, as against the Official Assignee [14 Moo. Ind. App. 232-233].

A cause was heard before a single Judge of the High Court, and a decree made

* Present: Sir James William Colville, Sir Robert Phillimore (Judge of the High Court of Admiralty), Sir Joseph Napier, Bart., the Lord Justice James, and the Lord Justice Mellish.

by him dismissing the suit. An appeal was made to the same Court in its appellate jurisdiction before two Judges. The Court was divided in opinion; the Chief Justice holding that the judgment should be reversed, and the Puisne Judge that it ought to be affirmed; and, under the 36th section of the Letters Patent of 1865, creating the High Court, a decree of reversal was ordered. On appeal, the Judicial Committee, without expressing any opinion whether the 36th section was applicable, having regard to the 26th rule of the High Court, directed the appeal to be heard on the merits [14 Moo. Ind. App. 221-222, 229].

The question involved in this appeal respected the right of the Appellant to the proceeds of goods bought by the Respondent at Manchester, and [210] shipped through the firm of Small and Co. in London, to Balfour and Co. at Calcutta, for sale under an agreement between these parties. The proceeds of the sale were claimed as against the Respondent by Cochrane, the former Official Assignee of the Court of Insolvent Debtors at Calcutta, of one James Hamilton Robinson, an Insolvent, who was one of the Partners, and, at the time of the transaction herein-after mentioned, the resident Partner at Calcutta of the Firm of Balfour and Co., the Consignees, for sale.

The suit was instituted by the Respondent against Cochrane, as the Official Assignee of the estate of Lewis Balfour, senior, and James Hamilton Robinson, two of the Partners in the Firm of Messrs. Balfour and Co. The firm of Balfour and Co. consisted of Lewis Balfour, senior, James Hamilton Robinson and Lewis Balfour the younger. At the time of presenting the petition of insolvency, on the 17th of February, 1867, by James Hamilton Robinson, the other two Partners were in England.

The Firm of Balfour and Co. carried on trade as Merchants in Calcutta for many years, and the Firm of Small and Co., in London, was the corresponding House in England, with whom the Firm of Balfour and Co. had been connected in business for many years. Various shipments were made, from time to time, by the Firm of Small and Co. to the Firm of [211] Balfour and Co., not merely on account of the Firms of Balfour and Co. and Small and Co., but on account of others in connection with the two Firms. In the year 1862 an agreement in respect of the purchase and shipment of goods to Calcutta was entered into between the Firms of Balfour and Co., Small and Co., and Bolton and Barlow, Merchants, of Manchester, the effect of which was, that such goods as Small and Co. and John S. Bolton and Barlow should deem advisable should be bought by John S. Bolton and Barlow, and John S. Bolton and Barlow should charge no commission for buying and examining the goods, but to charge only for packing and making up the goods. Small and Co. were to effect marine insurance, charging no commission. John S. Bolton and Barlow were to draw at six months on Small and Co. for costs of goods, including packing charges. The Bills were to be discounted by Overend, Gurney and Co., at $1\frac{1}{2}$ per cent. in excess of Bank minimum rate, Balfour and Co. to remit their three months' or six months' drafts, as might appear most desirable, on Small and Co., in favour of John S. Bolton and Barlow, which Overend, Gurney and Co. agreed to take at $1\frac{1}{2}$ per cent. above Bank minimum rate for three months, and $1\frac{1}{2}$ per cent. for six months, as provision for said six months' drafts. And it was further provided, that Balfour and Co., on sale of goods, were specially to remit proceeds to Overend, Gurney and Co. in first-class Bills drawn in favour of Overend, Gurney and Co., and Overend, Gurney and Co. agreeing to give up Balfour and Co.'s drafts on Small and Co. on receipt of remittances under rebate, Balfour and Co. to charge no commission for settling or guaranteeing sales, merely charging actual disbursements incurred. [212] In the event of Small and Co. being under cash advances, John S. Bolton and Barlow agreed to find cash for one-third the amount. Under the agreement the three several Firms were jointly interested as Partners in the profit or loss arising on such shipments.

In pursuance of this agreement, goods were, from time to time, purchased by the Firm of John S. Bolton and Barlow, and shipped to the Firm of Balfour and Co. in Calcutta, until some time in 1863, when John S. Bolton retired from the Firm of John S. Bolton and Barlow, which thenceforward was carried on under the style of

Thomas Barlow and Brother. After the retirement of John S. Bolton, the agreement was adhered to and adopted in all respects by Thomas Barlow and the Firms of Balfour and Co. and Small and Co., and various shipments were made to Balfour and Co., on triplicate account for a series of years, except that John S. Bolton had no interest therein. After the failure of Overend, Gurney and Co. the remittances were made to the Firm of Small and Co. by the Firm of Balfour and Co.

In the months of September, October, and November, 1866, Thomas Barlow purchased and shipped, in terms of the original agreement, certain goods to Messrs. Balfour and Co. The goods so shipped arrived in Calcutta, Bills of lading duly endorsed of the same having been previously received, by the Firm of Balfour and Co. at Calcutta, and which Bills so duly endorsed came to the possession of James Hamilton Robinson, the only Partner of the Firm of Balfour and Co. then residing at Calcutta.

In December, 1866, or, at latest, on the 1st of [213] January, 1867, an agreement was come to between the Respondent and Small and Co. and Balfour and Co., whereby, in consideration of the Plaintiff taking upon himself solely all the risk and responsibility attaching to the shipments (which had not then arrived in India), and discharging Small and Co. and Balfour and Co. from all liability to pay any losses which might accrue thereon, those Firms respectively transferred, assigned, and made over to the Respondent all their respective right, title, and interest in the said shipments. This agreement was reduced to writing in the form of a Letter from the Respondent's Firm to Balfour and Co., Calcutta, and signed by the Respondent for Thomas Barlow and Brother, by Small and Co., and by Lewis Balfour the elder for Balfour and Co.

The Letter was in terms as follows :

“ Manchester, 2nd January, 1867.

“ Messrs. Balfour and Co., Calcutta.

“ Dear Sirs.—Referring to the goods shipped on triplicate a/c under special agreement against which Messrs. Small and Co. have given their acceptances, you will please hand over all such goods (particulars of which we enclose) to Messrs. Barton, Baynes and Co., Calcutta. We agree to take said goods on our own risk and responsibility. We have agreed to return to Messrs. Small and Co. the following acceptances :—

	£	s.	d.			
	2943	8	2	due 13th March, 1867 a/c	Warwick Castle.	
	589	3	0	“ 1st April, “	“ Tantallon Castle.	
[214]	4707	5	2	“ 9th May, “	“ Knidworth Castle.	
	208	0	11	“ “	“ ditto.	
	804	5	2	“ 22nd May, “	“ Riversdale.	

“ In the meantime, until we hear that you have handed over the goods, we have made Williams, Deacon and Co. custodians for said acceptances, also of £217, 1s. 10d. paid by Messrs. Small and Co., for charges on account of the said goods. We refer you at foot to Messrs. Small and Co.'s signature, and also to Mr. Balfour and Messrs. Mattheson and Co.'s signatures, in confirmation of this. Messrs. Mattheson and Co. of course sign this in case any goods have arrived in Calcutta, and are delivered to Jardine, Skinner and Co. of Calcutta, and this Letter is sufficient authority in such case for Messrs. Jardine, Skinner and Co. to hand over the goods to Barton, Baynes and Co.—We are, dear Sirs, yours truly,

“ We confirm the above.

“ THOMAS BARLOW and Bro.

“ Mattheson and Co.

“ Small and Co.

“ Lewis Balfour.”

The Respondent, Lewis Balfour, for Balfour and Co. and Small and Co., by such Letter, concurred in directing J. H. Robinson, the only Partner of Balfour and Co. then resident at Calcutta, to hand over the said shipments to Messrs. Barton, Baynes and Co., of Calcutta, as Respondent's Agents, which he accordingly did in January, 1867, and Messrs. Barton, Baynes and Co. gave him the following receipt :—

[215] "Calcutta, May, 16, 1867.

Received from Messrs. Balfour and Co. the undermentioned invoices and Bills of lading as instructed by Messrs. Thomas Barlow and Brother, Manchester.

<i>Warwick Castle</i>	78/b.
<i>Fantallon Castle</i>	17/b.
<i>Riversdale</i>	30/c.
<i>St. Dunstons Castle</i>	143/b and c.

proceeds to be remitted to Messrs. Alexander Cunliffe and Co. for special appropriation.—B. B. and Co."

After the receipt of these Bills of lading, and on the 15th of January, 1867, James Hamilton Robinson received a Telegram from London, from Lewis Balfour, directing him to deliver the goods so shipped on triplicate account as aforesaid to the Firm of Barton, Baynes, and Co. In pursuance of this Telegram, Robinson, on the 18th of January, 1867, indorsed and delivered over the Bills of lading and goods to Messrs. Barton, Baynes and Co. At such time the Firm of Balfour and Co. had not merely stopped payment, but had been in insolvent circumstances for some years.

On the 17th of February, 1867, Robinson presented his petition of insolvency to the Insolvent Court in Calcutta, and was duly declared insolvent.

The then Official Assignee, on the 1st of March, 1867, demanded the re-delivery of the goods and documents from the Firm of Barton, Baynes and Co., who refused to comply with such demand.

An application to enforce the demand was made to the Insolvent Court, and by an Order of that Court of the 4th of March, 1867, Messrs. Barton, Baynes and Co. were directed to show cause, on the 11th of [216] March, why they should not re-indorse and deliver over to the Official Assignee all goods, Bill of lading, and other documents connected with such goods. The parties appeared and showed cause against such Order, which was, however, on the 16th of March, 1867, made absolute. Barton, Baynes and Co., in compliance with the Order, re-delivered over the goods, or the produce thereof, and the Bills of lading and other documents connected therewith.

Barlow then brought the present suit, on the 29th of June, 1867, in the High Court of Calcutta, against the Official Assignee, claiming the goods and the produce thereof, and also by his plaint claimed interest on the amount received and made over to the Official Assignee; and further prayed that the Order of the Insolvent Court might be cancelled.

The Official Assignee filed his written statement, setting up the several matters aforesaid, and prayed that the suit might be dismissed, as the relief sought could have been obtained in the insolvency proceedings.

The suit came on for hearing before the High Court in its ordinary original civil jurisdiction. Witnesses were examined, and on the 15th of June, 1868, Mr. Justice Norman, who sat alone, by his judgment decided in favour of the Official Assignee and against the claim of Thomas Barlow, on the ground of the transfer being fraudulent and void as against the Creditors of Balfour and Co.

Barlow appealed to the High Court in its appellate jurisdiction, and by his memorandum of appeal submitted that the judgment was erroneous, on the following grounds:—First, as the Court found that under the agreement mentioned in the plaint, the goods in question were shipped to Balfour and Co., and by [217] the terms of the agreement the proceeds of the goods were specifically appropriated for remittance home in first-class Bills; secondly, that the transfer of the 2nd of January, 1867, was *bona fide*, and for consideration; thirdly, that, even if no such transfer were established, the goods were placed in the hands of Barton, Baynes and Co., not by way of fraudulent transfer or preference, but to carry out the terms of the contract under which the goods were shipped; fourthly, that at the time of the insolvency of Robinson, the goods were not in his order or disposition; and, fifthly, that, at any rate, the Plaintiff had a joint interest in the goods and their proceeds, and the Court had jurisdiction to interfere, and ought to have interfered, to prevent the proceeds being divided between the general Creditors of Robinson.

The Respondent, by a memorandum of objections under section 348 of Act, No. VIII of 1859, submitted that Mr. Justice Norman should have declared that the

Firm of Balfour and Co. were Partners with the Firms of Small and Co. and Thomas Barlow in the goods in the plaint mentioned, and that the Firm of Balfour and Co. were held out and known as the only reputed Owners of the goods then in Calcutta; and that the Court should have found that the goods, at the time of making over the same by Robinson, the only Partner of Messrs. Balfour and Co. then in India, and at the time of presenting the petition on which the order of insolvency was granted, were, with the consent of the Plaintiff as such co-Partner, in the order and disposition of Robinson, vested in the then Respondent, under such adjudication, on behalf of the general Creditors of Balfour and Co.

The Chief Justice, Sir Barnes Peacock, was in [218] favour of reversing the decree of the 15th of June, 1868. Mr. Justice Markby gave his opinion for sustaining the decree; and the Judges of the Appellate Court being equally divided, the decree was reversed, in accordance with sect. 36 of the Letters Patent constituting the High Court. The Chief Justice proposed that the suit should be reheard before a full bench of Judges, but Justice Markby was of opinion the Court had not power to direct the case to be so reheard, and declined to accede to any such rehearing.

The Chief Justice, in his judgment, expressed his opinion, that there was a valid and *bona fide* transfer to the Respondents by the agreement of the 2nd of January, 1867; that there was no fraud or fraudulent preference within sect. 23 of the Indian Insolvent Act, 11th and 12th Vict. c. 21, and that the doctrine of reputed ownership under that Act had no application; and, moreover, that according to the true construction of the original agreement of 1862, there was a specific appropriation of the proceeds of the said shipments to meet the Bills drawn on and accepted by Small and Co. for the price, and that such specific appropriation bound the said shipments and their proceeds in the hands of Balfour and Co. and their Assignees, and, *a fortiori*, was good against the Assignee of one or two members of the Firm. In his judgment, the Chief Justice said: "It appears to me that this transaction of the 2nd of January was intended by the parties to be carried out, that it was honest and *bona fide*, and that the property in the goods passed by it to Messrs. Barlow Brothers. Further, I hold, that if the property did not pass to Barlow Brothers, the proceeds were specifically [219] appropriated for taking up the Bills of Balfour and Co. on Small and Co., and until those Bills were paid Mr. Robinson had no interest in the goods, which could justify his Assignee in stopping the remittance of the proceeds, or of taking the property out of the actual possession of the Plaintiff's Agents, Messrs. Barton, Baynes and Co. If the transfer of the 2nd of January, 1867, did not transfer the property and Mr. Robinson's interest under it, it is clear that Mr. Robinson was not entitled to the proceeds, but merely to one-ninth of the profits, if any, after all the costs and expenses should have been paid out of the proceeds. The speculation, however, as already shown, resulted in a loss. It has been urged that Small and Co. were in insolvent circumstances when the Letter of the 2nd of January was signed, but Small and Co.'s Assignees have not interfered. In that respect the case resembles *Thayer v. Lister* (30 L.J. (Ch.) 427). The Assignee of Robinson and Balfour had nothing to do with Messrs. Small and Co.'s insolvency or bankruptcy." Then, after observing that the Respondent had performed the agreement on his part, the Chief Justice proceeded:—"The question then is, whether the Assignee of Robinson, who would have been entitled to only one-third of one-third, or one-ninth of the profits, if any, would have been entitled to stop the remittances if the goods had not been delivered over to the Plaintiff's Agent, or was justified in taking the goods or the proceeds out of the hands of the Plaintiff's Agent, and to administer them for the benefit of the general body of Creditors of Robinson and Lewis Balfour the elder. It appears to me that he is not, and that it ought to be declared that [220] the goods and proceeds are the property of the Plaintiff."

Mr. Justice Markby agreed in opinion with Mr. Justice Norman, and based his decision on the grounds of the three Firms being Partners in the shipments in question, and of the agreement of the 2nd of January, 1867, being a fraudulent preference of the Respondent by Small and Co. and Balfour and Co., stating that it was rather a question of fact than of law. On the point of the reputed ownership of the goods by Balfour and Co. under the Indian Insolvent Act, he said that, so far as he had formed an opinion, he entirely concurred with the Chief Justice. He also intimated

an opinion that it was not open to the Respondent on the pleadings and issues to contend that the proceeds of the shipments were specifically appropriated.

By the decree made thereon in favour of the Plaintiff, the Defendant was ordered to pay the Plaintiff the sum of Rs. 95,279. 10a. 1p., together with interest at 6 per cent. from the dates and upon the amounts in the decree specified, to the date of realization.

The Appellant appealed to Her Majesty in Council from this decree.

After the appeal to England, Albert Birmingham Miller was appointed Official Assignee and Assignee of the estate and effects of Robinson and Lewis Balfour the elder, in the place of John Cochrane, the original Appellant; and by an Order in Council Miller was substituted in the appeal in the place of Cochrane.

Sir R. Palmer, Q.C., and Mr. J. D. Bell, for the Appellant.—[221] There is a preliminary objection, which, if sustained, will render any further consideration with respect to the merits unnecessary. The cause was first heard before Mr. Justice Norman, who dismissed the suit, and such dismissal having been affirmed by Mr. Justice Markby, who sat with the Chief Justice, Sir Barnes Peacock, on the hearing of the appeal, but who differed from him, we submit, that the High Court in its appellate jurisdiction ought to have affirmed the decree, and was not warranted in giving a decision against the Appellant. The 36th section of the Letters Patent of 1865, constituting the High Court at Bengal (*a*) is not in any way contradicted or affected by the 26th rule of the High Court (*b*), which, in fact, only explains the 36th clause of the Letters Patent, and the Appellate Court ought, therefore, to have dismissed the appeal.

[Their Lordships declined expressing any opinion [222] on this point, and desired the Appellant's Counsel to proceed on the merits.]

Then upon the merits our contention is, that neither in Law nor Equity was there any such specific appropriation of the proceeds of the sale of the goods, to support the decree pronounced against the Official Assignee, awarding payment to the Plaintiff. Even if it should be held to have been a specific appropriation of the proceeds of the goods in a suit properly framed, which this was not, yet we submit, that the Order of the Insolvent Court, pronounced on the 16th of May, 1867, not having been appealed against, bound the Appellant as to the matter decided therein, and he had no right to sue: *Garbett v. Udale* (5 Q.B. 408, 414); but having submitted to the jurisdiction of the Insolvent Court, he should have preferred his claim there. The assignment of goods to the Plaintiff, on which he grounds his suit, so far as the assignment purported to be a rescission of the contract or agreement theretofore existing between the Plaintiff and the Firm of Balfour and Co. and Small and Co., was absolutely null and void against the Official Assignee: *Dutton v. Morrison* (17 Ves. 193); *In re Wait* (J. and W. 605-8); *Barker v. Goodair* (11 Ves. 85); *Taylor v. Fields* (4 Ves. 396); *Young v. Keighly* (15 Ves. 557). [The Lord Justice James:—This differs from ordinary partnerships. It is a series of joint adventures.] The two firms of Balfour and Co. and Small and Co. at the time of the assignment, being in utterly insolvent circumstances, and the assignment, made within two months of the filing of the petition of Robinson, such an assignment was a voluntary and

(*a*) Sect. 36 provides, that any function directed to be performed by the High Court in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or Division Court, constituted under the provisions of the Act, the 24th and 25th Viet., c. 104, "and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority; but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail."

(*b*) Rule 26 directs that "appeals from the decision of one Judge in the exercise of ordinary original civil jurisdiction shall be heard and determined by at least two other Judges; and in case the two Judges who exercise the appellate jurisdiction differ in opinion, they may direct that the case shall be reheard before a Division Court, consisting of themselves and some other Judge or Judges; and if no such Order be made, the decision shall be affirmed." See Rules, Macpherson's New Civil Proceedings for Brit. India, Appx., p. cxvi. [Ed. 1871].

[223] fraudulent preference, in no way binding upon the Official Assignee, or the Creditors of the Firm of Balfour and Co. Fraud will vitiate a contract of sale: the principles are clearly laid down in *Attwood v. Small* (6 Cl. and F. 232). It was a colourable and fraudulent assignment as against the general body of the Creditors of Messrs. Balfour and Co., whose consent was in no way obtained by Lewis Balfour, senior, the only member of the Firm of Balfour and Co. who entered into the agreement. Indeed the Firm of Small and Co. and Lewis Balfour, senior, were precluded from making such assignment by being in insolvent circumstances. The indorsement of the Bills of lading and delivery over of the goods to Barton, Baynes and Co. by Robinson, having been made within two months before insolvency, were acts fraudulent and void under the 24th Clause of the Indian Insolvent Act, 11th and 12th Vict., c. 21, which is similar to the Statute, 7th Geo. 4, c. 57, s. 32, under which Statute, in similar circumstances, an assignment has been held void as against the Official Assignee: *Becke v. Smith* (2 M. and W. 196). So by the Bankruptcy Act, 12th and 13th Vict. c. 106, s. 126: *Marks v. Feldham* (Law Rep. 5 Q.B. 279); and by the Jamaica Insolvent Act, 11th Vict. c. 28, s. 67: *Nunes v. Carter* (4 Moore's P.C. Cases (N.S.), 222; Law Rep. 1. P.C. 349). Even if such acts could be deemed merely voidable, as against the Official Assignee, by the proceedings in the Insolvent Court and the High Court, the Official Assignee sufficiently manifested his opposition to the same, and his right to treat the same as invalid; and we rely on both such grounds, whether fraudulent and void, or merely [224] voidable; and we submit, that the 24th clause of the above Act not merely renders such acts fraudulent and void, but expressly and positively directs that such acts shall be deemed fraudulent and void from their inception.

Again, the goods were in the order and disposition of the Firm of Balfour and Co. up to and at the time of the adjudication of insolvency against Robinson, and as such passed to, and became vested in, the Official Assignee of Robinson, under the provisions of the 23rd section of the Indian Insolvent Act, 11th and 12th Vict., c. 21.

And, lastly, we submit that, with respect to interest, the Official Assignee having received the proceeds of the goods under the Order of the Insolvent Court, and the amount so received having been paid into the Bank in accordance with the rules of the Court, and no application being made to him, or the Court, to invest the same, the Plaintiff was not entitled to the interest decreed.

Their Lordships directed the Respondent's Counsel to confine themselves to the question of interest.

Mr. Jessell, Q.C., and Mr. C. E. Pollock, Q.C., and Mr. Bowring, for the Respondents.—Interest was properly allowed by the Court below. The proceeds of the sale of the goods were paid into Court, and no step was taken by the Official Assignee to invest the proceeds. In *Young v. Guy* (8 Beav. 147) a party recovered payment at law, but on equitable grounds repayment was decreed, and the Court held that the Plaintiff in equity was entitled to interest on the amount recovered from the time of its payment.

[225] Judgment was reserved, and now delivered by

The Lord Justice Mellish (July 20, 1871).—This was a suit brought in the High Court of Calcutta by Thomas Barlow, who traded under the style of Thomas Barlow and Brother, against the Defendant, who is the Official Assignee of the Court for the relief of Insolvent Debtors at Calcutta.

The plaint set out the terms of an agreement made in 1862 by the Plaintiff's Firm, the Firm of Small and Co., of London, and the Firm of Balfour and Co., of Calcutta, consisting of Lewis Balfour the elder, James Hamilton Robinson, and Lewis Balfour the younger, respecting goods to be bought by the Plaintiff's Firm at Manchester, and shipped by Small and Co. to Balfour and Co. at Calcutta, by which each of the three Firms was to take one-third share of profit or loss; the Plaintiff's Firm to draw Bills at six months on Small and Co. for the cost of the goods, the Bills to be discounted by Overend, Gurney and Co.; Balfour and Co. to remit Bills on Small and Co. as a provision for the six months' Bills, and Balfour and Co., on the sale of the goods, specially to remit the proceeds to Overend, Gurney and Co., and Overend, Gurney and Co. thereupon to give up Balfour and Co.'s

drafts on Small and Co. under rebate. The plaint states, that the Plaintiff, under that agreement, in September and October, 1866, purchased and shipped goods to Balfour and Co. in Calcutta, and that after the goods were shipped, another agreement was come to between the Plaintiff, Small and Co., and Balfour and Co., whereby, in consideration of the Plaintiff taking upon himself all risk attaching to the ship-
[226]ments, and discharging the Firms of Small and Co. and Balfour and Co. from all liability to pay any losses, these Firms made over to the Plaintiff all their respective right, title, and interest in the shipments: that shortly after the Plaintiff directed Balfour and Co. to hand over the shipments and documents relating to the same to Barton, Baynes and Co., and that the Bills of lading were accordingly handed over by Balfour and Co. to the Firm of Barton, Baynes and Co.; that the shipments arrived in Calcutta, and were taken possession of by Barton, Baynes and Co., and the larger portion thereof sold on account of the Plaintiff: that James Hamilton Robinson filed his petition in the Court for the relief of Insolvent Debtors at Calcutta on the 7th of February, 1867, and Lewis Balfour the elder, on the 18th of May, 1867; that the Defendant, as such Assignee, on the 1st of March, 1867, demanded possession of the goods from Barton, Baynes and Co., and on their refusal to comply with the demand, he procured an Order from the Insolvent Court requiring them to re-indorse and re-deliver to the Defendant, all the documents and goods belonging to the estate of the Insolvent as were then in their possession, and to account to him for all they had parted with; that in consequence of that Order Barton, Baynes and Co. handed over twelve bales of goods to the Defendant, and paid to him the net proceeds of those which had been sold, Rs. 90,563 10a. 1p. The plaint concluded with a prayer, that the Plaintiff's rights in respect of the goods, or the net proceeds thereof, and money might be declared, and that the Defendant might be directed to pay the same, with interest, to the Plaintiff.

[227] The Defendant, in his answer, denied the alleged agreement by which the Firms of Small and Co., and Balfour and Co., assigned their interest in the shipments to the Plaintiff: and also alleged, that such agreement, if made, and the delivery of the Bills of lading and goods to Barton, Baynes and Co. under it, was a fraud upon the laws relating to Bankruptcy and Insolvency; that it was void from having been made within two months of the insolvency of James Hamilton Robinson; and that the goods, at the time of James Hamilton Robinson filing his petition, were in his possession, order and disposition, with the consent of the true Owner.

The case came on to be tried before Mr. Justice Norman: and it was proved at the trial, that the original agreement for the consignment of goods to Calcutta was acted upon by the three Firms up to the failure of Overend, Gurney and Co., in May, 1866; that after that time the parties never obtained any Firm to take the place of Overend, Gurney and Co.; that the Plaintiff, nevertheless, bought the goods in question at Manchester, and shipped them through Small and Co., in four Ships, to Balfour and Co., in Calcutta: that the Plaintiff drew Bills on Small and Co., who accepted them for the price of the goods, and discounted the Bills with Messrs. Cunliffe. A correspondence was given in evidence between the Plaintiff and Small and Co., and Lewis Balfour, senior, who was then in London, during the autumn of 1866, with reference to procuring a Firm to supply the place of Overend, Gurney and Co.; but that no agreement was come to on that subject; that early in December, 1866, Small and Co. stopped payment, and dishonoured Bills drawn by Balfour and Co. That it was known [228] to all the parties in London that the stoppage and insolvency of Small and Co. would necessarily involve the stoppage and insolvency of Balfour and Co. That on the 15th of December, 1866, Small and Co. wrote as follows to the Plaintiff:—"Pending the completion of arrangements, we have sent out a Telegram, jointly with Messrs. Balfour, directing all funds and goods then in their hands to be handed over to Jardine, Skinner and Co." And, on the 18th of December, the Plaintiff wrote to Balfour and Co. at Calcutta:—"In consequence of correspondence with Messrs. Small and Co., you will please hand over the goods as per annexed list, to Messrs. Barton, Baynes and Co. They are bought, as you are aware, under special agreement, in triplicate account." On the 2nd of January, 1867, the agreement for the transfer of Small and Co.'s and Balfour and Co.'s interests in the shipments was made, and is contained in a Letter of that date from the Plaintiff to Balfour and Co., and was also signed in the corner by Small and

Co., and Lewis Balfour. [His Lordship read the Letter (*ante* [14 Moo. Ind. App.], p. 213), and proceeded:—]

The subsequent facts were proved to have taken place as alleged in the plaint. Upon this evidence Mr. Justice Norman held, that the transfer of the interest of Balfour and Co. to the Plaintiff by the agreement of the 2nd of January, 1867, was fraudulent and void as against the Defendant, and on that ground dismissed the suit with costs. From that judgment an appeal was heard before two of the Judges of the High Court, the Chief Justice, Sir Barnes Peacock, and Mr. Justice Markby. Mr. Justice Markby was of the same opinion as Mr. Justice Norman, and thought his judgment ought to [229] be affirmed, but the Chief Justice was of a contrary opinion, and, in accordance with his opinion, and under sect. 36 of the Letters Patent of the High Court, the judgment of Mr. Justice Norman was reversed, and a decree was made in favour of the Plaintiff, and the Defendant was ordered to pay to the Plaintiff, Rs. 95,279 10a. 1p., together with damages, in the nature of interest at 6 per cent. from the days when the cause of action as to each part of the principal arose up to realization, with the Plaintiff's costs of the original suit and of the appeal.

From this decree an appeal has been brought before their Lordships, and a preliminary objection to the decree was raised, that the 36th clause of the Letters Patent of the High Court was not applicable; and that under the rules made by the Judges of the High Court, the Judges who heard the appeal being equally divided in opinion, judgment of affirmance of the Decree of the Court below ought to have been entered. Their Lordships do not think it necessary to give any opinion on this question. They are of opinion, that it is their duty to hear and decide the case on the merits, and that it is quite immaterial how the judgment in the High Court ought to have been entered in consequence of the difference of opinion between the Judges, because the Judgment of the High Court, as entered, cannot be reversed, if it was right upon the merits.

With respect to the case on the merits, it is clear that the goods were not in the order and disposition of James Hamilton Robinson at the time he petitioned the Insolvent Court, because he had previously indorsed and handed over the Bills of lading relating [230] to all the goods to Barton, Baynes and Co., and the principal question to be determined is, was the transfer of the interest of Balfour and Co. in the shipments to the Plaintiff, by the Agreement of the 2nd of January, 1867, binding on the Defendant. Their Lordships are of opinion, that Lewis Balfour the elder, had, under the circumstances of this case, authority as a Partner in the firm of Balfour and Co. to bind his Firm to that Agreement by attaching his signature to the Letter of the 2nd of January, 1867, and that, therefore, the Agreement was binding upon the Defendant unless the Defendant can make out that the Agreement was rendered void by the provisions of the 11th and 12th Viet. c. 21, or was a fraud upon the Creditors of Balfour and Co.

It is desirable, in the first instance, to consider what was the position and the legal rights of the parties at the time the Agreement of the 2nd of January, 1867, was entered into. Mr. Justice Markby, in his judgment, states his opinion to be, that if the assignment of the 2nd of January, 1867, had not been made, the general Creditors of Balfour and Co. would have been entitled to one-third of the goods. Their Lordships cannot agree with this opinion. It is obvious that, even if Mr. Justice Markby was right in thinking that the property in the goods whilst on board Ship was vested in the three Firms; still, that the Creditors of Balfour and Co. could have no right to any part of the proceeds of the goods until all the liabilities of the three Firms, with reference to the adventure, were first satisfied; and one of these liabilities was an obligation to satisfy the Bills drawn by the Plaintiff on Small and Co. Their Lordships also agree with the Chief Justice, and for the reasons [231] stated by him, that neither the circumstances that the parties had not procured any Firm to supply the place of Overend, Gurney and Co., nor the insolvency of Small and Co., and of Balfour and Co., interfered with the right of the Plaintiff to have the agreement between the three Firms carried out: that is to say, his right to have the goods sold in Calcutta, and the proceeds returned to England in good Bills, for the purpose of satisfying the Bills drawn by the Plaintiff on Small and Co.

Their Lordships are also of opinion, that the insolvency of Balfour and Co.

deprived them of the right of acting as Factors for the three Firms in the sale of the goods at Calcutta, and the remission of the proceeds to England, and that, therefore, the orders to transfer the goods first to Jardine, Skinner and Co., and afterwards to Barton, Baynes and Co., which were sent out to Calcutta in December, 1866, were proper orders, and their Lordships think, that James Hamilton Robinson would have been perfectly justified in handing over the Bills of lading to Barton, Baynes and Co., even if the Agreement of the 2nd of January, 1867, had never been made, and the Telegram which was sent out in consequence of it never sent out. Such, then, being the position of the parties, was the Agreement of the 2nd of January, 1867, a fraudulent Agreement as respects the Creditors of the Firm of Balfour and Co.? When this Agreement was entered into it was quite uncertain whether the consignment of these goods to Calcutta would turn out a profitable or an unprofitable adventure, and their Lordships are of opinion, that there is nothing fraudulent or improper in an insolvent Firm parting with or putting an end to a current speculation, the result of which [232] is still uncertain, on the best terms they are able. On the contrary, such a course is an honest one to follow. If an honest man discovers he cannot pay a bet if he loses, and is ready to rescind the bet before the event happens, he is not bound to take the chance of winning for the benefit of his Creditors. The rescission and abandonment of a speculation, whilst the result is still uncertain, is a totally different thing from preferring one Creditor to others after a debt has been incurred. In the present case it seems to their Lordships clear that, on the 2nd of January, 1867, the Plaintiff was not a Creditor of Balfour and Co., and could not have proved against the estate of Balfour and Co. in respect of these transactions, and this alone conclusively proves that the agreement was not a fraudulent preference.

It remains to be considered, whether the Agreement of the 2nd of January, 1867, and the transfer of the Bills of lading under it, was rendered void by the 11th and 12th Vict. c. 21, s. 24, and their Lordships are clearly of opinion, that the case does not come within that section. The fact that the Plaintiff was not at the time a Creditor of the Firm of Balfour and Co., takes the case out of the section, and, moreover, the Agreement was not a voluntary assignment by Balfour and Co., and still less by James Hamilton Robinson, of any defined interest in the goods, but was an agreement whereby, in consideration of being freed from all liability to loss, Balfour and Co. sold to the Plaintiff their interest in any profit that might be made in the speculation. A further objection was taken that, even assuming the judgment of the Chief Justice to be correct on the general merits of the case, the Plaintiff was not entitled to interest. On [233] this point it is material to observe that, in the account which was drawn up between Barton, Baynes and Co. and the Defendant as Official Assignee, interest is charged, and it, therefore, appears that by the wrongful act of the Defendant the Plaintiff has been deprived of money which was actually making interest, and their Lordships are of opinion that, under these circumstances, a Court of Equity would clearly be disposed to give interest; and it is by no means clear that, even in a Court of Law, although the ordinary rule is, that in actions for money had and received interest is not given, the fact of the Defendant having received interest would not be a sufficient ground for making the Defendant liable to pay interest; and as the High Court have the powers both of a Court of Equity and a Court of Law, their Lordships are of opinion that interest has been properly given.

On the whole, their Lordships will recommend to Her Majesty that the decree of the High Court be affirmed, and this appeal dismissed with costs (see *Ex parte Copeiand*, 3 Dea. and Ch. 199; and *Ex parte Prescott*, *Ibid.* p. 218).

[Mews' Dig. tit. BANKRUPTCY, E. THE BANKRUPT, I. *Fraudulent Preference*, 1. *Generally*; tit. INTEREST, A. ALLOWANCE OF, 1. *In General*. S.C. 8 Moo. P.C. (N.S.) 127; L.R. 3 P.C. 733.]

[234] FAEZ BUKSH CHOWDRY,—*Appellant*: FUKEROODEEN MAHOMED ALIASSUN CHOWDRY,—*Respondent* * [July 18, 1871].

On appeal from the High Court of Judicature at Fort William.

Suit by A. to establish his right to execute Decrees, against B. and another, by attachment and sale of lands in possession of C., B.'s Son; on the ground, that the lands were held by C. benamée, to defeat B.'s Creditors. Evidence was given that C. was the real Purchaser of the property sought to be attached, and not a benamée holder for B. Nothing but hearsay evidence was given by A. that it was a benamée transaction. Held, by the Judicial Committee, following *Sreemanchander Dey v. Gopaulchunder Chuckerbutty* (11 Moore's Ind. App. Cases, 43), that although there may be, with respect to benamée transactions, circumstances which might create suspicion and doubt as to the truth of the case, yet that the appellate Court will not decide upon mere suspicion, but upon legal grounds established by evidence, and that from the evidence in the suit, a *bona fide* purchase by C. was established.

The Respondent in this appeal was the Plaintiff in the suit. The Appellant and Kurreeem Buksh Chowdry and Rohomutunissa Chowdranee, were the Defendants.

The object of the suit was for a declaration that a certain estate which the Appellant had purchased was the property of Kurreeem Buksh Chowdry and Rohomutunissa Chowdranee (the Widow of Kurreeem Buksh Chowdry's Brother), and liable to be sold under an execution decree obtained by the Respondent against them.

The facts of the case were these:—

The estate in dispute consisted of a 13 annas 11 gas, and 1 core, share of a moiety of Pergunnah Belgachee, and the whole of Pergunnah Bajoo Rass Mohobutpore. This estate formerly belonging to one Soriutoollah Chowdry and Kurreeem Buksh Chowdry, who many years ago made over the greater part thereof to their respective Wives, in lieu of a marriage settlement. Soriutoollah Chowdry having died, his Widow, together with Kurreeem Buksh Chowdry and his Wives, mortgaged the property to Khajah Abdool Guney, to secure a loan of Rs. 30,000, on the 24th Bysack, 1256 (April, 1849); and the Khajah, on default in payment, took proceedings to foreclose the mortgage; and on the 27th of April, 1853, obtained a decree for possession.

On the 6th of January, 1857, he sold the estate to the Appellant for Rs. 32,501, and executed a Deed of sale. The Appellant paid in cash Rs. 25,000, and gave a Bond and mortgage of a portion of the property to the Vendor for the balance. The money which was paid in cash was raised by granting a putnee of the estate to one Gunga Narain Chowdry and borrowing from him on mortgage and a Bond, on which the Appellant alone was liable, for the sum of Rs. 4000.

At the time when this sale took place, a portion of the property having been seized for the debts of Kurreeem Buksh Chowdry, the Khajah had put in a claim to the estate as being his, which claim was [236] in May, 1857, allowed, and the property was directed to be released.

The Appellant obtained possession of the estate, and paid the Government revenue and received the rents.

On the 27th of July, 1852, the Respondent obtained decrees against Kurreeem Buksh Chowdry, and the Widow of Soriutoollah Chowdry, for the sum of Rs. 3686. 0. 5.

On the 3rd of July, 1860, he seized the property in question under an Order for execution, alleging the property to be that of the judgment Debtors. On the same day the Appellant filed a petition claiming the property as his own; and on the 31st of December, 1861, the Judge, Mr. Kemp, after hearing evidence, decided in the Appellant's favour, and released the property from attachment.

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colville, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

On the 14th of May, 1863, the Respondent—after suing in the Court of Patna in the year 1862, which Court refused to entertain the suit on the ground of jurisdiction—brought the present suit in the Court of the Principal Sudder Ameen of Furreedpore, against the Appellant. The object of the suit was to establish the Respondent's right to put in execution two decrees which he held against Kurreen Buksh Chowdry by attachment and sale of certain lands, which lands he contended belonged to Kurreen Buksh Chowdry, though standing in the name of his Son, the Appellant, as he insisted, benamtee, and which the Respondent contended, was the property of the Appellant and not his Father.

The Appellant put in a written statement, relying, by way of defence, first, on the claim being barred by the Law of limitations; and secondly, on the property being really his own by purchase and not [237] held benamtee. The ground on which he contended that the law of limitations applied was, that the suit being brought to set aside a summary decision, by Act, No. 14 of 1859, should have been brought within a year from the date of the decision, and that as the decision was given on the 31st of December, 1861, and the suit not actually commenced until the 14th of May, 1863, even allowing for the time he was suing in the wrong Court, it was too late.

The Respondent filed a written statement, which was an echo of the plaint, but contesting the applicability of the law of limitation.

The Respondent examined Witnesses to prove that the property was held by the Appellant, *benamtee* for his Father; but the Witnesses' testimony amounted to nothing more than hearsay evidence. On the other hand, the Appellant proved actual possession in himself, as Owner, by Witnesses, who were tenants paying him rent.

On the 20th of December, 1864, the Principal Sudder Ameen of Furreedpore (Oopendro Chunder Nyarutno, on the remand of the case to that Court), decided that the suit was barred by the law of limitations; and the principle upon which he came to that conclusion was that as the suit had to be brought within one year from the 30th of December, 1861, yet, even allowing for the time which was lost in suing in the Court at Patna, more than a year elapsed before the suit was brought; and he dismissed the suit with costs.

Against that decision the Respondent appealed to the High Court at Calcutta. The appeal was heard by the Justices Morgan and Shumboo Nauth Pundit, who, on the 15th of May, 1865, decided, [238] that if the suit was one to set aside the summary Order, it was barred by limitation; but that in the opinion of the Court, the suit was not one within that definition, but was a regular suit to set aside an impediment to the Plaintiff's obtaining an execution of a decree, and, therefore, that the one year law of limitation did not apply, and the Court remanded the case for trial on the merits.

The suit being remanded, the Principal Sudder Ameen, of Furreedpore (Mr. L. W. Hutchinson), on the 17th of July, 1865, dismissed the suit on the merits, he, in his judgment, giving his reasons for holding that the Appellant was the real Purchaser and not a benamtee holder. The material part of his judgment was in these terms:—"The Plaintiff's claim hinges on the meagre allegation, that the purchase of the shares in the Pergunnahs, from Khajah Abdool Guney of Dacca, by the second Defendant, was benamtee or fictitious, though the conveyance itself, upon which the transfer of the property is said to have taken place, is admitted to be strictly legal and formal. Of course, the Plaintiff is unable to prove from documents that the purchase was benamtee, and his Witnesses, eleven in number, merely suppose that the transfer of the property to the second Defendant was fictitious, but the supposition of these Witnesses is insufficient to turn the scale of evidence in the face of facts to the contrary. The execution of the Kabalah, and its registration, are unquestionable facts, and now it is to be seen, where did the second Defendant procure the money to make the purchase? His Father, the first Defendant, is an insolvent with several unsatisfied Decrees, so it is not likely that anybody with sense would accommodate him. The Son, a young man of energy, and [239] evidently known to his neighbours, came forward to rescue his paternal property, and his friends helped him. Khajah Abdool Guney, on the 21st Pous, 1263, took Rs. 25,000 in cash and a Bond for Rs. 7000 payable at a future date, and gave the property to the second Defendant; and another friend, one Gunga

Narain Chowdry, assisted him with Rs. 22,000 on condition that the second Defendant, after receiving the Pergunnahs from Khajah Abdool Guney, should pass them over to him in Putnee, and at the same time a Bond for Rs. 4000 was executed, and the money was generously lent. I am glad to observe, that the second Defendant did prove grateful to his benefactor, as there is ample evidence on record that the property was given in Putnee. For these reasons I think the benamtee not proved, and that the second Defendant bought the property in good faith and with his own money, or rather with the money for which he alone would have to make good, should he fail to repay Khajah Abdool Guney Rs. 7000 and the Chowdry Rs. 4000. The case is dismissed, with costs and interest."

The Respondent appealed to the High Court from this judgment, and a division Bench, consisting of the Justices, H. J. Bayley and Shumboo Nauth Pundit, on the 15th of January, 1866, reversed the decision of the Principal Sudder Ameen. The Court were of opinion, that the evidence of Khajah Abdool Guney showed that he had not intended to convey for the benefit of the Appellant alone but for that of the Father, from whom he expected it would devolve to his children for their support, and that the property was in fact restored to the same person from whom on foreclosure it had been taken, and that the Appel-[240]-lant's name was used benamtee. That the Plaintiff, as a Decree-holder, brought the action to obtain a declaration that the property in dispute, released summarily to the Appellant, one of the Sons of Kurreem Buksh Chowdry, the Debtor, as the Son's property is still the property of the Debtor, and so liable to sale in execution. That Khajah Abdool Guney, to whom the property was conditionally sold by the Debtor, was examined in the summary case of execution and an attested copy of his deposition was offered to the Lower Court by the Plaintiff as evidence long before its final disposal, and was without any objection on the part of the Appellant, received by the Court. That consequently, the Court allowed the copy of the deposition to be read at that stage of the case. That it appeared from that deposition and the evidence in the case, that Kurreem Buksh Chowdry was not in a solvent state; that he and (not as he and his Son alleged his Wife and another) had mortgaged the property to the Khajah; that on failure of payment as agreed to, the mortgage was in due course of law foreclosed; that the Khajah, notwithstanding that the property had become absolutely his, finding that Kurreem and his numerous children had no other means of subsistence, like a generous man offered to return the property to Kurreem and his Sons for their maintenance, provided the Khajah was repaid the money due to him; that though the sum due to him was below the market value of the property, if sold by competition, the Khajah was quite satisfied with a payment of the greater portion of his due in cash, and even agreed to receive a Bond for the remainder, Rs. 7000, from the Appellant, the second Son of the Debtor in whose name the conveyance was taken on [241] this occasion. That it further appeared that the money paid in cash to the Khajah was supplied by one Gunga Narain Chowdry as an advance, and the Conveyance was made by the Khajah, and the sums were Rs. 22,000, as consideration for a portion of the property taken by Gunga Narain Chowdry in Putnee, and another sum of Rs. 4000, for which he took a Bond from Faez Buksh. That Gunga Narain Chowdry being examined in this case, stated laconically, that he took the Putnee from the Son, lent the money to him, and that the Father had no rights left in the matter. That Gunga Narain Chowdry could not but be aware of the circumstances that must be naturally expected to have occurred when the Deed of conveyance was executed by the Khajah in the presence of Kurreem Buksh Chowdry. Yet that this Witness did not like to supply full details from which the Court could clearly understand that the Son alone treated with the Witness; and that the latter was the energetic young man the Lower Court assumed him to be; that that Witness was aware that the Son alone was treating with the Khajah, and that he (the Witness) had, in order to oblige the Son, as the Lower Court supposed, lent the money to him alone. That there was nothing in all that the Son was supposed to have done which the Father could not do, and make use at the same time of the name of the Son. That as that Witness held a Putnee, granted ostensibly by the Son, his interests, if not a generous desire to assist his Landlord under whom he was holding a Putnee, might have induced him not to be more full in his answer regarding the connection of the Father with the property in dispute, than he would

otherwise have been. The Court added, "We attach a greater importance to the pointed statements of [242] the Khajah. We do not think that it proves the case of the Son, because the Khajah in one place says, 'he does not know who holds the estate.' If he had sold to the Son alone, the Father had no occasion to disturb the possession of the Son. The real meaning of the transaction which the Khajah deposed to is this:—Knowing that the Father, and through him his children after the Father's death, would have no other means of subsistence, the Khajah agreed to return, as far as he was concerned, the property to the Father, from whom he had received it, thinking that the Father, and through him necessarily his children, might enjoy the property as a maintenance, and that after the Father's death it may come to the children as their inheritance. We do not understand that the Khajah ever considered that Gunga Narain Chowdry was advancing money to Faez Buksh Chowdry alone, or that he himself would have conveyed the property for an inadequate price to Faez Buksh Chowdry alone for his sole benefit and enjoyment. It is not attempted to be shown that there was any ground or inducement to this generous partiality in favour of that Son. The lower Court has then, we think, taken an erroneous view of the circumstances of the case, and required the Plaintiff (the Appellant) to prove more than he is bound to show. If the property in dispute, on the evidence of the Khajah, is proved not to be the exclusive property of Faez Buksh Chowdry, it can only be the property of the Father. In short, we find, that the Khaja returned it to Kurreem, from whom he had taken it, whatever be the ostensible proprietorship now set up. We are satisfied, therefore, on a full and careful consideration of the whole case, that the [243] claim of the Plaintiff is right, and that the decision of the lower Court dismissing the plaint was wrong. We accordingly reverse the judgment of the lower Court and decree the appeal and the plaint of the Appellant with all costs of both the Courts."

The Appellant filed a petition for review of judgment, which was admitted for hearing, and further evidence was taken, and he, according to the rules affecting appeals to Her Majesty in Council, preferred the present appeal from the judgment of the 15th of January, 1866, also petitioning the Court that the further evidence taken should be forwarded as part of the record for the purposes of the appeal.

Sir R. Palmer, Q.C., and Mr. J. D. Bell, for the Appellant.—This is not a case of benamée. Suspicious circumstances, of what is supposed to be a colourable transaction, are not sufficient. Positive proof must be given of the benamée. *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (11 Moore's Ind. App. Cases, 44). The estate was the sole and absolute property of the Appellant by purchase, and was not liable to be taken in execution under the decrees against Kurreem Buksh Chowdry and the Widow of Soritootollah Chowdry. But another objection exists as to the procedure. The plaint sought a declaration that the estate was liable to execution under the decrees against those parties, and the finding of the High Court that the estate belonged to Kurreem Buksh Chowdry did not entitle the Respondent to the relief sought. According to the Code of Civil Procedure Act, No. VIII. of 1859, sect. 246, the only mode of enforcing a decree where [244] property seized in execution is claimed by a third party, is by a summary suit, and there is no power in the Courts to entertain a suit by a Decree-holder against Kurreem Buksh Chowdry and the Widow of Soritootollah Chowdry. In order to sue a person in possession of property intended to be attached, it is necessary to make a declaration that the estate is that of the judgment Debtor.

Mr. Doyne, for the Respondent.—The Conveyance by Abdool Gunnee was for the benefit of Kurreem Buksh, and he took possession of the estate in the like manner as he had before the foreclosure. The use of the Appellant's name was benamée, and colourable to defeat Creditors. The question of benamée is settled in the cases of *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (11 Moore's Ind. App. Cases, 28) and *Gopeechrist Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53).

The Right Hon. the Lord Justice James.—In the judgment delivered in the case to which their Lordships have been referred, viz. *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (11 Moore's Ind. App. Cases, p. 43), there is this

passage:—"Undoubtedly there are in the evidence, circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the Appellant; but in matters of this description it is essential to take care that the decision of the Court rest not upon suspicion, but upon legal grounds, established by legal testimony." That principle is sufficient to dispose of this appeal, which only [245] differs from the case referred to in this respect, that in the appeal now to be decided, there is not, in their Lordships' opinion, any legal evidence to create suspicion, or any doubt to be entertained with regard to the substantial honesty of the transaction.

It appears quite clear that the Father, whose judgment Creditor obtained this property, was in insolvent circumstances, that he had not a farthing of money with which to purchase the property in question; that the property was then in the hands of a Mortgagee, who had foreclosed, and had become the absolute Owner of the property, so that it was his to deal with as he thought fit.

Having probably, as was suggested in the judgment of the High Court, kind considerations for the Father and the family, he was induced not to insist on retaining the whole value of the property so acquired, but to allow it to go back to the family, on being satisfied or secured, in some way or other, the real amount of the debt for which he had seized the property.

In that state of things the way in which the transaction was completed was this,—the Son gets a man to lend him part of the money in consideration of a Putnee and a bond. The Son gives a mortgage to the original Mortgagee for parting with the interest which he had obtained under the foreclosure: he gives his Bond, and then the Conveyance is made to the Son.

Their Lordships think, in accordance with the judgment of the High Court, that this was done for the benefit of the family. The whole circumstances show, that it was open to the Mortgagee and to the family to do it, not by a Conveyance to the insolvent [246] Father, or in trust to the insolvent Father, which would give it to the Creditors, who had no right, equitable or moral, with regard to this property, but to give it in such a way as best to effect their object, that is, to give it to the Son, who seems to have been the proper man to carry out the arrangement for himself and for his family.

Under those circumstances, their Lordships think, that the judgment of the Principal Sudder Ameen was right; and they will, therefore, humbly recommend to Her Majesty, that the judgment of the High Court ought to be reversed, and that in lieu thereof there should be an order dismissing the appeal from the Principal Sudder Ameen, with costs.

The Appellant is to have the costs of this appeal.

[247] KOOLDEEP NARAIN SINGH.—*Appellant*; THE GOVERNMENT and Others.—*Respondents* * [July 18, 1871].

On appeal from the High Court of Judicature at Fort William, in Bengal.

An auction Purchaser of a Zemindary at a sale for arrears of Government revenue, cannot resume lands, held under a ghatwally tenure, at a fixed rent, created before the Permanent Settlement, on the ground, that the services have ceased to be performed by the Ghatwal, and that there was no necessity for such services; if the Government refuse to renounce its claim to the performance of such ghatwally services [14 Moo. Ind. App. 255-6].

The omission of words of inheritance in a Sunnud, dated in 1743, granted by the then ruling Power, which confirmed a previous Grant, not in evidence, of the lands being held ghatwally, is not sufficient proof, *per se*, that such

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), the Right Hon. Sir Joseph Napier, Bart., the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

Grant was not hereditary, when evidence of long and uninterrupted usage shows that the lands have descended from Father to Son as ghatwally for more than a hundred years [14 Moo. Ind. App. 256].

Before the British rule in India, it was customary, where the tenure was in fact hereditary and passed as hereditary from Father to Son, to take out a new Sunnud from the ruling Power on each descent [14 Moo. Ind. App. 256].

This suit was instituted by the Appellant to obtain possession of Mouzahs Kluttee and Domriah, appertaining to Pergunnah Bhaugulpore. The Appellant founded his title as auction Purchaser, under a sale by auction of the zemindary, on the 28th of April, 1863, for arrears of Government revenue under which the Mouzahs are held.

The Respondents disputed the Appellant's claim [248] on the ground, that the Mouzahs were held under an hereditary ghatwally tenure at a fixed rent created before the Permanent Settlement.

The Appellant admitted that the Mouzahs had been granted by Sunnud, on condition of ghatwally services, but insisted that as the performance of such services had been dispensed with for a long time, and that, as there was no longer a necessity for such services, he was entitled to put an end to the tenure and recover possession.

The original Grant creating the tenure was not produced, but it was in evidence that in 1743, more than twenty years before the East India Company obtained the Dewanny, a Sunnud confirming the tenure was granted to one Mahadeo to "take care of the Ghats or passes, so that Travellers may pass without fear;" and that since that date the Mouzahs had been held under that tenure in a strict course of descent from Father to Son. The Appellant insisted, that this Sunnud did not confer hereditary rights, as it contained no words of inheritance. It also appeared that, in addition to the ghatwally services, a quit-rent of Rs. 61 had always been paid for the two Mouzahs, and at the time of the Permanent Settlement of the zemindary, in assessing the amount of income to be paid by the Zemindar to the Government, the amount in respect of the Mouzahs was fixed at the same amount as that which was always payable by the holders of the tenure, viz., Rs. 61 per annum, the Government confirming that amount as a permanent assessment. By a suit for rent decided before the Permanent Settlement against Monoruth Singh, the Son of Mahadeo, put in evidence, it further appeared, that Rs. 61 was the fixed rent at which the two Mouzahs were held.

[249] The Appellant instituted the present suit on the 27th of April, 1864.

The Respondents respectively filed statements by way of answers, and the Government, in their statement, contended that, unless the Government, which had a right to demand Police services, renounced its claim and demand, the Appellant had no right to resume or assess the ghatwally tenure; and it was declared on the part of the Government, that it had not renounced its right to demand ghatwally services, and that it was intended to enforce the demand when necessary.

The Principal Sudder Ameen of Bhaugulpore (Nurotum Mullick) delivered judgment, in which he dismissed the suit with costs, holding that he was governed by the decision of the High Court, in the case of *Munrunjun Singh v. Rajah Lelanund Singh* (3 W. R. 84), and he expressed his opinion, that the Defendants' tenure was protected under Act, No. XI., sect. 37, of 1859, as being a tenure held at a fixed rent before the Permanent Settlement.

Against this decree the Appellant, appealed to the High Court.

On the 20th of June, 1866, the appeal was heard before a Division Bench consisting of the Justices, Jackson and Markby, who concurred in referring the appeal for the decision of a full Bench of the High Court, on the ground, that a leading question as to the nature of a ghatwally tenure founded on the Sunnud relied upon had been adjudicated on by another Division Bench (the above case referred to by the Principal Sudder Ameen), in which decision Mr. Justice Jackson stated he could not concur.

Accordingly, the appeal was heard by the full [250] Bench, composed of the

Chief Justice, Sir Barnes Peacock, and the Justices Trevor, Loch, Jackson, and Shumboo Nath Pundit.

On the 8th of September, 1866, *seriatim* judgments were pronounced by the Chief Justice and the Justices constituting such full Bench, in the result dismissing the appeal with costs (see cases reported, *nom. Bahoo Kooldeep Sing v. Mahadeo Singh*, 6 W.R., 199).

A difference of opinion prevailed among the Judges as to the grounds on which the Plaintiff's suit should be dismissed.

The judgment of the Chief Justice was, in effect, that the tenure had been granted, as far back as the year 1743, to Mahadeo, as a ghatwally tenure, in confirmation of a previous Grant of the same tenure, not produced in evidence: that, after Mahadeo, his Son had held, paying rent from before the Permanent Settlement, at the rate of Rs. 61; and that "such a Grant, coupled with long usage, such as that which had prevailed in the present case, in which the tenure had passed from ancestor to heir without objection for several generations, would be sufficient to show that the grant was a grant of inheritance," and that in cases of Mahomedan grants it seemed that words of inheritance were not necessary, citing Baillie on "Land Tax of Ind'a," Intro. p. 47. The Chief Justice doubted, without deciding the point, whether the Sunnud did not give its own force a heritable estate to Mahadeo, but held that, as the original Grant was not forthcoming, long usage might be received in evidence to show the effect of the original Grant as creating a tenure of inheritance; and upon the whole of the evidence the Chief Justice expressed his opinion that—"the evidence was sufficient to prove [251] that the Defendants have been holding under a valid tenure of inheritance upon ghatwally service and a quit-rent of Rs. 61. He was also of opinion, that in such a case the Zemindar had no right to dispense with the services of the Ghatwal, and resume the land, and that the Defendants had as good a right and title to the lands as the Government to the revenue." He referred to certain previous rulings of the Sudder and High Courts in Ghatwally cases, and expressed his dissent from them, so far as they held, that the land of the Ghatwal being held by him in lieu of wages, might be resumed as soon as the Government had no further need of the services; and he was also of opinion, that the Defendants' tenure was protected by one or other of the exceptions contained in sect. 37 of Act, No. XI. of 1859.

Mr. Justice Trevor differed from the Chief Justice, as to the effect of the Sunnud to Mahadeo, and was of opinion, that it was in its express terms personal to Mahadeo, and operated merely as a life grant, and that even by the light of the subsequent usage as to the effect of the Grant, the original Grant could not be presumed to have been hereditary in terms. But (he added) it is in my opinion, one of those Grants which were so common in Mahomedan times, in terms limited to the life of the Grantee, but which by usage were considered to convey a hereditary right with or without the payment of a fine. Moreover, the original Grantee died, before the Decennial Settlement, and at that time his Son, Monoruth Singh, was in possession. Since then, the Grandson and Great-grandson of Mahadeo had succeeded, and as far as the evidence went, as a matter of right. That the course of actual succession under it, confirmed the opinion expressed by him as to the nature [252] of the original Grant, and that direct successions had taken place, notwithstanding that the estate had been sold three times for arrears of revenue, and the Plaintiff was the fourth Purchaser. He differed also from the Chief Justice, in thinking, that sect. 37 of Act, No. XI. of 1859, did not apply to the case, being applicable only to tenures paying money rents, and not to service tenures.

Mr. Justice Loch, without going into the matters discussed by the two preceding Judges, put his judgment on another ground, viz.,—that as the Ghatwals had not refused to perform ghatwally services, and the Government had declared their intention of preserving the right to their services, the Plaintiff could not resume the lands.

Mr. Justice Jackson, was of opinion, that sect. 37 of Act, No. XI. of 1859, did not apply. He also differed from the Chief Justice in thinking, that there was no such analogy, as the Chief Justice had expressed, between this and English feudal tenures. He observed, that there was "a clear distinction between the grant of an estate burdened with a certain service, and the grant of an office, the performance

of whose duties are remunerated by the use of certain lands. The Sunnud (he stated) appears to me most unmistakably to belong to the latter class." He was of opinion, that there had been no previous grant, and that none was referred to in the Sunnud: the previous position of Mahadeo having been merely the usual one of Probationer. He observed, that there was no evidence that Bhaugulpore ghatwallys were "ordinarily descendible," and thought that such descent rather depended on good conduct, and finally, the learned Judge, with much hesitation, arrived at the same conclusion as Mr. [253] Justice Loch, on which ground he too was of opinion, that the Plaintiff's suit should be dismissed.

Mr. Justice Shumboo Nauth Pundit, while in general terms saying, that he would not have held that the Plaintiff could have resumed, even if the ghatwally services had determined, put his judgment on the same ground as Mr. Justice Loch.

The appeal was from this judgment of affirmance. The Government only appeared to support the High Court's judgment.

Sir R. Palmer, Q.C., Mr. Doyne, and Mr. W. C. Mazumdar, for the Appellant.—It is an indisputable principle that a Purchaser at a sale for arrears of Government revenue has a right to revert to the state of things existing at the time of the Permanent Settlement, and to avoid all terms which the first Zemindar, under that Settlement, might at the earliest moment have avoided, *Mussamut Sona v. Rajah Neelanund Singh* (5 W.R., 290); *Rajah Leelanund Singh v. Surwan Singh* (*Ibid.* 292). The High Court ought, therefore, to have held that the Appellant was legally entitled to resume this ghatwally tenure. The judgment of the Chief Justice proceeds upon an assumption that the lands were the same as those granted to Mahadeo, and that the conditions of holding were the same; whereas the condition was entirely altered by a succession of different arrangements of a variable nature entered into at the discretion of the Employer of the Ghatwal, or as a matter of temporary contract. Again, it was an error of law to raise an implication of an intention to confer a heritable title. The Sunnud produced only gave a life estate to the then Ghatwal, and, consequently, it was resumable [254] on the death of the Grantee. If by such usage, it was intended, that what passed between the year 1743 and the time of the Decennial Settlement, there could be none such where the ghatwally tenure altered so materially, as to be used as evidence against the Appellant, whose title and rights relate back to the time of that settlement, and who is not prejudiced or affected by the discretion or laches of any previous Zemindar. If the Government had at any time since the Permanent Settlement a right to the ghatwally services, it is clear that it has long since been waived, such ghatwally services having been dispensed with, and Government have now no legal right to insist on the appropriation of these particular lands to ghatwally services, or to the employment in such services by the families of the original Ghatwal, *Forbes v. Meer Mahomed Tuquee* (13 Moore's Ind. App. Cases, 438), and the cases there cited (*Ibid.* 451). Ben. Reg. VIII. of 1793, sect. 41. The exceptions in the Act, No. XI. of 1859, sect. 37, do not embrace a service tenure like the present suit, but, as held by the majority of the Judges of the High Court, who expressed an opinion on that point, are applicable only to tenures rendering money rents, being of the nature of incumbrances, which a service tenure would not necessarily be.

Mr. Forsyth, Q.C., and Mr. Pontifex, for the Government.—First, until the Government renounces its claim to ghatwally services, the Appellant is not entitled to resume this ghatwally tenure; the Ghatwal being liable on pain of forfeiture to perform his services. Secondly, the tenure is not such as the Appellant, an auction Purchaser, is entitled to annul.

[255] The Right Hon. Sir James Colville.—This is a suit brought by an auction Purchaser to resume possession of certain villages held under the tenure known as the ghatwally tenure. It does not appear to be an ordinary suit for resumption and reassessment; for the Plaintiff claims a right to the possession of the land from the date of the auction sale, with mesne profits from that time; but the substantial question raised in the suit is, whether the Appellant, as auction Purchaser, having acquired the rights of the Zemindar, with whom the original Settlement was made, is entitled to resume and put an end to the ghatwally tenure. It has been found as a fact by the Courts below (and their Lordships must assume that finding to be correct), that this tenure existed in its present form before the Decennial

Settlement. The original Sunnud granting the ghatwally tenure is far more ancient. The first document produced goes back to the year 1743, and that Sunnud appears to refer to and recite a former Sunnud. There is no mention in this document of the rent reserved, but there does appear to their Lordships to be, as there appeared to the Judges of the High Court to be, on the record, proof that the rent payable in respect of these Mouzahs at the date of the Decennial Settlement, was the present rent of Rs. 61. The auction Purchaser, therefore, coming in by virtue of the sale, would appear to have no right to disturb this tenure in the way in which an auction Purchaser can sweep away incumbrances created since the Decennial Settlement. The only advantage which he gains by the character of being auction Purchaser is, that he is relieved from any difficulty arising from the [256] law of limitation, and that he is not conclusively barred by the acts or the omissions of the former Zemindars, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the Zemindary. It would seem, therefore, that if he has any right at all to destroy the tenure, it must be by virtue of that clause which has been cited from Reg. VIII. of 1793, sect. 41, relating to Chakeran or service lands. That enactment does not seem to have been much discussed below, but their Lordships fail to see upon what the title of the auction Purchaser can depend, if it does not depend upon that. Their Lordships further consider it to have been properly found by the Courts below that this tenure is an hereditary tenure. It is true that the Sunnud which is produced contains no words of inheritance, but it is in their Lordships' knowledge that before the acquisition of the Dewanny, before the British power became the ruling Power in India, it was extremely common where a tenure was in fact hereditary, when it practically passed as hereditary from Father to Son, to take out a new Sunnud upon each descent. Therefore, it appears to their Lordships, (and they are under the impression that it has been so, decided here (see *Rajah Suttosurrun Ghasal v. Moheschunder Mitter*, 12 Moore's Ind. App. Cases, 263), as it appears to have been decided in the High Court), that the omission of words of inheritance does not show conclusively that the Sunnud was not hereditary. Then there is the strongest possible evidence, that these tenures have descended from Father to Son; that they have, in fact, been hereditary, and their Lordships are, therefore, of opinion, [257] that the conclusion to which the High Court came upon that point was correct.

The question, then is, whether, upon the suggestion that these ghatwally services have ceased to be necessary, the Zemindar has a right to resume the lands, and to turn out the persons who have enjoyed them for such a long period of time. Now, their Lordships think that the principle which should govern this case is that which was laid down in the case of *Forbes v. Meer Mahomed Taqeer* (13 Moore's Ind. App. Cases 438), which has been referred to. They concur in the view entertained by the Chief Justice, and, in fact, by all the Judges who sat with him, that, under the circumstances of this case, the right does not accrue to the Zemindar on the mere suggestion that the services have ceased or that they are no longer necessary. They are by no means prepared to say, that if the Government, who had clearly a joint interest with the Zemindar in the continuance of the services when necessary, were not here disputing the Zemindar's right, that the Zemindar would, as between him and the Ghatwal, have any right so to resume the land; they are disposed to think that, upon the principle laid down in the case just referred to, that right would not exist. The case which has been cited in support of a right so to dispossess the Ghatwal is a case decided on the 5th June, 1866, the case of *Rajah Neelanund v. Sururun Singh* (5 W.R. 292). That case was decided by two of the learned Judges who sat in the High Court in the case now under appeal, Mr. Justice Kemp and Mr. Justice Jackson, who seem to have considered that the land being held in lieu of wages and on a *quasi* contract for services, the Zemindar was at liberty [258] to determine the tenure when the services were no longer required. In that case, however, the Ghatwals were said to hold the land, not under a Sunnud conferring an hereditary and indefeasible right, but "on the payment of a quit rent, with enjoyment of the profits of the land in lieu of wages, and possession, however long, would not entitle them to hold the land at a fixed jumma, or to retain a portion of the land after they have ceased to perform the duties for which the land was assigned to them." It would appear, therefore, that the particular tenure there in question

was very different from the present tenure. If it were of the same nature, it is clear that the two learned Judges who decided that case have departed from their former opinion, since they have concurred in the judgment now under appeal. Mr. Justice Jackson indeed differed from the rest of the Court as to the conclusion that the tenure was hereditary,—he did not think that the evidence was sufficient to make that out,—but in all other respects he joined with his Brethren in pronouncing the judgment now under appeal. It seems to their Lordships, that they would be taking upon themselves a very great responsibility, if, upon a question of this kind, a question of tenure peculiar to India, and upon which the judgment of Indian Courts is so valuable, they were to overrule the unanimous and carefully considered judgment of a full Bench of the High Court, particularly when that judgment appears to them with the general principles of justice and equity. They must, therefore, humbly recommend Her Majesty to dismiss this appeal with costs.

[See *Rajah Leelanund Singh Bahadur v. Thakoor Munoorunjun Singh*, 1873, L.R. Ind. App. Sup. Vol. 185; *Collector of Trichinopoly v. Lekkamani*, 1874, L.R. 1 Ind. App. 312.]

[259] WILLIAM FARQUHARSON, —Appellant: DWARKANATH SINGH and the GOVERNMENT OF INDIA,—Respondents * [July 1, 3, 1871].

On appeal from the High Court of Judicature at Fort William, Bengal.

Suit by an Auction Purchaser of a Putnee, sold under Ben. Reg. VIII. of 1819, for possession of 3000 beegahs of land within his Putnee, and to enhance the rent against a Ghatwal, and the Government, charging encroachment against the Ghatwal beyond the quantity of 100 beegahs held ghatwally, according to a return made by a former Ghatwal. The only evidence of encroachment consisted of the Isumnovisee returns made by the Thanadars to the Magistrates in the years 1811, 1812, 1813, from which it appeared, that the quantity of land the then Ghatwal held ghatwally was 100 beegahs. Held, that the evidence of the Defendants of long-interrupted possession of the 3000 beegahs, presumably before the Decennial Settlement, outweighed the effect of the Isumnovisee returns, which were, though *prima facie*, not conclusive evidence of the quantity of the land held ghatwally; and further that, though such return was not objected to by the then Ghatwal, it did not affect the right of the Ghatwal in possession.

This was a suit for possession and enhancement of rent brought by the Plaintiff, Erskine, the Putneedar, against the Respondent, Dwarkanath Singh, the Ghatwal, and the Government, on the ground of encroachment of lands in his Talook not held ghatwally.

The question in the case was, whether the Respondent, Dwarkanath Singh, the Ghatwal, and entitled as such to certain ghatwally lands within the Appellant's Putnee Talook, held lands in excess of what he was entitled to, and was liable to pay rent in respect of such excess to the Plaintiff, Erskine, the Putneedar [260] for the lands which the Respondent, Dwarkanath Singh, alleged he held ghatwally. The Courts below held, that the Plaintiff had failed to show such holding was in excess, and the correctness of that finding turned in the present appeal mainly upon their value as evidence against the Respondent, the Ghatwal, of certain Police returns, called Isumnovisee, relating to the ghatwally lands, and that point was the sole question argued on the appeal.

The Plaintiff, Erskine, since deceased, and represented by the Appellant, his Executor, became in May, 1852, the Purchaser, at a sale for arrears of rent under

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

Ben. Reg. VIII. of 1819, of the Putnee Talook of Bacesgram, within the zemindary of the Maharajah of Burdwan, comprising 38½ Mouzahs, of which the village Desoodya, in which the ghatwally lands of the Respondent, Dwarkanath Singh, the Ghatwal, was one. On enquiry as to the holdings of the Ghatwals within his purchased Putnee, he considered that the Ghatwals had largely encroached beyond the limits of their original grants on the other lands of the respective villages. The Respondent was in possession of the entire lands of Plaintiff's village Desoodya, stated to be about 3000 beegahs, held at a rent of Rs. 51-8, while the returns, the Isumnovisee, by the Thanadars, of Police establishment, to the Magistrates, showed that his Father, Ram Singh, to whom he succeeded at Ghatwal, had been returned in the years 1811, 1812, 1813, as the holder of only 100 beegahs. These returns showed similar alleged encroachments on the part of various other Ghatwals, and the Plaintiff called on them to come and settle and pay a rent for the excess lands. This they refused to do, and the consequence was the institution of this suit and eleven [261] others, which were all tried along with the present case in the Courts below upon the same evidence. The other suits being under the appealable value, were, therefore, not appealed from.

The plaint in this suit was filed by Erskine against Dwarkanath Sing, as Ghatwal of Ghat Desoodya, and the Government. In form, the plaint was for possession of the excess lands, on the ground that the first Defendant had got possession by encroachment and refused to pay rent for them. But the suit appeared to have been afterwards framed into an enquiry, whether the Respondent as Ghatwal had encroached, and to what extent, and also what rent he should pay for the alleged excess. The plaint contained an allegation that the principal Defendant had been appointed as the head Ghatwal in the place of his Father, Ram Singh, the former head of the ghat of the village Desoodya; that Ram Singh filed an Isumnovisee in the Foujdary Adawlut, in the year 1811, stating the quantity of his ghatwally lands to be 100 beegahs, yielding a punchuck jumma of Rs. 51-8; that the first Defendant had no right to any other land in the Mouzah Desoodya, except those 100 beegahs, and that he had been in possession in the mal lands, to which he had no right, in excess of the quantity mentioned in the Isumnovisee. This return was filed with the plaint.

The first Defendant, by his statement or answer, contravened the effect of the Isumnovisee of the year 1811, in respect to the ghatwally; and submitted, that the boundaries of the lands and the quantity, with the length and breadth thereof, had not been truly stated in the Isumnovisee. That the Isumnovisee was prepared at one time, and a map recently, [262] and that they did not agree with each other. That the Isumnovisee filed by the Police Amlah did not bind him, the present Ghatwal, and he disputed the claim as improperly brought, as except as a suit for enhancement of rent, under the Act, No. X. of 1859, it could not be tried in a Civil Court.

The Government, in their answer sustained the first Defendant's case, relying upon two judgments of the Sudder Court, delivered in the years 1817 and 1829.

The principal evidence of the Plaintiff consisted of the Isumnovisee papers or returns by the Thanadars to the Magistrates, dated in the years 1811, 1812, and 1813, in which the Thanadars returned the Defendant's Ghatwal as containing only 100 beegahs.

After an interlocutory decision by the Civil Court Judge of West Burdwan, and a remand of the case by the High Court, Mr. W. T. Tucker, the Judge of that Court, who re-tried the case gave judgment on the 23rd of October, 1865, holding that the Isumnovisee papers were not to be relied on, and that the Plaintiff had failed to establish his claim.

Against this decision an appeal was brought to the High Court, in which the same grounds were urged as contained in the allegations in the plaint. The High Court, consisting of the Justices Bayley and Markby, on the 23rd of July, 1867, dismissed the appeal on the ground that the Plaintiff had failed to establish his claim (see *Erskine v. Manik Singh Ghatwal*, 6 W.R., 10, and *Erskine v. The Government*, 8 W.R., 232).

The appeal was from this decree. The Respondent, Dwarkanath Singh, did not

appear, but the Government appeared to support their interest and that of the Ghatwal.

[263] Sir R. Palmer, Q.C., and Mr. Doyne, for the Appellant, contended,—First, that the *Isumovisee* of 1811 was admitted by the Respondents, and established in evidence with those also of 1812 and 1813, as to the quantity of ghatwally lands being 100 beegahs only to which the Respondent's Father was then entitled; and secondly, that in the absence of any evidence or well-founded explanation by the first Respondent as to how his Father became legally possessed of the excess lands constituting 3000 beegahs, such statement was conclusive as to the right of the Appellant, as auction Purchaser, under Ben. Reg. VIII. of 1819, sect. 11, to receive a fair rent for such excess from the first Respondent, the Ghatwal.

The cases of *Rajah Lilanund Sing, Bahadoor v. The Government of Bengal* (6 Moore's Ind. App. Cases, 101); *Mahbub Hossein v. Patasu Kumari* (1 Ben. Law Rep. 120); and *Raja Lilanund Sing Bahadur v. The Government* (2 Ben. Law Rep. 114), were referred to.

Mr. Forsyth, Q.C., and Mr. H. C. Merivale, for the Government, were not called on.

The Right Hon. The Lord Justice Mellish.—This is a suit for ejectment which was brought to recover, nearly 3000 beegahs, of land.

The Plaintiff was the Purchaser of a Putnee under a sale for non-payment of the rent of the Putnee, and claimed that under the Ben. Reg. VIII. of 1819, section 11, having purchased the Putnee in such cir- [264] cumstances, he was entitled to set aside all estates which had been created after the origin of the Putnee, and to recover all the lands which were originally part of the Putnee. However, it appearing, that the first Defendant had been in possession of those lands for a very long time, admitting that Defendant's possession of the lands, the Plaintiff afterwards sued for a right to increase the rent, and have a proper rent payable to him out of the land.

The evidence which the Plaintiff produced in support of his case entirely consisted of three documents. At first only one document was produced, which was an *Isumovisee* of the year 1811. Subsequently, two other documents were produced, which appear to be returns made by the Police, and there appears to be evidence to show that they are made generally on the information of the ghatwally holder, stating his name, the quantity of land which he held, and the Putnee rent which he pays for it; and it appears, in one of the returns for these three years, that the then holder of the estate which the first Defendant now holds, the ghatwally holder had returned that the quantity of his land was 100 beegahs. That was the sole evidence of the Plaintiff. He did not produce any evidence at all to show how it happened that if 100 beegahs was all that the ghatwally holder was entitled to in the years 1811, 1812, and 1813, that quantity of 100 beegahs had increased to the very large quantity of 3000 beegahs at the time when the sale took place. On the other hand, the first Defendant produced evidence to show that as far back as living memory went, the whole quantity of 3000 beegahs had been held. He produced one Witness of 80 years old, and another of [265] 75 years old, who had known the land all their lives, who said that the ghatwally holder had held the whole 3000 beegahs during all the time that they remembered the property. Both the Courts below believed those Witnesses, there being no evidence whatever to contradict them, and thought that for sixty years the land had been so held. Then the question rose as a simple question of fact before the Courts below, taking the evidence on both sides, whether they ought to find that the original estate of the ghatwally holder consisted of 100 beegahs only, or of 3000 beegahs. Both the Courts below found, as a matter of fact, on this evidence, that the original Ghatwally consisted of that number of beegahs, and that, therefore, the Plaintiff was not entitled to maintain this suit.

Their Lordships entirely agree with those decisions. Not only does this case come within their ordinary rule that on a mere question of fact where both the Courts below have agreed and where there has been no mistake in point of law, they will not reverse the decisions of the Courts below, unless they can see that those decisions are clearly wrong, but their Lordships come to the same conclusion. It appears to them that weight must be given to ancient possession, and that there may

be a variety of causes why incorrect returns may have been made in the years 1811, 1812, and 1813. It may have been that the Police Officer was careless and did not care about what he returned, or it may have been that the ghatwally-holder at that time had some reasons for giving incorrect information, or possibly it may have been that the ancient Ghatwals originally held only 100 beegahs but that the estate had increased to 3000 beegahs many years before and before the [266] creation of Putnee, which notwithstanding the Ben. Reg. VIII. of 1819 would entitle the ghatwally-holder to hold the whole quantity. But whatever the reason may have been, their Lordships are of opinion, that the long uninterrupted possession of the ghatwally-holder ought clearly to have greater weight than those returns. Upon those grounds, therefore, they think that the judgment of the Court below must be affirmed.

With respect to the cases which have been referred to, all that they really show is this, that different Courts at different times have given greater or lesser weight to those returns. All the Courts agree that they are admissible in evidence, and they have been admitted in evidence in this case. In each particular case the Courts have considered what weight ought to be given to them, and it is nothing very surprising if the Courts at different times have not given exactly the same weight to those documents. Their Lordships are of opinion, that the Courts in this particular case have given quite as much weight to these returns as they deserve.

Their Lordships will, therefore, humbly recommend to Her Majesty that this appeal be dismissed with costs.

[267] THOMAS NEWTON.—*Appellant*; The Hon. C. A. TURNER, R. SPANKIE, and G. D. TURNBULL, Puisne Judges of the High Court, North-Western Provinces,—*Respondents* * [Nov. 21 and 22, 1871].

On appeal from the High Court, North-Western Provinces.

Two Orders of the High Court of the North-Western Provinces, the one being an Order *nisi* calling on the Appellant, a Barrister and Advocate practising in that Court, to show cause why he should not be suspended from the practice of his profession as an Advocate of that Court, and the other Order declaring him guilty of gross professional misconduct, and suspending him from practice for five years, on appeal, as to the rule on which the first Order was made discharged, and the Second Order reversed; the Judicial Committee being of opinion that, though the Appellant had been guilty of a grave irregularity and deserving of censure, yet the facts proved did not amount to that *mala praxis* on which the High Court, having regard to the position and functions of an Advocate in the North-Western Provinces, could fairly found any proceeding of a penal character.

This was an appeal from two Orders and judgments of the High Court, Allahabad, North-Western Provinces, dated the 13th and 27th August, 1870, whereby the Appellant, a Barrister-at-law, and an Advocate of the High Court of the North-Western Provinces, was suspended from practice for alleged professional misconduct, liberty being given to him to apply, at the expiration of five years, for permission to resume practice.

[268] The circumstances under which the Order of the 13th of August, 1870, was made arose out of a communication by Mr. Bramly, the Officiating Judge of the Allyghur District, dated the 19th of July, 1870, to the Registrar of the High Court, North-Western Provinces, of proceedings held before him in consequence of two Letters addressed to him by the Administrator General of Calcutta, dated the 10th of May, and the 14th of June, 1870, regarding Mr. Newton's professional conduct

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. Sir Montague Edward Smith.

in applying for letters of administration on behalf of a Mrs. Saunders to the estate of her late Son, when he knew she could not be entitled to such administration.

The Respondents, at that time the presiding Judges of the High Court, thereupon issued an Order and citation, dated the 30th of July, 1870, calling upon Appellant to give explanation, on the 13th of August, 1870, with reference to the imputations on his professional conduct, as alleged against him by Mr. Bramly in the communication above mentioned.

The Appellant, as directed, appeared in person on that day, and read out from a written statement, which he had verified, such explanation as he was able to afford, and which explanation was, to some extent, satisfactory, as he was relieved of one of the two charges contained in the citation of the 30th of July, 1870.

With reference to the other charge, the Respondents served the Appellant with a rule, dated the 13th of August, 1870, calling upon him to show cause why he should not be suspended from practice, and also as to certain other charges which were not contained in the citation of the 30th of July, 1870.

[269] The Appellant appeared by Counsel on the 27th of August, 1870, who read from a written statement signed by the Appellant, but did not otherwise orally address the Court. The Appellant also filed affidavits in disproof of the allegations made against him; and the Respondents, constituting the Court, though they admitted having too hastily assumed certain matters against the Appellant, on the previous day of charge, declared that the Appellant had been guilty of gross professional misconduct, and passed an Order on the 27th of August, 1870, suspending him from practice for five years, with permission to apply for restoration to practice, if accompanied with certificates of character, at the expiration of such period.

The facts of the case, as well as the Orders of the Supreme Court, fully appear in the judgment of their Lordships.

On the 5th of January, 1871, the Appellant presented a petition, accompanied with grounds of appeal, to the High Court, for leave to appeal to Her Majesty in Council, and the Court granted a certificate allowing such appeal.

Sir R. Palmer, Q.C., and Mr. W. Bush Cooper, for the Appellant, contended, first, that as Mr. Bramly, the Officiating Judge of the Allyghur District, was fully competent to admonish the Appellant for any misconduct he might have conceived he had been guilty of at the time of such alleged misconduct occurring, and not having exercised such discretionary power, acted illegally in forwarding an *ex parte* proceeding to the High Court, reflecting on the Appellant's professional [270] conduct, as set forth in the communication made by him on the 19th of July, 1870; that the High Court proceeding thereon had also acted illegally, especially in proceeding *ex mero motu* on such communication: *Emerson v. The Judges of the Supreme Court of Newfoundland* (8 Moore's P.C. Cases, 157); and that the Order or citation, dated the 30th of July, 1870, being, therefore, illegally issued, all proceedings thereon were *ab initio* void: secondly, that the High Court acted illegally in proceeding *ex mero motu* as to the second rule or Order, dated the 13th of August, 1870, no one having applied for such rule, and all proceedings taken thereon were *ab initio* void: that the matters set forth in such second rule or Order of the 27th of August, 1870, being purely of a private character unconnected with the Appellant's professional duties, and regarding which no one had preferred any complaint, not even the Appellant's Client, Mrs. Saunders, the High Court's severe comments and Order were unmerited and illegally passed: and, lastly, that the misconduct imputed to the Appellant amounted at the utmost to an error of judgment or misconception of law, for which professional men are not subject to punishment.

Mr. Shapter, Q.C., for the Judges, objected to the competency of the appeal, on the ground that, as it was a criminal proceeding, the High Court had no jurisdiction to allow the appeal, referring to sect. 30 of the Letters Patent, 17th March, 1866, establishing the High Court in the North-Western Provinces. On the merits he commented on [271] *Emerson v. The Judges of the Supreme Court of Newfoundland* (8 Moore's P.C. Cases, 157), and cited *In re Stewart* (5 Moore's P.C. Cases (N.S.), 187; S.C. Law Rep. 2 P.C., 88); *Ex parte Bayley* (9 B. and C., 691); *Lechmere Charlton's Case* (2 My. and Cr., 342); *Martin's Case* (2 Russ. and My., 674, n.).

Judgment was reserved, and now pronounced by

The Right Hon. Sir James Colvile (9th December, 1871).—This appeal is brought by Mr. Thomas Newton, a Barrister-at-Law, and an Advocate of the High Court of Judicature for the North-Western Provinces, against two Orders of that Court, dated respectively the 13th and the 27th of August, 1870.

The particular terms of these Orders will be afterwards considered. It is sufficient for the present to state, that they were made in the exercise of the power vested in the Court by the 8th section of the Letters Patent constituting it; and that by the latest of them Mr. Newton was suspended from practising as an Advocate of the Court until the further Order of the Court. Liberty was at the same time given to him, at the expiration of five years from the date of the Order, to apply for permission to resume practice, which, on the production of satisfactory proof of good conduct in the meantime (it was said), would be conceded to him. The effect, therefore, of the Order was to suspend Mr. Newton from practising as an Advocate of the Court, certainly for five years, and possibly for a longer and indefinite period.

[272] The following are the proceedings which resulted in this suspension:

On the 19th of July, 1870, Mr. Bramly, the officiating Judge of Allyghur, forwarded to the High Court a report of the proceedings in his Court on an application made by Mr. Newton on behalf of one Mrs. Saunders for letters of administration to the estate of her deceased Son, Paterson Tandy Saunders, imputing improper conduct to Mr. Newton in that matter, and submitting to the Court whether such conduct was becoming a Barrister. The precise nature of the charges against Mr. Newton will appear from the next proceeding.

On the receipt of this communication the High Court passed an Order, dated the 30th of July, 1870, calling upon Mr. Newton, on the 10th of August following, to answer the matters stated in Mr. Bramly's Letter and report, whereby it had been brought to the notice of the Court that he, Thomas Newton, had been guilty of grossly improper conduct in that, whilst acting as Counsel for one Mrs. Saunders, on application to Mr. Bramly for letters of administration of the estate of her deceased Son to be granted to her, he, well knowing the said Mrs. Saunders not to be the administratrix of the deceased Paterson Tandy Saunders' estate, obtained from the said Mrs. Saunders, and indorsed and put in circulation, a Government loan note for the sum of Rs. 3000, belonging to the estate of the said Paterson Tandy Saunders, and also certain other Government loan notes the property of the said estate, the said Government notes having been indorsed by Mrs. Saunders as Administratrix, although the said Thomas Newton was well aware that administration of the estate and [273] effects of the said Paterson Tandy Saunders had not been granted to the said Mrs. Saunders; whereby also it had been brought to the notice of the Court that Mr. Thomas Newton had been guilty of grossly improper conduct in the discharge of his professional conduct as an Advocate in having wilfully deceived the said Mr. Bramly in the course of the hearing of the said application for Letters of administration, by informing him, on or about the 9th of July, 1870, that he was greatly surprised to hear that the said Paterson Tandy Saunders was illegitimate, whereas he, the said Thomas Newton, was well aware of the illegitimacy of the said Paterson Tandy Saunders, with some circumstances of aggravation concerning this latter charge which it is unnecessary to state.

Mr. Newton appeared before the Court under this Order and made a verbal statement in explanation of both charges; evidence was taken, and a number of Letters were produced in the course of the inquiry. On its termination the Court acquitted Mr. Newton of the second charge, but pronounced his explanation in respect of the first to be unsatisfactory, in terms which will be afterwards considered; and, having commented on his conduct in respect of various new matters which had come out in the course of the inquiry, and on the perusal of the Letters produced, determined to take further proceedings against him. The result was that, on the 13th of August, 1870, an Order, being the first of those under appeal, was drawn up in the following terms:—

“In the matter of Thomas Newton, an Advocate of the Court. It appearing to the Court that the above-mentioned Thomas Newton, an Advocate there[274]—of, has been guilty of grossly improper conduct in the discharge of his professional duty as an Advocate in procuring his Client, Catherine Saunders, to indorse, as ‘Administratrix to Paterson Tandy Saunders' estate,’ three Government promissory notes, of the aggregate value of Rs. 14,000, or thereabouts, viz., No. 999⁶/₁₁ of 1854-55, for

Rs. 1000; No. ⁹⁹¹¹⁸⁵₁₃₄₆ of 1856-57, for Rs. 10,000, both bearing interest at 5 per cent.; and No. ⁹⁹¹¹⁸⁵₁₃₄₆ of 1859-60, for Rs. 3000, bearing interest at (5½) five and a half per cent., and belonging to the estate of Paterson Tandy Saunders, deceased, he, the said Thomas Newton, well knowing that the said Catherine Saunders was not the Administratrix of such said estate, and in indorsing and putting in circulation one of the said notes, to wit, the Government promissory note No. ⁹⁹¹¹⁸⁵₁₃₄₆ of 1859-60, for the sum of Rs. 3000, bearing interest at 5½ per cent. And also in drafting a certain Letter, dated on or about the 14th day of April, 1870, and in procuring the same to be copied by one Maria Hill, and signed and sent by the said Catherine Saunders to the firm of Gillanders, Arbuthnot, and Co., of Calcutta, which said Letter contained a statement, or introduction, in the words following, to wit:— ‘With reference to your kind offer to advance money for the coming Indigo season,’ which statement or introduction was known to the said Thomas Newton to be false, and inserted with the intention of inducing the said firm of Gillanders, Arbuthnot, and Co., to advance for the manufacture of indigo certain moneys, and with the intention of procuring the said Catherine Saunders to pay to him the said Thomas Newton out of the moneys if and when so advanced a sum or [275] sums of money on account of his fees as an Advocate, and also in procuring employment as an Advocate, by means of a threat contained in a certain Letter written and sent by the said Thomas Newton to the said Catherine Saunders, and dated on or about the 27th day of January, 1870, in the words following, to wit:— ‘If I do not appear for you, I fear the result, as I know all the particulars; and recollect, if the answer is not properly put, you may lose all you have.’ And generally in his behaviour and conduct in connection with his employment as an Advocate by the said Catherine Saunders, at divers times in the months of January, February, March, April, May, June, and July, 1870. Now, the said Thomas Newton is hereby ordered to attend at the sitting of this Court, to be held at the Court House, Allahabad, on Saturday, the 27th day of August instant, at eleven of the clock in the forenoon, to show cause why he, the said Thomas Newton, should not be suspended from the practice of his profession as an Advocate of this Court within the jurisdiction of this Court.

Mr. Newton duly appeared to show cause against this rule; and, on the 27th of August, 1870, the Court gave final judgment. It acquitted Mr. Newton on all but the two first charges, viz., the imputed misconduct in inducing Mrs. Saunders to indorse the Government notes; and the imputed misconduct in causing her to write the Letter to Gillanders, Arbuthnot, and Co.; and finding that these two charges had been wholly or in part established against him, passed the Order of suspension, which is the second of those under appeal.

Exception was taken at their Lordships’ Bar to this [276] course of procedure. It was argued first, that the Order of the 30th of July, 1870, was objectionable, inasmuch as it prejudged the Appellant’s case by assuming that he “had been guilty of grossly improper conduct.” Their Lordships, however, are of opinion that, although this Order may not have been very happily worded, the true construction of it is, that Mr. Newton was thereby merely called upon to answer the matters stated in Mr. Branly’s Letter and report; such matters being, for the sake of convenience, reduced into the two formal charges of professional misconduct set forth in the Order; and that there was no intention on the part of the Court to prejudge the case, or to prevent Mr. Newton from having the full benefit of any explanation of the matters charged, which he might be able to offer. That this was so, is shown, their Lordships think, by the subsequent proceedings.

It was next objected, that the Judges improperly placed themselves in the anomalous position of being at once Accusers and Judges; and that they ought to have committed the conduct of the proceedings against Mr. Newton to some third person. And in support of this latter proposition, the case of *Emmerson v. The Judges of the Supreme Court of Newfoundland* (8 Moore’s P.C. Cases, 157) was cited. In that case, whilst litigation between an Attorney with his former Client was still in some sort pending, though after payment under protest of the sum claimed, the Court, of its own mere motion, and not on the application of the opposite party, and without previously calling upon the Attorney to explain his conduct, served him with a notice to show cause within four days, why he [277] should not be struck off the Rolls, and refused to enlarge the rule, and give him further time to prepare his

defence; and on his failing to show cause within the four days, made the rule absolute. It is obvious, that several of the circumstances which induced this Committee to reverse that Order, do not exist in the present case. It is, however, undoubtedly true that, in delivering their Lordships' judgment, Lord Kingsdown said, that an explanation should have been required; and that upon that explanation proving insufficient, "the proper course would have been that some person should have been instructed on behalf of the Crown, to apply to the Court for a rule for this Gentleman to show cause why further proceedings should not be taken (8 Moore's P.C. Cases, 167).

Looking to the substance of the objection as applicable to this case, their Lordships think, that there is a broad distinction between the charges originally brought by Mr. Bramly, and those made for the first time by the Order of the 13th of August, 1870.

The High Courts in India exercise peculiar powers of superintendence and control over the subordinate Courts, and the proceedings therein. It was, their Lordships apprehend, in the regular course of practice that Mr. Bramly should make the report which he did make of the proceedings in his own Court; and that he should complain, if he had ground of complaint, to the High Court of the supposed *mala praxis* of a Practitioner over whom he had no direct power; but who, by virtue of being an Advocate on the Rolls of the High Court, had the right of appearing [278] in the Lower Court; and their Lordships are of opinion, that the High Court was perfectly justified in taking action on that report and complaint, by calling upon Mr. Newton to explain his conduct.

Whether it would not have acted more regularly if it had placed the conduct of the further proceedings against Mr. Newton in the hands of a third party, is another question. But the Judges have stated that they had not the means of doing so, and their Lordships must accept that statement; and they are disposed to think that even on the authority of the case cited, the omission to do this is not a fatal objection to the subsequent proceedings.

Their Lordships, however, cannot but regret that the learned Judges of the High Court, acting on Letters which came to their knowledge in the course of the first inquiry, should have thought fit, on the instant and without further inquiry, to frame new charges against Mr. Newton, and thus assume the functions of Accuser and Judge. A very strong and clear case may arise, in which such a course would be justified. But the inconvenience of it is great; and the more manifest in the present case, inasmuch as the learned Judges found themselves obliged, in all but one instance, to abandon the charges which they themselves had on the first impression suggested and framed.

Their Lordships have deemed it right to make these observations on the questions of form which have been raised before them. To decide, however, such a case as this upon a question of form, would be far from satisfactory; and they, therefore, proceed to consider it upon its merits.

They are relieved from the necessity of considering [279] any but the two charges upon which Mr. Newton was finally suspended. Of the second of the original charges he was acquitted on the first proceeding against him. Of all but two of the charges embraced in the Order of the 13th of August, 1870, he was also acquitted, the Court being of opinion that, though the conduct imputed to Mr. Newton by those charges may have been inconsistent with the rules and traditions which regulate the conduct of Barristers in this Country, and may not have been altogether unobjectionable even in India, it did not amount to that *mala praxis* on which the Court, having regard to the position and functions of an Advocate in the North-West Provinces, could fairly found any proceeding of a penal character.

Their Lordships propose to deal first with the last of the two charges which the High Court thought were established against Mr. Newton, viz., that of having counselled Mrs. Saunders to write to Messrs. Gillanders, Arbuthnot, and Co., the Letter of the 14th of April, 1870.

The facts admitted or proved concerning this Letter are as follows:—

Mrs. Saunders was a native woman who, after cohabiting for several years with Mr. George Saunders, an Indigo planter, in the Allyghur District, had been married by him some time before his death. The date of this marriage is now ascertained to have been the 17th of October, 1856. Under the Will of her deceased Husband

she seems to have been tenant for life of his Indigo Factory and other property. She had several children by him, born either before or after the marriage. One of them was a Son, Paterson Tandy Saunders, who, under his Father's Will, [280] or otherwise, was possessed of several Government notes aggregating Rs. 14,000. Another was a Daughter who had been married first to a person of the name of Nichterlein; and afterwards, after having been sued by him for breach of promise of marriage, to a Mr. Kelly. George Saunders had been indebted to Mr. Nichterlein's estate, which was in the hands of the Administrator-General. Mrs. Nichterlein, before her second marriage, had made a gift of her share of this debt to her Mother, or to her Father's estate; but this gift was disputed by her second Husband: and the original debt, and the effect of Mrs. Nichterlein's gift, appear to have been, at the beginning of 1870, subjects of pending or contemplated litigation. Mrs. Saunders had likewise a cross claim against Nichterlein's estate for the proceeds of indigo of a former season.

On the 15th of December, 1869, Paterson Tandy Saunders died, under age and unmarried. Shortly after his death, and on the 10th of January, 1870, Mr. Newton, who had acted in at least one lawsuit on behalf of Mr. George Saunders, and appears to have kept up friendly relations with the family, wrote to Mrs. Saunders condoling with her on the death of her Son, and volunteering, if he were not then retained, to act for her in that matter, some advice concerning the litigation between her and the Administrator-General.

It further appears, that she was then pressed for money, and that she required funds both for the purposes of the Indigo Factory, and for carrying on the suits pending or about to be commenced, and that in respect to the latter Mr. Newton was to receive certain fees. In these circumstances she, under the [281] advice of Mr. Newton, wrote and sent to Messrs. Gillanders, Arbuthnot, and Co., Merchants of Calcutta, the following Letters:—"Coel Factory, Allyghur, 14th April, 1870. Dear Sirs,—With reference to your kind offer to advance money for the coming Indigo season, I write to inquire whether you would place at my disposal Rs. 30,000. On hearing from you I will commence my Indigo advances."

On the first inquiry, that of July, 1870, it came out on the evidence of Miss Hills, the Governess and amanuensis of Mrs. Saunders, that if any money had been received from Gillanders, Arbuthnot, and Co., Mr. Newton's fees would have been paid.

Messrs. Gillanders, Arbuthnot, and Co., however, declined to make any advance, and nothing came of the application to them.

The Judges of the High Court, nevertheless, saw fit to make this transaction matter of charge against Mr. Newton. The view of it which they took when they framed the charge in respect of it, which is contained in the Order of the 13th of August, 1870, was thus stated by the acting Chief Justice:—"Again you induced an uneducated woman whom you were advising, whether wisely or unwisely matters not, to carry on certain litigation, whereby you hoped to secure to yourself, what I must call, under the circumstances, the exorbitant fee of Rs. 3800, to write to a Calcutta firm a Letter drafted by you, containing a false assertion, whereby that firm was to be induced to advance to Mrs. Saunders, for the purposes of her Indigo Factory, certain moneys, and which moneys that firm would naturally consider was to be employed for the legitimate purposes of the Factory, whereas a large portion was to be paid to you for the [282] purposes of carrying on litigation. It is abundantly clear that Gillanders, Arbuthnot, and Co., had never promised to advance moneys to Mrs. Saunders. That Lady, from her manner to-day, we cannot doubt, had never heard their names before. The Court cannot but come to the conclusion that the statement made in the Letter to Gillanders, Arbuthnot, and Co., as to their previous offer of assistance, was, to your knowledge, false, and that it was made for the purpose of obtaining money to pay your fees."

When, however, cause was shown against the rule, it came out that Mrs. Saunders, so far from having never heard the names of Messrs. Gillanders, Arbuthnot, and Co., had been in correspondence with them at various times between the years 1866 and 1870, and had had various business transactions with them. It was further urged, that the assumption that Gillanders, Arbuthnot, and Co. had offered to advance money to Mrs. Saunders, if erroneous, had deceived, and could deceive, nobody. And the High Court in its final judgment of the 27th of August, 1870, expressed its willingness to assume "That it was from information given him by Mrs. Saunders, that

he (Mr. Newton) introduced the passage relating to a former offer of advances. The gist, therefore, of the offence imputed to Mr. Newton in respect of this transaction is reduced to this, viz., that he, knowing that a portion of the moneys to be received from Gillanders, Arbuthnot, and Co. was to be employed in payment of his fees, drafted for his Client a Letter calculated to induce the firm to believe that this advance was sought for a different purpose. It appears to their Lordships, after carefully considering all that is said of this matter in the final judgment of the High [283] Court, that the harsh view of the transaction there taken is not borne out by the facts, and that the drafting of the Letter cannot be taken to constitute such grave professional misconduct as would justify any part of the severe sentence passed on Mr. Newton. The Letter is an application in the most general terms from an Indigo planter for an advance of money for the coming season. It is clear that Mrs. Saunders did want money for the purposes of her Factory. Their Lordships are not aware that such an application implies any undertaking that the money if advanced is to be ear-marked; is not to be mixed with the general funds of the Planter; and that no part of it is to be withdrawn, even temporarily, and applied to a purpose other than the cultivation or manufacture of Indigo. If the lender chooses, he can of course take any security or guarantee he may think necessary, in order to have the money set apart and applied entirely to the purpose of producing the crop on the security of which he makes the advance. But here the loan was declined. All that is established is, that Mrs. Saunders, pressed for money to provide both for carrying on her Factory, and for the prosecution of a suit in which she may well have hoped to recover further funds, wrote this Letter under Mr. Newton's dictation, meaning to apply part of the money in the first instance to the payment of his fees in the suit. Looking to all that is established in respect of this Letter, and to the absence of any complaint on the part of any person concerning it, their Lordships are of opinion, that the Order against Mr. Newton cannot be maintained on this charge.

They next proceeded to consider the graver charge [284] against him of having induced or advised his Client to indorse the Government notes as Administratrix of Paterson Tandy Saunders, when she was not entitled to assume that character. The facts proved, which particularly relate to this transaction are as follows:—

On the 5th of April, 1870, Mrs. Saunders wrote to Mr. Newton enclosing one of the notes belonging to the estate of Paterson Tandy Saunders, and standing in his name, being a note for Rs. 10,000, and asking him to get the note renewed in her name, and broken up into ten notes for Rs. 1000 each. On the 9th of April, 1870, Mr. Newton wrote to Mrs. Saunders to the effect that he had spoken to Mr. Clarke, the Treasury Officer at Allyghur, who had informed him that the note could not be renewed, nor interest paid upon it, until she had taken out administration to her Son's estate. Thereupon Mr. Newton was instructed to make, and did make, as Counsel for Mrs. Saunders in Mr. Bramly's Court, the application for Letters of administration to the estate of her deceased Son, describing him as a British subject who had died a minor and intestate. The date of this application was the 2nd of May, 1870. On the 6th of May, the day before the usual citations were issued by the Judge, Mr. Newton, who had advanced some small sums to Mrs. Saunders, received from her the security for Rs. 10,000 and two other Government notes standing in Paterson Tandy Saunders' name, and part of his estate, all being indorsed by her as Administratrix of that estate. At the same time she executed to him a receipt admitting the loan of Rs. 200, and he executed to her a receipt for the notes; and Miss [285] Hills, in her account of the transaction, has deposed as follows: "Mr. Newton wrote the indorsements in pencil on the notes, and told me to write it small on the pencil marks; and I said at the time, 'Mrs. Saunders has not got the administratrixship, how can I write that?' and he said, 'Whatever blame there is will fall on me.' I said nothing more. I then wrote the indorsements. Mrs. Saunders signed them."

The indorsements were special to Mr. Newton. One of these notes, being one for Rs. 3000, he afterwards specially indorsed to the Delhi Bank, and that Bank having demanded in Calcutta a renewal of it, inquiry was made concerning the fact of the grant of administration to Mrs. Saunders, and so the transaction was brought to the notice of Mr. Bramly.

In the meantime a question had arisen in Mr. Bramly's Court touching the legitimacy of Paterson Tandy Saunders, and whether administration of his estate ought to be granted to Mrs. Saunders as his Mother and next of kin, or to the Administrator-General as representing the Crown. It appears to be now certain, that Paterson Tandy Saunders was born out of wedlock; but it is suggested on behalf of Mr. Newton that he might, nevertheless, as the Son of a Scotchman retaining his domicile though resident in India, have been made legitimate *per subsequens matrimonium*.

Their Lordships think that it is fortunate for Mr. Newton that the determination of this case does not depend upon this point. If it appeared that Mr. Newton, knowing that Paterson Tandy Saunders was born out of wedlock, had applied for Letters of administration as if the deceased had been born in [286] wedlock, and, pending that application, had caused Mrs. Saunders to indorse these Bills in the character of Administratrix when she did not possess that character, and had attempted to raise money on them for Mrs. Saunders, in the expectation that he might ultimately succeed in showing that the *status* of Paterson Tandy Saunders was to be regulated by Scotch law, and that under that law, though born out of wedlock, he was legitimate, their Lordships are of opinion, that his conduct would have been almost without excuse. For the proof of legitimacy and of the right of Mrs. Saunders to administration, and to a beneficial interest to any part of her Son's estate, would in that case have depended on the determination of a disputable, and possibly, very nice question, viz.:—Whether Mr. George Saunders, if his domicile of origin were Scotch, had not lost that domicile, and acquired an Indian domicile by settling as an Indigo planter in India and there dying. In the cases of *Campbell v. Campbell* (Law Rep. 1 H.L. Sec., 182), and *Munro v. Munro* (7 Cl. and F., 842), one of the principal issues was, whether the Father of the person whose legitimacy was in question had retained his Scotch domicile. And in both cases the facts on which the issue was determined were very different from those on which the like issue would have been tried in the case of Mr. Saunders.

But, in truth, this was not the defence of Mr. Newton in the High Court, nor need it be his defence here. The case which he made there was, that when he first made the application for Letters of administration, and when he caused Mrs. Saunders to indorse [287] the Notes, he did not know or believe that Paterson Tandy Saunders was born out of wedlock; and, therefore, had good reason to believe that in a few days she would possess the character which the indorsement attributed to her. And this fact has been found in his favour by the High Court. On the occasion of the first hearing the acting Chief Justice says:—"When you procured your Client to sign the promissory notes as Administratrix, you doubtless were under the belief that she would at once get administration granted to her, and we, therefore, do not regard the act as so gravely criminal as it would otherwise have been. The opinion which we have formed on the second charge, which is made against you in the Judge's report, that you possibly were not aware that any impediment existed to the obtaining of the administration by your Client, enables us to assume in your favour that, when you procured your Client's signature as Administratrix, you believed that in a very short time she would be in a position legally to assume that character and make a good title to her Son's property."

If the High Court had found upon sufficient evidence that Mr. Newton had advised Mrs. Saunders to make the indorsements as Administratrix, knowing that she had no title, or a doubtful title, to obtain the grant of letters of administration, their Lordships would have felt that the sentence upon Mr. Newton ought to be confirmed. But the finding of the High Court negatives this knowledge; and upon this finding of the High Court, their Lordships feel that, although in this matter Mr. Newton has been guilty of a grave irregularity, which, in their opinion, is well deserving of censure, he has been acquitted of having [288] acted with the *malus animus* which is a necessary ingredient in every fraudulent act, and, therefore, that his conduct, though censurable, does not bear the character which the heavy sentence passed upon him would stamp upon it. Their Lordships, therefore, however unwilling to weaken the hands of the Courts of India in repressing professional misconduct and maintaining a high standard of honour amongst those who are admitted to practice before them, have come to the conclusion, that in this case, it is

their duty humbly to advise Her Majesty to allow the appeal, and to reverse the last of the Orders against which it is brought, and that in lieu thereof to order that the rule to show cause of the 13th of August, 1870, be discharged. They do not propose to recommend the reversal of that Order, inasmuch as such reversal would imply that no rule to show cause ought to have been made. They make no order or recommendation as to costs.

[Mews' Dig. tit. INDIA : 3. *Legal Decisions*. S.C. 8 Moo. P.C. (N.S.) 202 : L.R. 4 P.C. 18.]

[289] JUGGUT MOHINI DOSSEE, and Others.—*Appellants*; MUSSUMAT SOK HEEMONEY DOSSEE, and Others.—*Respondents** [Nov. 22 and 23, 1871].

On appeal from the High Court of Judicature, at Fort William, Bengal.

Suit for possession of lands dedicated to the religious service of a family Idol, and for the appointment as Sabaet, or Manager of the religious endowment, under a Deed of dedication; against a party in cession, claiming title as a *bona fide* Purchaser for value, without notice of the alleged trust, whose title, however, was derivable through the Deed of dedication; held wrongly dismissed by the Court below, the Purchaser proceeded against having had sufficient notice to throw upon him the *onus* of proving exemption from the religious trusts in the lands, which he had failed to do.

This was an appeal from a decree of a division Bench of the High Court, whereby the appeal of the Appellants from a decree of the Judge of East Burdwan, was dismissed.

The facts of the case and the evidence (except that the lands, the subject of dispute, were different and were situate within another jurisdiction) were identical with those of the appeal of the present Respondents, other than the Respondent, Kalidoss Chunder, which appeal was dismissed by Her Majesty in Council in 1869 (see 13 Moore's Ind. App. Cases, 270).

[290] In that case the Respondents, except Kalidoss Chunder, sued to recover possession of four-fifths of certain lands lying within the jurisdiction of the Civil Court of Zillah Beerbhoom, from Hurreenath Roy, the original Plaintiff in this suit, since deceased, the predecessor in estate of the Appellant and his lessees and the vendees of parts thereof, on the allegation that the lands though ostensibly given to the Father of Hurreenath for his own use by a petition executed in the Beydi year 1229, A.D., 1813, by five Brothers who then represented the joint family, had not in fact passed to him, but had continued to be joint down to the Bengali year 1245, A.D., 1820, when a second partition was made, and the lands were set apart for the maintenance of the worship of the joint family Idols, and the Plaintiff sought in that suit, on the ground of the first partition having been inoperative, and the second operative, that as to their four-fifths in the lands so dedicated, the leases and sales effected by Hurreenath Roy should be set aside and possession given to the Plaintiffs.

The Defendant, Hurreenath Dutt, in that suit asserted that the first partition was in all respects *bona fide*, and was given full effect to, and that the alleged second partition was a mere fraudulent device and fabrication.

In the present case Hurreenath Dutt was the Plaintiff, and the Plaintiffs in the other suit Defendants. The Plaintiffs' suit was framed to get rid of various alienations by, and dealings, of the Defendants, with certain other lands situate in East Burdwan which were admitted, by the partition of 1229, and previous Deeds of

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colville, the Right Hon. Sir Robert Phillimore (Judge of the High Court of Admiralty), and the Right Hon. Sir Montague Edward Smith. Assessor.—The Right Hon. Sir Lawrence Peel.

dedication, which that [291] partition confirmed and gave effect to, to have been set apart for the maintenance of the joint family worship, and sought to have the Plaintiffs' share in the lands so dedicated, made over to him to maintain *pro tanto* for the purposes of the family worship.

The Defendants' answer set up precisely the same case as their plaint in the other suit, viz., that the partition of 1245 B. E., had altered the disposition of the family property made by the former partition and the previous endowment Deeds, and that the estate though dedicated for family worship by the first, had been desecrated by the second partition, and passed thereunder to two of the Defendants for their separate use.

The general issue was the same in both suits, namely, whether the partition took place in 1229 or 1245.

The suit out of which this appeal arose, was instituted by Hureenath Dutt, about five months after the institution of the other suit, in which he was made a Defendant against the Sokheemoney Dossee, Brijnath Dutt Boicoont Nath Dutt, Bindoobosini Dossee, Puddabutty Dossee, who represented four out of the five Brothers who had originally formed the joint family, and the Respondents, Kalidoss Chunder and Ramruttun Mittra alienees of lot Pilkhundee. The subject of the suit were, first, the lands of lot Pilkhundee; second, certain Lakhiraj lands detailed in the schedule to the plaint; third, the surplus proceeds of sale of lot Mohunpore, which had been sold for arrears of revenue, and which the Plaintiff alleged had been received and appropriated by the Respondent, Sokheemoney Dossee; and fourth, the ornaments and furniture of the Idols.

[292] The case for the Appellants was confined to the first and second subjects, namely, Pilkhundee and the Lakhiraj dedicated lands, it having been founded by the Courts below, that the evidence was insufficient to establish a charge of waste or breach of trust against the Defendants, as to the third and fourth subjects of claim.

As to Pilkhundee and the Lakhiraj lands, the Plaintiff, by his plaint, prayed that as they had been by the partition of 1229 and the previous Deeds of dedication of 1220 and 1227 validly dedicated and entrusted to the management of the deceased Husband of the Defendant, Sokheemoney Dossee, Manickram Dutt, as Sebaet on behalf of the joint family, on whose death they had come to her as his Widow impressed with the same trusts, and as she had subsequently repudiated the trust and asserted her own separate rights as to the Lakhiraj lands which, on their being resumed by the Government as invalid Lakhiraj, had, on her application and contrary to the objection of the Plaintiff, been resettled with her as her own, and as the Defendant, Puddabutty, the Widow of the deceased Gopeenath, the youngest Brother of the four Brothers of Manickram, had set up certain fabricated and false conveyances of Pilkhundee, by the last of which it purported to have passed to the Defendant (the Respondent), Kalidoss Chunder, a stranger to the family, from the Defendant, Ramruttun Mittra, an alleged Purchaser from Puddabutty, who was again alleged to have purchased the lot with her Stridhun from her Husband, Gopeenath (to whom it was alleged to have passed as his separate property under the second partition), the illegal and fraudulent dealings by the Defendants, with the joint endowed property, [293] should be set aside and possession should be given to Plaintiff of his share, viz., one-fifth of those properties, he being "willing to conduct in person the Shebathee business to that extent.

The Defendants, Sokheemoney, Puddabuttee, Brijnath and Boikantnath, by their joint answer admitted the execution of the earlier Deed of partition and the Deeds of endowment, that, under those Deeds, Pilkhundee and the Lakhiraj in dispute had been dedicated, as stated by the Plaintiff, alleged that by the second Deed of the partition of 1245, the earlier disposition of those properties had been done away, and that Pilkhundee had fallen to the share of Gopeenath, who sold it to his Wife, the Respondent, Puddabutty, for a consideration paid out of her Stridhun, and that she had, on the 25th of Fulgoon, 1248 (March, 1842), sold the same to the Defendant, Ramruttun Mittra, who afterwards sold it to Kalidoss Chunder.

As to the Lakhiraj lands, the Respondent, Sokheemoney Dossee alleged that, though dedicated by the earlier Deeds for the worship of the family Idols, they were not so by that of 1245, and that, having been resumed and settled by Govern-

ment with her in 1250 (1843), the Plaintiff's claim thereto was barred both by the ordinary Law of limitation, by twelve years' adverse possession, and also, under the special Law of limitation provided by Act, No. XIII. of 1848.

The Defendant, Kalidoss Chunder, set up the same defence as to Pilkhundee, and took his stand on the second partition, having given Pilkhundee to Gopeenath.

The Defendant, Ramruttun Mittra, disclaimed all interest in the subject of the suit, but supported the [294] contention of the other Defendants as to the second partition overriding the first.

The evidence put in on either side was almost identical with that in the first suit.

The Plaintiff examined Witnesses, who proved that the Respondent, Sokheemoney Dossee, continued, as alleged by the Plaintiff, to maintain, as Sebaet, the worship after her Husband's death for several years of the rents of the Lakhiraj and other endowed property, and that there was no such appropriation to her own secular purposes as was alleged by the Defendants.

The Deed of sale from Ramruttun to Kalidoss Chunder, dated the 23rd Bahadoor, 1261 (September, 1854), recited the second partition as the basis of the Vendor's title, and stated it to have been effected by the five Brothers, Manickram, Sunboonath, Bishonath, Kashinath, and Gopeenath.

On the 30th of March, 1860, the Judge of East Burdwan (Mr. H. M. Reid), dismissed the Plaintiff's suit with costs. The judgment, and the findings were to this effect:—That, as to the Lakhiraj lands resumed and settled with the Respondent, Sokheemoney Dossee, the Plaintiff was barred both by the ordinary law of limitation and also by the special law of limitation under Act, No. XIII. of 1848; that as to Pilkhundee, he was not so barred, because the Defendants had shown no adverse possession in Ramruttun before 1853, or in any other Defendant, and that it appeared that Sokheemoney Dossee, even up to the date of the suit had been asserting her possession as Sebaet; that, on the merits, the second partition was proved against the Plaintiffs by his own admissions and those of his co-sharers, *i.e.*, the Defendants; that, though Kalidass Chunder had failed to produce or [295] prove his Vendor's title Deeds, yet that the absence of all those documents was compensated by the admissions of the Defendants, that such Deeds had been executed, and accordingly the Judge held under the second issue, that Pilkhundee had been the private property of Gopeenath, and was purchased from him by his Wife, Puddabutty, with her own funds, and was sold by her to Ramruttun, by whom it was again sold to Kalidoss Chunder.

On the 20th of June, 1860, the Plaintiff, Hurreenath, having died pending the suit, his Son and heir, Mohendurnath Dutt, and the Appellant, Juggut Mohini Dossee, the Widow of another Son of Hurreenath, and Guardian of his minor Sons, filed their memorandum of appeal in the High Court from this decree.

The appeal was heard before the Judges of the Division Bench (Messrs. Kemp and Campbell), who differed in opinion, and in consequence the appeal was, according to the practice of the High Court, dismissed on the 15th of April, 1863.

Justice Kemp was of opinion, that the first partition of 1229, and the preceding endowments were *bona fide* and the endowments real; that the alleged partition of 1245 was not *bona fide* and its execution was not proved, and that there was no evidence of any admission of it by Hurreenath's Father or by Hurreenath himself, and that, therefore, the estate of Pilkhundee being endowed, the alienations of it were invalid and must be set aside. That, as to limitation affecting the claim of Pilkhundee, there was no proof of any sale to Puddabutty from Gopeenath, or of her having Stridhru wherefrom to pay the purchase-money, or of any sale to or real possession by Ramruttun, and that the alleged purchases were invalid, benamie and fraudulent, and that there [296] had been no *bona fide* adverse possession. That, as to the Lakhiraj lands resumed and settled with Sokheemoney Dossee, such settlement having been made with her, not as Sebaet, but in her own right, and more than three years before the institution of this suit, the Plaintiff's claim was barred under the provisions of Act, No. XIII. of 1848. That the Plaintiff was not entitled to be appointed Sebaet, and that the relief to which he was alone entitled was to have a declaration made that the alienation of Pilkhundee, which was an endowed estate, was invalid and void.

Justice Campbell was of opinion, that though the parties alleging the partition

of 1245 had not fully proved it, and much doubt might be cast on the character of that Deed, yet the onus was on the Plaintiff, and he had not disproved that Deed, which had been in existence for several years, and the possession under it, and which it was "probable that at one time Bissonath had consented to, although Hurreenath never did." And he, therefore, was of opinion, that the appeal should be dismissed, consequently, the decree of the Court below was affirmed.

The appeal was from this decree.

Sir R. Palmer, Q.C., and Mr. Doyne, for the Appellants, insisted, that it having been decided in the former appeal, *Maharance Shibessouree Debia v. Mothooranath Acharjo* (13 Moore's Ind. App. Cases, 270), that the partition took place in 1229, and not in 1245, that question was, so far as concerned the Respondents who were before the Court in that case concluded, and as regarded the Respondent, Kalidoss Chunder, the *bona fide* and effect of the former, and the fraud and want of proof of the latter, [297] was clear and well established. That Mr. Justice Campbell was in error in holding, that the *onus* of disproving the second partition was on the Plaintiff. That the partition of 1229 and the continuing endowment of Pilkhundee having been established, the sale of it as private property to the Respondent, Kalidoss Chunder, even if proved to have taken place, which they submitted had not been done, was wholly invalid, *Elberling on Inheritance*, 96, and should be set aside, as held by Mr. Justice Kemp. That, as regarded the resumed and resettled Lakhiraj lands, the judgment of both the Judges of the Division Bench were erroneous, the Plaintiff's right to relief not being at all barred under the provisions of Act, No. XIII. of 1848, as those provisions related merely to the right of possession, and not to cases of trust and title, such as the present suit. That, as regarded so much of the lands now claimed as might in the opinion of their Lordships continue to be impressed with the religious trust, the Appellants, as representing the only branch of the family who had sought to maintain the trust, were entitled, at least so far as regarded their own share, and in the like manner as was asked by the Respondents in the former appeal Case, to possession as *Sebaets*.

Mr. Leith, for the Respondent, Kalidoss Chunder, submitted, first; that the judgment of the Lower Court was right in deciding that the Plaintiff (on whom the *onus* lay) had failed to prove his alleged title to the lands in suit, and that the judgment of Mr. Justice Campbell, in the High Court, rightly affirmed that decision.

Second; that the judgment of the Lower Court was also right in holding that the Respondent, [298] Kalidoss Chunder, had sufficiently proved his title to the lands in question.

Third; that the execution and validity of the Deed of partition of 21st Srabun, 1245, as well as the separate and exclusive possession and enjoyment of the lands by that Respondent, and those from whom he derived title, were sufficiently proved.

Fourth; that the Plaintiff, as well as his Father, under whom he claimed title as heir, had so far acquiesced in the Deed of partition, and allowed the several members of the family, and also third parties, including the Respondent, to deal with separate portions of the property comprised therein for valuable consideration on the footing of the validity thereof, that even if such Deed had been originally not binding upon him, he could not now be allowed to impeach the possession of the Respondent, who claims thereunder, and

Fifth; that it was established by the Decrees in other suits, and the other documentary as well as the oral evidence produced in this suit, that the Respondent, and those through whom he derived title, had been in continuous beneficial possession, as owners of the lot Pilkhundee, under a title adverse to that set up by the Plaintiffs, for a period of more than twelve years preceding the institution of this suit, and that therefore the Plaintiff's suit was barred by the Act of Limitation, No. XIII. of 1848.

Judgment was reserved, and now delivered by

The Right Hon. Sir Robert Phillimore (Dec. 9th, 1871).—This is an appeal from a Decree passed by Mr. Justice Kemp and Mr. Justice Campbell, forming a Division Bench of the High Court of Calcutta, affirm-[299]-ing a decree of the Judge of East Burdwan, by which the suit of the Plaintiff, now represented by the Appellants, was dismissed.

The Judges of the High Court differed in opinion on the effect of the evidence: Mr. Justice Kemp expressed his opinion in favour of the Plaintiff as to part of the relief which was prayed against Kalidoss Chunder, the only Respondent who appears on this appeal, but as the Judges were not unanimous, the decision given in the Court of First Instance stands unreversed.

The Plaintiff's suit was for possession, but not for possession in the ordinary character of proprietor of lands: he made title to the possession of these lands, for which he sued on this special ground, that they had been dedicated to the religious service of the family Idols, by virtue of two Instruments of dedication in the Christian years 1813 and 1820, which still, at the time of the suit, impressed on the lands a trust, which by his suit he sought to have declared. This was the foundation and main character of his claim, though somewhat inconsistently with the nature of the dedication, he sued for a certain proportion only, as though the suit had been one in respect of private interest. The Court could not have so dealt with the possession, under these instruments of dedication.

He asked also to be appointed Sebaet, or Manager of the lands so dedicated. His plaint embraced other charges of breach of trust, relating to other properties, which are no longer insisted on. The properties which this appeal relates to are one lot called Pilkhundee, to which Respondent makes title as a Purchaser, *bona fide*, for value without [300] notice, and certain other lands enumerated in a schedule to the plaint, which were once claimed to be held as Lakhiraj, were resumed by the Government as held under an invalid Lakhiraj title, and were permanently settled for with Government by Sokheemoney Dossee. The appeal against her was heard *ex parte*. All these properties were comprised in, and dedicated by, the two instruments of dedication before mentioned.

The first Sebaet was the Husband of Sokheemoney, and after his death she held a portion at least of the dedicated lands by the title of Sebaet in succession to her Husband. Notice of the trust, if it be valid, is clearly established against her.

Her claim as to the lands resumed, is advanced under her settlement with the Government, the nature and effect of which will be subsequently considered.

The title of Kalidoss Chunder to lot Pilkhundee is derived through successive alleged alienations under a Deed, which will be described as a second Deed of partition, by which, as he contends, a valid partition of the family property was first constituted.

He admits that a Deed, purporting to be one of partition between the five Brothers who constituted the joint family, had been executed some years before, and that the dedication insisted on by the Plaintiff had been in fact made under those instruments of dedication before mentioned, but he seeks to avoid the effect of all upon the same grounds which were unsuccessfully advanced on the case lately decided by their Lordships on appeal (*Maharane Shibesouree Debia v. Mothooranath Acharjo*, 13 Moore's Ind. App. Cases, 270), when the earlier Deed was [301] established as the valid deed of partition of the family property. This decision, which is partly stated in the Appellant's case, and which was read in full on the argument, need not be further referred to, except to state, that the facts there decided cannot be considered to have been established against Kalidoss Chunder, who was not a party to that suit. Their Lordships, therefore, will proceed to consider the facts of the case solely upon the evidence which this case presents.

The nature of the suit must be borne in mind, in considering certain questions which arise in the cause as to the burthen of proof, the general Law of Limitation, the special Law of Limitation under Act, No. XIII. of 1848, the claim to possession, and the limitation of that claim to a portion or share of the whole property dedicated.

The suit, although it seeks to set aside the mutation of names, and to have possession decreed to the Plaintiff, seeks that relief as incident to the establishment of the trust. Although that relief cannot in the present state of litigation, as the proceedings have been instituted and conducted, be allowed, still it must be considered that the suit is brought to establish a religious trust. The trust is created by the instrument of 1813, confirmed by that of 1820. It is not constituted by the first partition Deed. If any vice existed to defeat this partition Deed, that vice

would not affect the dedication of the property under the antecedent instruments to the religious trust, if they show a real and not merely a colourable dedication.

The two Deeds which create and confirm the dedication are *prima facie* valid. Nothing is proved [302] to lead to the belief that they are at variance with the usages of the Country, or family, or that regard being had to the value of the property dedicated and to the property at that time of the family, there is any excess in the appropriation to the religious services of the family, of the portion of the family property thus set apart, such as to generate distrust of its reality.

It was argued that such dedications of property without the assent of the State, should be regarded as merely revocable appropriations, which the founders might vary the use. No authority whatever was adduced in support of this position, which strikes at the root of most modern endowments of the like nature.

A family trust of this nature has never in modern times, at least, been held to require such an assent. The cases supporting such trusts are too numerous for citation. They are collected in Norton's Leading Cases on Hindu Law of Inheritance, part ii., p. 406.

The argument of Mr. Leith, founded on the non-registration of these instruments of dedication at the time or shortly after the time of their execution, and on the subsequent registration of them at the time of the registration of the first Deed of partition, viz., that they constituted in effect one instrument, and rested on the sole foundation of the first Deed of partition, was not urged in the Courts below, and appears to have no foundation of fact to support it, since the mere contemporaneous registration of the three furnishes no ground for presuming such union. There is abundant evidence that all were acted on.

The trust declared on appears then to be established as to the lands dedicated by these two prior instruments; and it lies on the Respondents to show some subsequent legal conversion of the lands to the ordinary uses of property.

The second Deed is said to work this conversion, and the question arises which of the two Deeds of partition is to prevail.

The first Deed of partition is an instrument, which but for the existence of the second, would have been exposed to no suspicion.

A partition is favourably viewed by the Hindoo religion and law. It wants no extrinsic support.

The alleged presumption against the first Deed, that it may have been a mere device because one member of the family was indebted, may more reasonably be removed than maintained by due attention to that fact. Such a state of things often leads to partitions, but to fair and honest ones. It would be a prudent course in the members of a joint family to prevent, by a partition, the interference of strangers in their family arrangements, and an inquiry into the state, condition, extent, and uses of their joint property; and no suggestion has been made that the partition under the first Deed was unequal.

The second Deed, however, does afford ground for suspicion. It makes no reference whatever to the first Deed: it professes to be the ordinary partition of a, till then, joint family property; it appoints as a Sebaet one whom no prudent person would appoint a trustee, one an actual insolvent. Such an appointment, independently of its obvious impropriety, would be little likely to be made by a Hindoo family having several and more competent members, from the fear of the scrutiny to which it might lead if the Creditors [304] of the Sebaet traced the property to his possession. Again, as a dedication, in fact, was to be defeated by it, some difficulty on this ground alone would present itself to the minds of those who might meditate on the change which this Deed seeks to effect. All comparison, therefore, supports the Deed prior in time, which priority alone, in a balanced state, would establish the first instrument.

It was urged with great force in the argument that every Judge and Court that has hitherto dealt with this second Deed, has either actually declared it invalid, or stated it to be subject to grave suspicion. A decision against the Plaintiff generally in this suit would be, in substance, deciding against a trust, *prima facie*, well established, on evidence of a subsequent Deed of revocation not only not proved but on every judicial examination of it, discredited. Their Lordships, therefore, think, that a trust was created by the deeds of dedication of the pilkhundee property.

It remains to be considered, whether the Respondent can support the Decree in his favour upon the ground that he is a Purchaser for value without notice. Now, the very origin of his title, as well as the contention on the mutation of names, prove that he must have had notice of the original trust. The devolution of the title to him from Gooroochurn under the second Deed is, until the conveyance to himself, accompanied with very suspicious circumstances at every stage of it, such as ordinarily accompany an attempt in a Hindoo family to put property out of the reach of an apprehended claim. He is not shown to have made any inquiries as to the grounds for supposing that the trust was legally at an [305] end; and, therefore, he cannot exonerate the property from the trust which attached to it.

The principal claim of Sokheemoney Dossee to hold the resumed lands free from this trust on the grounds advanced by her, is destitute entirely of legal foundation. She did not rest her title so much on the operation of the second Deed of partition as a revocation of the first, as on the effect of the resumption proceedings and the settlement for revenue with her. Such a settlement does not establish proprietary right in the land, but is made with Government as to their claim to their Khiraj, or revenue. The settlement and the possession under it being evidence of a right to possession, are also so far evidence of proprietary right, but do not necessarily constitute it. *A fortiori*, they could not divest and destroy trusts to which the Settlor was subject. The claim supposes a mere Settlement for revenue to have the same effect in clearing away preceding titles which a sale under the Revenue Laws works; but antecedent trusts have, in certain cases, been impressed by the decisions of Courts of Justice, including this Tribunal on estates, acquired even under these revenue sales. (See the cases referred to in Mr. Justice Macpherson's work on Mortgages, p. 86, 5th edition.) Sokheemoney Dossee could not get rid of her Sebaet title and possession by the machinery of this settlement, though it was in terms made with her as a private person. Therefore, the claims of the Plaintiff, so far as he seeks to have the trust established as to the property, receives no answer whatever from the law as to limitation of suits, or from the terms of the settlement for revenue with her.

[306] It remains to consider one argument which was addressed to their Lordships on one part of the evidence, which seems not to have been formerly distinctly advanced.

It was urged, that the evidence shows that the family had, in several instances under the first Deed, dealt with other portions of the property included in the dedication instruments as though they were private property. This argument was thus met, that there was no proof that the properties so dealt with were dedicated properties, since the identity of the name was perfectly consistent with properties held separately under Malguzary and under Lakhiraj titles, which might both bear the same description; that a disposition of part might not be to the prejudice of the trust necessarily; and that changes of property not designed otherwise than for the benefit of the endowment would not be questioned in a Court of Justice. The correctness of each position cannot be gainsaid, and the argument for the Respondent on this point, which is conjectural, is conjecturally answered. How the real facts may be, it is not possible for their Lordships, on the evidence, to decide; but this is to be observed, that a former abuse of trust, in another instance, cannot be pleaded against a Trustee who seeks to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he is seeking to protect the property, though it would be a reason for excluding him from the administration of the property as Sebaet. The Court could not with any propriety say, We will decline to protect the property and leave it further [307] exposed to loss, and decline to make a declaration that it is trust property, merely because they would not trust the Plaintiff with its administration.

The title being founded on trust, and the contention of the holders being that it is not now in their hands subject to the trusts, *prima facie* at least, attaching to it, the *onus* of the proof was on them. They did not discharge themselves by proving a Deed as to which Mr. Justice Campbell declares that he probably would not have made it the foundation of a decree in their favour. The learned Judge appears further to have mistaken the nature of the change of possession, which he considered to have prejudiced the Plaintiff's case. The old Sebaet title was recorded in the

Collector's Registry. A mutation of names— in itself a change—was applied for on the part of Kalidoss Chunder, and resisted on the part of the Plaintiff, claiming as Trustee. The Plaintiff was, in effect, referred to a civil suit, and the very reason of such a reference, viz., that the matter is not in the jurisdiction of the revenue Officer, cannot, either in reason or law, invert the ordinary course of proof and presumption in a civil suit to establish a trust. Their Lordships think the judgment of Mr. Justice Kemp, on the facts of the case, correct, and the Decree which, but for the supposed application of the law of Limitations, Mr. Justice Kemp would have given as to the resumed lands, as well as to Pilkhundee, is that, which their Lordships will humbly advise Her Majesty to make.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be allowed: that the Decrees of the High Court and of the Court below [308] be reversed, so far only as they dismiss the claim of the Plaintiff to set aside the alienation of Lot Pilkhundee, and to have the truth of the dedication instruments declared, and that it be declared, that the lands specified in the schedule to the plaint, and the said Lot Pilkhundee were and continue dedicated under the instruments of dedication of 1813 and 1820 to the religious uses specified in those instruments of endowment; and now add a declaration, that the Decree is to be without prejudice to any further suit or proceedings for the enforcements of the religious trusts declared on the appointment of a proper Sebaet.

Their Lordships think that the costs in the Courts below should be allowed to the respective parties, according to the usual course of proceeding in those Courts when a Plaintiff recovers part of his demand, and that the Appellant should have the costs of this appeal.

[309] HELEN SKINNER, *Appellant*; SOPHIA EVELINA ORDE, WILLIAM ORDE, CHARLES GRANT BARLOW, and SOPHIA SKINNER.—*Respondent* * [Dec. 11 and 12, 1871].

On appeal from the High Court of Judicature, North-Western Provinces, Allahabad.

A Child born in India, whose Father was a European British subject and a Christian, must be presumed to have the Father's religion, and his corresponding civil and social *status*, and it is the duty of a Guardian to bring up his Ward in his Father's religion [14 Moo. Ind. App. 323].

An Infant, the Child of a Christian Father and the issue of a Christian marriage, was left, by the death of her Father, of very tender age, and brought up by her Mother as a Christian during her early youth. Her Mother, after cohabiting with a man having a Wife and professing the Christian religion, became, with him, a Mahomedan, for the purpose, as it appeared, of giving legal effect to a Mahomedan marriage between them, but which alleged marriage was not proved to have been duly celebrated.

The infant, after attaining the age of fourteen years, and being with her Mother, professed a desire to become a Mahomedan in religion, and adopted the Mahomedan mode of life. The Courts in India having been applied to, under the circumstances, by her relatives, to remove the Infant from the custody of her Mother, made an Order under the provisions of the Acts, Nos. XL. of 1858 and IX. of 1861, and placed the Infant under a Christian Guardian. Such Order, on appeal, confirmed by the Judicial Committee.

In this case special leave to appeal was allowed (see *In re Skinner*, 13 Moo. Ind. App. Cases, 532) from an Order of the Judge of Meerut, dated the 19th of May,

* Present: Members of the Judicial Committee—The Right Hon. Sir James William Colville, the Right Hon. the Lord Justice James, the Right Hon. the Lord Justice Mellish, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier. Assessor:—The Right Hon. Sir Lawrence Peel.

1870, and Orders of the High Court [310] of Judicature for the North-Western Provinces, at Allahabad, dated the 7th of July and the 16th of July, 1870, whereby Victoria Skinner, an infant of the age of fourteen years, was ordered to be removed from the custody of her Mother, the Appellant, and Guardians of her person and property were appointed.

The facts of the case, as they appeared from the petition and evidence in the cause, were as follows:—

Victoria Skinner, the Minor, was the Daughter of George Skinner, deceased, and the Appellant his Wife. George Skinner was the illegitimate Son of a native woman by a European Father. During his lifetime, and at the time of his death, George Skinner professed the Christian religion, and he was married to the Appellant in a Christian Church according to the Christian rites. He was killed at Delhi at the outbreak of the Mutiny in the year 1857.

After the Father's death, Victoria Skinner remained with her Mother, until she was removed from her custody and placed under the care of the Respondent, Sophia Skinner, by the Order of the Judge of the Court at Meerut. Victoria Skinner was entitled to a fortune estimated at Rs. 100,000, derived from an indigo estate (known as the Skinner estate), in which her Father had a share at the time of his death. Her income was stated to be Rs. 400 per mensem.

It appeared, that in the latter part of the year 1867, the Appellant formed a connection with a person named John Thomas John, who had formerly professed the Christian religion, but had then recently become a Mahomedan. He had at that time a Christian Wife, living at Agra, to whom he had been married in the year 1859, but whom he deserted in order to live with the Appellant; and from the year [311] 1867 the Appellant continued to live, and at the respective dates of the Orders appealed from she was living, with him as his mistress or so-called Wife, and it appeared from the evidence that in the year 1869 she had a child by him, which died. It further appeared, that the Appellant never professed any religion other than Christianity at any time before she formed the connection with John Thomas John. She then adopted and had since professed Mahomedanism. Mr. John, in his evidence, stated that he embraced the Mahomedan faith in October, 1867, and that he contracted a Mahomedan marriage with the Appellant on the 24th of that month, but no Witness was called to prove such marriage; and he admitted, on cross-examination, that towards the end of 1868, or the beginning of 1869, he had denied the facts of the alleged marriage and of his change of faith to the Judge in whose Court he held a situation.

In the month of April, 1869, the Appellant and Mr. John removed Victoria Skinner, who was then thirteen years of age, from the school at Meerut which she was attending, and withdrew her from all Christian associations. It appeared from the evidence, that previously to that time Victoria Skinner had been brought up and treated as a Christian. She wore European costume, and was not kept in seclusion, but regularly went to school, and in other respects conformed to European habits. From the time of her removal from school in April, 1869, her education appeared to have been totally neglected. She resided entirely with the Appellant and Mr. John in seclusion behind the purdah, and under the influence of these associations, it was alleged, she was induced to renounce Christianity and profess the [312] Mahomedan religion. Under these circumstances the Respondents presented a petition in the Court of the Judge of Meerut on the 21st of March, 1870, and thereby prayed that Guardians might be appointed to the person and property of the Minor, and that an account might at once be taken of the receipts and expenditure on behalf of the Minor from the Appellant and Mr. John. On the 22nd of March, 1870, the Judge of Meerut made an Order, that pending a final Order the Minor should be placed under the temporary charge and custody of the Respondent, Sophia Skinner.

The Appellant and Mr. John, by their answers to the petition, submitted that the Court had no jurisdiction to entertain the Respondents' application; that the petition was presented, not for the purpose of furthering Victoria Skinner's interests, but from hostile feelings towards Mr. John; that the Appellant was not, and never had been, Mr. John's mistress, that a marriage, legal according to Mahomedan law, had taken place between them, and had been recognized by the Peti-

tioners; that the Appellant and Mr. John were not desirous of depriving Victoria Skinner of education and Christian associations, and that her own wishes as to her guardianship and religion ought to be consulted. The objection to the jurisdiction of the Court was based on the ground, that the Minor was a European British subject, but that objection was overruled by the Judge of Meerut, Mr. G. D. Turnbull, who, under the Act, No. XL. of 1858, made an Order, dated the 19th of May, 1870, directing that the Minor should be removed from her Mother's care, that the charge of her property should be placed under the Collector of the District, [313] and that another Guardian should be appointed for her person, the selection of such Guardian to be made either by the Court or by consent of the parties themselves.

The Appellant and Mr. John appealed against that Order to the High Court of Judicature for the North-Western Provinces, Allahabad. The reasons stated in the petition were: first, that the District Court at Meerut had no jurisdiction to entertain the petition presented by the Petitioners; secondly, that the evidence established that no influence was used to induce Victoria Skinner to change her religion; thirdly, that assuming that the Judges found that undue influence had been used, yet the exercise of such influence was no sufficient reason for depriving the Mother of the custody of her child; fourthly, that it was manifest that the petition was presented not for the purpose of protecting the interest of Victoria Skinner, but from feelings of enmity entertained by the Petitioners against the then Appellants; and, lastly, that Victoria Skinner was entitled to select what religion and what Guardianship she pleased.

The appeal was heard before Mr. C. A. Turner, officiating Chief Justice, and Mr. R. Spankie, one of the Judges of the High Court, who delivered the judgment of the Court on the 7th of July, 1870. By that judgment the High Court confirmed the Order of the Court below, so far as it directed the removal of the Minor from the custody of her Mother, and directed the appointment of a Guardian of her person, but they considered it desirable to cancel the Order placing the property of the Minor under the charge of the Collector, and substituted for it directions for the appointment by the Court of [314] a Guardian of her property. The grounds upon which the High Court confirmed the Order for the removal of the Minor from the Appellant's custody were thus stated in their judgment:—

"Whether or not a marriage has been duly celebrated in accordance with the rites of the Mahomedan law between the Appellants, that marriage could not be regarded by a Christian as valid during the lifetime of John Thomas John's Christian Wife. Looking at the matter from a Christian point of view, Helen Skinner is living in adultery with John Thomas John. It is also manifest that the Appellants have worked upon a Minor, to induce her to profess herself a Mahomedan. Has, then, the Judge erred in directing that the Minor be removed from the custody of the Mother? We answer that question in the negative. The Judge, in the exercise of his jurisdiction, under Act, No. XL. of 1858, is in our opinion justified in having respect to the religion professed by the Father of a Minor, and in passing such Order with regard to the custody of the person of the Minor as he may hold to be in accordance with what would have been the Father's wishes, had he been alive to express them. It cannot be supposed that the Father of the Minor would have considered a woman, who, in his view, would have been leading a life of adultery, would be a suitable Guardian for his child, nor is it to be presumed that he would have desired that she should be educated in a religion other than that which he himself professed. We do not desire to be understood as holding, that a mere change of religion would justify the Court in removing a Child from the custody of the Mother, but where, under colour of her change in religion, a [315] Mother forms a connection or leads a life which, by persons professing her Husband's faith, would be deemed immoral, we hold that she thereby ceases to be a proper person to be entrusted with the education of her Child."

By a further Order of the High Court, of the 16th of July, 1870, it was ordered, that Miss Scanlan, of Mussoorie, should be appointed Guardian of the person of the Minor. And it was further ordered, that Miss Scanlan should receive such reasonable remuneration for the charge of taking care of and providing duly for the education and maintenance of the Minor, in a manner suitable to the fortune of the

Minor, and in accordance with her reasonable wishes, as should be determined by the Court on the presentation of a scheme for the management of the property by Mr. T. Bailey. And it was further ordered, that the relatives of the Minor, and among them, the Mother of the Minor, might have reasonable access to the Minor at such times and seasons as might be right and convenient, but the permission thereby granted was expressly declared not to extend to John Thomas John, alias Jan Mahomed, claiming to be the then Husband of the Mother of the Minor.

By another Order of the High Court, on the same day, Thomas Bailey was appointed Guardian of the property of the Minor, and a certificate of administration granted to him for the purpose, the remuneration to be at the rate of Rs. 5 per cent. on all such sums as might come into his hands on the account of the Minor, and Mr. Bailey, at his earliest opportunity, was to inform the Court of the amount of income accruing from the property of the Minor, and should propose a scheme showing the amount to [316] be expended on the education of the Minor, and the amount (if any) which might remain available for investment, after disbursing all such necessary expenses, and also the fund, or funds, in or upon which any such balances might be invested.

The Appellant having obtained special leave (see *In re Skinner* 13 Moore's Ind. App. Cases, 532), brought the present appeal against the Order of the Judge of Meerut of the 19th of May, 1870, and the Orders of the High Court of the 7th and 16th of July, 1870.

Sir R. Palmer, Q.C., and Mr. Cave, for the Appellant. This is a question involving the right to the guardianship of an infant Mahomedan, over whom the jurisdiction of the Courts in India has been exercised under Acts, No. XL of 1858 and IX of 1861. The Appellant, the Mother of the Infant, Victoria Skinner, has, by an Order of the High Court, been removed from the custody and guardianship of her Daughter, an Infant of the age of fourteen years. The second section of the Minors' Act, No. XL of 1858, gives jurisdiction to the Civil Court over the persons and property of Minors not under the protection of the Court of Wards, and not being European British subjects; the provisions of which Act are extended by the subsequent Act, No. IX of 1861. The legal status and the rights of the Minor's Father have been already decided by this Court in the case of *Barlow v. Orde* (13 Moore's Ind. App. Cases, 277), where it was held, [317] that the family, in truth, followed no particular religion. The special leave to appeal was granted on statements contained in the petition of the Appellant, supported by the joint declaration of herself and her Husband, John Thomas John, but the Court below acted on the allegations contained in the original petition of the Respondents presented to the Court of the Judge of Meerut; but we insist, that the allegations contained in that petition were not proved, and that even if they had been, they were not sufficient to warrant the Orders either of the Court at Meerut or of the High Court. The effect of the Order of the High Court is to direct that the Minor be brought up in the Christian religion, against the manifest wish and desire of the Infant herself, and contrary, as we conceive, to the law and justice of the case. Now, the Father of the Infant having appointed no guardian, and the infant being at his death of the age of only one and a half years, the Mother was the natural Guardian for nurture, and was entitled to the custody of the child, subject, of course, to the right of the Court, in its discretion, to interfere and direct its education, as directed by Act, No. XL of 1858, sect. 26. A Mother is only removable on the ground of immorality. *Reg. v. Greenhill* (4 A. and E. 624); *Reg. v. Clarke* (7 E. and B. 186); *In re Moore* (11 Ir. C.L. Rep. (N.S.), 1); *In re Curtis* (28 L.J. (Ch.), 458). In the last case it was held, that the Court of Chancery would not interfere with the legal custody of a Child by taking it from its Father, simply with reference to what was most for the Infant's benefit. In *Erskine Perry's Oriental Cases* in the Supreme Court of Bombay there are two cases the converse of that decided [318] by the High Court, *Reg. v. Shapuri Bezonji* (*Perry's Oriental Cases*, p. 91); in that case a Parsee family detained an infant Child from its Father on the ground of the Father having embraced the Christian religion. The Supreme Court at Bombay, on a Writ of *habeas corpus*, ordered the Child to be given up to the Father; and in the case of a Brahmin convert, *Reg. v. Niskett* (*ibid.*, p. 103), that Court ordered a Hindoo boy of twelve years old to be delivered up to his Father, and refused to examine the Boy as to his capacity and

knowledge of the Christian religion, or as to his wishes to remain with his Christian instructor. The assumption by the High Court that the Appellant was leading an immoral life was not warranted by the facts of the case; the Appellants' marriage with John Thomas John was valid, and sufficiently proved. It was performed in the presence of Witnesses, which is all that is requisite by the Mahomedan law: *Hamilton's Hedaya*, Vol. I., Book II., ch. I., p. 25 [Ed. by Grady].

It is clearly not for the Infant's benefit that she should be separated from her Mother. The General rule of English Courts regarding the bringing up of the Infant in the Father's religion is not disputed: *Austin v. Austin* (34 Beav. 257, 265); *In re Newbery* (Law Rep. 1 Eq. 431); but that rule is not applicable here: there is no certainty what the Father's faith really was: *Barlow v. Orde* (13 Moore's Ind. App. Cases, 277). Here the Infant is of sufficient age to select for herself what faith she prefers, and has, upon due deliberation, chosen the Mahomedan. *In re Conner* (16 Ir. C.L. Rep. (N.S.), 112) [319] the Court refused to take a Child of tender years from the custody of its Mother on the ground that the Mother's religion differed from that of the deceased Father. The rule that the Father's religion is to be enforced, is subject to the discretion of the Court, whether or not it is for the welfare of the Child. In *Stourton v. Stourton* (8 De G. M. and G. 760) it was held that, whatever the religion of the Mother is, provided she is not immoral, the Court would not, when the Infant is old enough, have his religious views interfered with. Here the Infant is of the age of fourteen years: *Witty v. Marshall* (1 Y. and C. (N.R.), 68).

Mr. C. E. Pollock, Q.C., Mr. Horace Davey, and Mr. M. D. Chalmers, for the Respondents.—The Order of the Judge at Meerut, as well as those of the High Court, were justified under the Acts, Nos. XL. of 1858 and IX. of 1861, which give ample jurisdiction over Minors in such cases as this. The Father was undoubtedly a Christian, he was married according to the form of the Church of England, and professed that religion up to the time of his death. When the Father has not left any expressed direction as to the religion in which his children are to be educated, the Court will assume that his wishes were that they were to be educated in his own religion: *In re North* (11 Jur. 7). The rule of the English Courts, that the Child should be brought up in the Father's religion, therefore, is applicable; and it is the duty of the Guardian to bring the Minor up as a Christian, and the Court will control [320] the Guardian, *Jones v. Powell* (9 Beav. 345), unless there are circumstances which take the case out of the rule: *Stourton v. Stourton* (8 De G. M. and G. 760); *Hawksworth v. Hawksworth* (Law Rep. 6 Ch. Ap. 542); *In re Darcys* (11 Ir. C.L. Rep. 298); *Reg. v. Clarke* (7 E. and B. 186); *In re O'Malleys, Minors* (8 Ir. Ch. Rep. 291). The English law must be the governing rule in this case: *Abraham v. Abraham* (9 Moore's Ind. App. Cases, 241). The Acts, Nos. XL. of 1858 and IX. of 1861, have amply provided for such a case as this, and have been properly applied by the Courts below. Nothing could be more impolitic, as well as inexpedient, than that this Tribunal should interfere with the discretion exercised by the Courts in India in a matter affecting so materially the interests of the Infant. The Mahomedan law is wholly inapplicable, as it applies only when the whole family are Mahomedans. It does not recognize such a state of things as exists in this Country. The laws of marriage and the custody and control of Infants by their Guardians provide for the protection of a Minor so situated as the Infant here.

Their Lordships' judgment having been reserved, was now delivered by

The Lord Justice James (Dec. 11, 1871).—This is an appeal from an Order of the High Court of the North-Western Provinces, in substance, confirming an Order of the Judge of the Court of Meerut, removing an Infant Ward and her property [321] from the custody and guardianship of her Mother, the Appellant, and the alleged second Husband of that Mother.

The Application was made to the Judge under the provisions of the Indian Act, No. IX. of 1861, which are as follows:—

"1. Any relative or friend of a Minor who may desire to prefer any claim in respect of the custody or guardianship of such Minor, may make an application by petition, either in person or by a duly constituted Agent, to the principal Civil Court of original jurisdiction in the District, by which such application, if preferred

in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the Petitioner, or his Agent, if he appear by Agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody or being in the possession of the person of such Minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition, and the determination of the right to the custody or guardianship of such Minor.

"2. The Court may direct that the person having the custody or being in possession of the person of such Minor shall produce him or her in Court, or on any other place appointed by the Court, on the day fixed for the hearing of the petition, or at any other time, and may make such order for the temporary custody and protection of such Minor as may appear proper.

"3. On the day appointed for the hearing of the [322] petition, or as soon after as may be practicable, the Court shall hear the statements of the parties, or their Agents, if they appear by Agents, and such evidence as they or their Agents may adduce, and thereupon shall proceed to make such Order as it shall think fit in respect to the custody or guardianship of such Minor and the costs of the case."

The Judge accordingly, after hearing the case, presented to him, made an Order, removing the Ward from the Custody of her Mother. An appeal from this Order was presented to the High Court, which Court pronounced the final Order now complained of. The Act, No. IX. of 1861, gives no further appeal, but on the statement made to this Tribunal that the question really involved the religious education of a Ward, special leave was given by Her Majesty, on the recommendation of this Board, to prosecute the appeal now to be disposed of.

Several English cases have been cited to their Lordships, and one is referred to and relied on in the judgment of the Judge of the Court of Meerut; and it is, obviously, of very great assistance to the Courts in India, and to this Board, to see how, in the exercise of a similar jurisdiction for the same object, the Courts in this Country have thought it best to act for the protection and welfare of infant Wards. The course of decision in the English and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court, that in the matter of religious education great, and in the absence of controlling circumstances, paramount, weight should be given to the expressed or implied wishes of the deceased Father. It was contended with some plausibility before their Lordships, that this rule had its [323] origin in the statutory power of English Fathers to appoint Guardians for their children.

However this may be, their Lordships do not think it necessary or desirable for the determination of this case, to refer to or rely on any such rule.

The Indian Act certainly does not expressly refer to any such right, and appears to have had one object in contemplation, the protection of the Infant Ward, and to have given the Judge (subject, of course, to appeal) the power, and to have imposed on him the duty, of doing what, in his judgment, is best for the Infant; and no other power or duty.

In India, however, all, or almost all, the great religious communities of the world exist, side by side, under the impartial rule of the British Government. While Brahmin, Buddhist, Christian, Mahomedan, Parsee, and Sikh are one nation, enjoying equal political rights and having perfect equality before the Tribunals, they co-exist as separate and very distinct communities, having distinct laws effecting every relation of life. The law of Husband and Wife, parent and child, the descent, devolution, and disposition of property are all different, depending, in each case, on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations.

From the very necessity of the case, a Child in India, under ordinary circumstances, must be presumed to have his Father's religion, and his corresponding civil and social status; and it is, therefore, ordinarily, and in the absence of controlling circumstances, the duty of a Guardian to train his Infant Ward in such religion.

[324] What are the facts of the present case? Beyond all question the Ward was the child of a Christian Father, the issue of a Christian Marriage. She was left an infant of very tender years, her Father being one of the victims of the great

outbreak and massacre at Delhi in the year 1857. She remained thenceforth under the protection of her Mother, a Lady, apparently, of ancestry not Christian, and with no great knowledge of Christian tenets, or attachment to Christian habits. But she was married to a Christian in a Christian Church, and does not appear to have professed any other faith, or to have reverted in costume or customs to her ancestral faith until the autumn of 1867. The child up to that time had certainly been brought up and, so far as she was educated at all, educated as a Christian girl, eating, drinking, and associating with her Christian cousins, and going to a school.

In the autumn of 1867 this occurred. The House of the Widow became the House of one John Thomas John, a Clerk of inferior grade in the Judge's Court, and they lived and cohabited together as Husband and Wife, John Thomas John being already the Husband in Christian marriage of a living Christian Wife. It is suggested that this union was sanctified and legalized in this way—that the Widow became a Mahomedan, that John Thomas John became a Mahomedan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahomedan form a valid Mahomedan marriage with the Widow, the Appellant.

The High Court expressed doubts of the legality of this marriage; which their Lordships think they were well warranted in entertaining.

[325] But however this may be, their Lordships can entertain no doubt, that when the connection between John Thomas John and the Widow was formed, whether it was merely adulterous or under the cover of a Mahomedan marriage, the home was no longer a fit home for a Christian young girl; and if the matter had then been brought to the notice of the Judge, it would have been his plain duty, without delay, to find a more suitable home and guardianship than what had become, in fact, the home and guardianship of John Thomas John. The matter was not, however, brought so soon as it ought to have been to the attention of the Judge.

Some relatives interfered, in order that the child might be sent to a proper school—a proper Christian school; and John Thomas John and his alleged Wife, professing to yield to the suggestion, took the girl in June, 1869, up to Simla, with the avowed object of placing her in a Christian school there. They now represent that this project failed, by reason of the girl's refusal to go to school; and that she began to express a preference for the Mahomedan religion, and the Oriental mode of feminine life in seclusion behind the purdah; and that at some period (the time is not exactly fixed) a Moulavie was introduced, who confirmed her in her resolution to become a Mahomedan. The young Lady, who by this time had attained the age of fourteen years, or thereabout, made the following deposition:—

"I know Mr. John. I first knew him when we came to Meerut, and for the past two years know him well. No one has ever persuaded me to be a Mussulmani. My own feelings alone have prompted me. I wish to remain a Mussulmani. I would not be [326] persuaded to become a Christian, because it is from my own conviction that I am a Mussulmani. I am in the purdah by own free will. I went up to Simla with my Mother and Mr. John. They wished me to go to school, and pressed me very much to go, but I would not consent. I heard of the marriage of my Mother to Mr. John five or six days after it took place. I cannot say how long Mrs. James Skinner has known of the marriage, but she must have known of it a long time, as they have lived together for two years, and it has been matter of notoriety. I believe all Mr. Skinner's family must have known of it. I wish to return to my Mother. I believed Mrs. James Skinner to be a Mussulmani; Mrs. Orde to be a Christian. To Counsel for Petitioners. My Mother can read very little—small story Books; but she cannot read Persian, nor write at all. She can only read the Urdu in print, not the written character, excepting very good text-hand. I have read easy Books on religion in Urdu, but not studied them. I am studying the Koran with a Teacher. There was a picture of my Father, and there were several other pictures; but as I had heard that it was strictly forbidden to keep pictures by our religion, I, therefore, destroyed them with my own hands. The picture was on paper in a frame with glass. It was destroyed soon after we returned from the Hills. I heard that to keep pictures was prohibited after my return from the Hills, from a Preacher, a Moulavie, who came to the House and preached a sermon. No one advised me otherwise. I had long thought of becoming a Mussulmani, but when I was young did not understand

the different religions; when I returned from the Hills I turned my attention to it. [327] and had the Preacher called to preach. Almost all my family are Christians. I have had no intercourse during the last six or seven months with any others who are Christians, but their family and Mrs. Benu. Since I have been in their House I have not had any Letter of any kind from Mr. John. I had some Letters from my cousin Sophy, who is in Calcutta, and Charlie, which were on my Table. These I sent for. Two from Charlie I sent for the day before yesterday, which were old, and I tore them up; the other from Sophy I sent for yesterday, and showed it to Mrs. Aldwell. The two from Charlie I sent for by Achakrai, and the one from Sophy by my Ayah. To Counsel for Petitioners.—I know Mrs. Benu. I have seen her several times since I came from Simla. I know her to be a Christian.” This evidence was, with the consent of the Counsel on both sides, and also of the principal parties, though the questions and answers were put and given in the vernacular of the Country, Urdu, recorded by the Court in English, and was read over to the Witness in Urdu, and by her acknowledged to be correct.

The case of the Appellant, in fact, rested on this deposition. An eloquent appeal was made to their Lordships' feelings not to sanction such a violation of the young Lady's present religious convictions and natural feelings as was involved in tearing her from her Mahomedan home and Mother, and committing her to the care of a christian strange Schoolmistress. The Judges of the High Court, however, did not think that deposition sufficient to induce them to abstain from making in July, 1870, the Order for the appointment of the Guardian, which would have been the [328] only possible Order that could have been made in 1867.

Their Lordships cannot dissent from that conclusion. It would be very easy, of course, for a Mother, under such circumstances, to procure from a young Daughter the expression of a wish to remain with her and to become a Mahomedan like her, rather than continue a Christian and go to a strange school: and it is impossible, in their Lordships' judgment, to believe that in the interval which had occurred between the visit to Simla and the application to the Court any such knowledge of the differences between the two religions had been acquired, or any such settled conscientious convictions had been formed, as to make it really likely that her moral and religious condition would be endangered by placing her where she should receive the secular and religious instruction and training, which she ought to have long previously and without interruption enjoyed. Their Lordships are, therefore, of opinion, that the Order, in so far as it removed the Ward from her Mother and alleged stepfather, and placed her under a Christian Guardian, was right, and that is really the only matter that has been brought before them.

Their Lordships will humbly report to Her Majesty that, in their opinion, the Order of the High Court ought to be affirmed, and this appeal dismissed with costs.

This recommendation of their Lordships is, of course, without prejudice to any application to be made by or on behalf of the Ward concerning her future position; and considering the present age of the young Lady, their Lordships think it would be very proper for the Court to ascertain for itself what [329] her present opinions and wishes are, and what, having regard to those wishes and opinions, would in the present state of things be best for her.

Affirming the principle of the Order, their Lordships feel that it would be very difficult for an appellate Tribunal in this Country to interfere without injury, as to the details of the particular guardianship and scheme, which must so essentially be a matter of *quasi* parental discretion to be exercised on the spot by those best acquainted, or best able to acquaint themselves, with all the circumstances, and their Lordships disclaim any desire so to interfere. But they suggest, for the consideration of the Court in India in similar cases, that while selecting a School (such, for example, as Miss Scanlan's in this instant) it would be desirable, where practicable, to have some independent person as Guardian, to whom the Ward could apply, in whom the Court and the Ward could confide, and whose duty it would be to communicate to the Court any matter which might arise.

[Mews' Dig. tit. INDIA, 3. LEGAL DECISIONS; tit. INFANT, I. CUSTODY AND EDUCATION, i. *Religious Education*, b. *Control of by Court*. S.C. 8 Moo. P.C. (N.S.) 261; L.R. 4 P.C. 60. See *In re Scanlan*, 1888, 40 Ch.D. 214.]
P.C. ix. 809 26a

[330] ALEXANDER JOHN FORBES.—*Appellant*; BABOO LUCHMEEPUR SINGH, DHUNPUR SINGH, SHEIKH JOWHUR ALI, and MUSSUMAT AMEEROON-ISSA BEGUM,—*Respondents* * [Nov. 24, 25, 26, Dec. 7, 8, 1871].

On appeal from the High Court of Judicature at Fort William, Bengal.

Exposition of the principles enacted by the Bengal Regulations as to the power of a Zemindar to sell for arrears of rent the tenure, free from previous titles and incumbrances created by a defaulting tenant [14 Moo. Ind. App. 340]. Distinction laid down in the Regulations, between sale for arrears of revenue and for arrears of rent.

Ben. Reg. VIII., sect. 11, of 1819, gives express power to sell the tenure, free from all incumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives or assignees; but the power so given is confined to the case of tenures, where the right of selling or bringing to sale for an arrear of rent, has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure [14 Moo. Ind. App. 342].

A Mortgagee had foreclosed under Ben. Reg. XVII. of 1806, and a decree was made in 1854 for possession of the mortgaged Talook. In 1855 a summary suit was brought by the Zemindar against the heirs of the Talookdar (the Mortgagor) for arrears of rent, to which the Mortgagee was not made a party. A decree for sale was made *ex parte*, and the Talook sold by auction, under Act, No. VI. of 1858. The Mortgagee then brought a suit to recover possession of the Talook, and to set aside the sale by the Zemindar for arrears of rent. Held, reversing the decision of the High Court, that, as it was an Istemrari talook, the Zemindar had no power by the Bengal Regulations, or Act, No. X. of 1859, Sect. 105, to sell the tenure, and the sale declared invalid.

The case of *Shahabooddeen v. Futieh Ali* (7 W.R., 260) approved of and followed [14 Moo. Ind. App. 340].

The question in this case respected the right of the Appellant, a Mortgagee after foreclosure, against a tenant of the Mortgagor of Talook Gohooman held under an hereditary Istemrari tenure in the Zemindary of two of the Respondents, to the possession of such [331] sub-tenure purchased, against a Purchaser at a sale in execution of a decree for rent which had accrued before the foreclosure, and involved the question, whether by such a sale the tenure itself passed, or merely the interest of the Tenant and the Mortgagee.

The suit was instituted by the Appellant to establish his right, as proprietor and Istemrardar to recover possession, with mesne profits, of the Talook Gohooman, etc., held under an hereditary Istemrari, a fixed rent tenure, situate in Pergunnah Havalee, Zillah Purneah; and as ancillary to the above relief, the Appellant sought by the suit to set aside an execution sale of the Talook, effected under the provisions of Act, No. VI. of 1853, and Act, No. VIII. of 1835, which incorporated Ben. Reg. VII. of 1799, sect. 15. The sale sought to be set aside was in execution and satisfaction of a money Decree obtained, *ex parte*, by the Zemindar, Baboo Pertab Sing (since deceased), in a summary suit instituted by him in the Court of the Deputy Government Collector, for arrears of rent in respect of the Talook, against the heirs of a former Istemrardar, Shah Ali Reza, then deceased, in pursuance of the provisions of Reg. VIII. of 1831, in respect of arrears of rent, or enhancement of rent, under which Talook was sold under process of execution to realize the amount of the decree, as being the property of the Defendants in their representative capacity, as the heirs in succession of Baboo Pertab Singh.

The questions at issue in the Court below were first, whether the sale in execution of the decree passed anything more than the title and interest of the Defendants as heirs of the Istemrardar, Shah Ali Reza; and whether the sale was valid as against

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. Sir Montague Edward Smith. Assessor.—The Right Hon. Sir Lawrence Peel.

the Appellant, a Mortgagee of the Istemrari Talook under a Bye-[332]-bil-waffa (deed of conditional sale) from Shah Ali Reza, who had become the absolute Owner of the tenure, and had confirmed his title by having obtained under Reg. XVII. of 1806 first a decree of foreclosure and subsequently a decree of the Zillah Judge, for possession made in a regular suit brought with that object against the former Istemrardar, and which, on appeal to the late Sudder Dewanny Adawlut, at Calcutta, was finally affirmed by an Order of Her Majesty in Council, made on the appeal of *Forbes v. Ameeroonissa Begum* (see case reported, 10 Moore's Ind. App. Cases, 340). Secondly, as to the invalidity of the sale, in consequence of the non-observance of certain steps and conditions prescribed in respect to sales by Ben. Reg. VIII. of 1831, Act, No. VIII. of 1835, sect. 2, that ten days' notice shall be given of any such intended sales. Thirdly, whether the sale should be set aside, on the ground, that it had been admitted by the Zemindar, in a petition presented by him to the Government Collector, that the sale was not carried out *bona fide*, but fraudulently, although he alleged that the fraud was the act of his Mookhtar, who had been by him intrusted with the conduct and carrying out of the sale, and the Mookhtar (the Respondent, Sheikh Jowhur Ali) having, while acting in such fiduciary position, become the Purchaser in his own name of the Talook, at an inadequate price.

The Principal Sudder Ameen (Beenee Madhul Thome), on the 28th of March, 1860, dismissed the Appellant's suit with costs, mainly upon the ground of his having no right of action, in consequence of a former Sudder Ameen decreeing that the summary suit of the Zemindar had been rightly brought, and [333] against the proper parties, and that the sale of the Talook under the Decree obtained in that suit was legal and valid, and that it was not proved that there was any irregularity or fraud in the sale.

The Appellant appealed to the High Court at Calcutta, and a division Bench, consisting of the Justices, H. T. Raikes and Shumbhoo-Nath Pundit, on the 12th of March, 1863, dismissed the appeal on the single ground that the Appellant was no longer in a position to carry on his appeal, as his right of action had been lost to him by reason of the Decree of the late Sudder Court in 1862, having dismissed his foreclosure suit.

A petition for review of judgment was afterwards allowed, on the ground that the auction sale to the Respondent Sheikh Jowhur Ali, did not carry with it the transfer of the tenure, but merely the transfer of the interest of the judgment Debtor at the time of the sale.

The High Court, on the 26th of April, 1867, consisting of Mr. H. V. Bayley and Shumbhoo-Nath Pundit, on the review of judgment, made a Decree declaring that the Plaintiff was not entitled to a Decree for setting aside the sale; in effect, affirming the decree of the Principal Sudder Ameen of the 28th of March, 1860. In the judgment the Court held, that the Appellant, if he desired to save the tenure from sale in execution of the Decree obtained by the Zemindar, was bound to have paid not only the rent due after the Appellant had obtained his foreclosure Decree, but also that which had accrued due from the heirs of the registered Talookdar previous to that Decree, and that having failed to do so, it was not rights and interests which passed, but the tenure itself under the sale in execution.

The appeal was from this Decree.

[334] Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant; and Mr. Field, Q.C., and Mr. Doyne, for the Respondent, Sheikh Jowhur Ali.

The points argued were:—

First, as to the effect of the auction sale under the Decree in the summary suit by the Zemindar against the Mortgagor's heirs for arrears of rent, whether it affected more than their interests, if any, and not the tenure, which had been foreclosed by the Appellant, the Mortgagee. *Dwarkanath Doss v. Manick Chunder Doss* (3 W.R., 197); *Shahabooddeen v. Futteh Ali* (7 W.R., 260). Act, No. X. of 1859, sect. 105.

Second, whether the Respondent, the auction Purchaser, under a decree for sale for arrears of rent due to the Zemindar had a title equivalent to that of a Purchaser at a Government sale for arrears of revenue. On this point the following Regulations and cases were referred to:—Ben. Regs. VII. of 1799, sect. 15, cl. 7; XVII. of 1793; XLIV. of 1793, sect. 5; XXXV. of 1795; V. of 1812; VIII. of 1819, sects. 8, 11, 12, 18, cl. 4; I. of 1820, sect. 2. *Lamb v.*

Bejoy Kishen Doss (8 Moore's Ind. App. Cases, 427); *Tirthanund Thakoor v. Paresman Jha* (13 W.R., 149); *Sathkourie Mitter v. Useemuddeen Sirdar* (14 Ben. S.D.A. Rep. 626).

Third, as to the validity of the sale of the Talook in consequence of the non-observance of the conditions prescribed with respect to such sales by Ben. Regs. VII. of 1799; VIII. of 1831; and Acts, [335] Nos. VIII. of 1835, sec. 2, and VI. of 1853, as to the notice of the intended sale.

Their Lordships' judgment having been reserved, was now delivered by

The Right Hon. Sir Montague Smith (Jan. 26, 1872).—This is an appeal from a Decree of the High Court of Calcutta on review, in effect, dismissing a suit brought in the Zillah Court of Purneah in 1856 by the Appellant, as Mortgagee after foreclosure, to recover possession of certain Talooks in Pergunnah Havalee, and to set aside a judicial sale of them made at the instance of Baboo Pertab Singh, the Zemindar, under a claim for arrears of rent.

The main question in the appeal is, whether the sale of the Talooks made to Sheikh Jowhur Ali, the Respondent who alone appeared at the hearing of this appeal, under a Decree in a suit instituted by the Zemindar against the heirs of Shah Ali Reza, the Mortgagor, for arrears of rent, treating them as defaulting tenants, is a valid sale as against the Appellant, the Mortgagee, who was not a party to that suit.

Shah Ali Reza, a Mahomedan, held the property by an hereditary tenure created by Sunnuds granted prior to 1793 to the ancestors of Shah Ali Reza. These Sunnuds are not set out in the present record; but it has been certified since the argument, by the Registrar of the High Court, that they are the same as those printed in the record of the appeal in a former suit between the Appellant and the representatives of Shah Ali Reza. Their Lordships thought it right to ascertain with accuracy the contents of these Sunnuds, inasmuch as the High Court based their judgment [336] in a great degree on the assumption, that the tenure was made saleable for arrears of rent by special terms contained in them.

It appears from the Sunnuds, thus verified, that this assumption is unfounded; and it was admitted by the learned Counsel for the Respondent that if they were the same as those set out in the former Record this was so. By the Sunnuds the mouzahs are given by way of istemrar to Hossein Reza and his descendants on a fixed and absolute jumma of Rs. 2291.

On the 13th of March, 1850, the Appellant advanced to Shah Ali Reza Rs. 39,500; and to secure this advance the latter made, in ordinary form, a conditional sale of the Talooks to him, to be absolute if the money was not repaid on 13th of March, 1851.

It is necessary to advert shortly to the litigation which has been going on since 1851 in this and two contemporaneous suits.

The mortgage-debt not having been paid, the Appellant took proceedings to foreclose under Reg. XVII. of 1806; and the foreclosure was completed in due course in August, 1852.

Thereupon, on the 28th January, 1853, the Appellant commenced a suit against Shah Ali Reza to obtain possession, which was defended on grounds impeaching the validity of the foreclosure. This suit passed through all the Courts, and underwent a great variety of fortune. The Zillah Judge on the 18th of December, 1854 (a day material to be borne in mind), made a decree in favour of the Appellant for the possession of the Talooks. On appeal to the Sudder Dewanny Adawlut, the suit was remanded, when the then Zillah Judge dismissed it, and the [337] Sudder Court affirmed his decision; but both these judgments were reversed by Her Majesty on appeal, and the Order in Council declared, that the Appellant was entitled to the possession of the mortgaged premises as absolute Owner. The case is reported in 10 Moore's Ind. App. Cases, 340.

The Order in Council bears date on the 3rd of February, 1866.

Shortly after the decree of the Zillah Judge of the 18th of December, 1854, in the Appellant's suit for possession, viz., on the 6th of January, 1855, the Zemindar, Baboo Pertab Singh, brought a summary suit in the Collector's Court against the heirs of Shah Ali Reza for arrears of rent. The heirs in that suit allowed judgment to go by default, and on the 26th of February, 1855, an *ex parte* decree was made against them for the amount of the arrears claimed, viz., Rs. 712. On the 19th of March, 1855, the Zemindar prayed that the Decree might be put into execution and the

Talooks sold, and they were sold accordingly on the 26th of April, 1855, to the Respondent, Sheikh Jowhur Ali, for Rs. 1000. This is the sale which it is sought to set aside in the present suit.

It is plain that, when this summary suit against the heirs of Shah Ali Reza was commenced, they had no title or right whatever in the Talooks. The Appellant had become absolute Owner, and, moreover, he had obtained the Decree of the Zillah Judge for possession, which was ultimately sustained on the final appeal to Her Majesty.

On the 24th March, 1856, the Appellant commenced the present suit to set aside the sale and for [338] possession against the Zemindar, the Purchaser, Sheikh Jowhur Ali, and the heirs of Shah Ali Reza.

His right to recover was at first opposed in the Courts below, on the ground that by the judgments given in India in the first of the above-mentioned suits, his title, by foreclosure, had been invalidated; and, on this objection, decrees were made against him by the Zillah and High Courts. On the reversal of these decrees by Her Majesty in Council, in 1866, the Appellant, in order to obtain the fruits of the long litigation, at last decided in his favour, obtained a rehearing of his case on review, and the High Court then pronounced the judgment against him, now under appeal.

The contention of the Appellant is, that the Zemindar could only sell the interest of the heirs of Shah Ali Reza (if any), and not the tenure and estate which had passed to him before the Decree for sale; and he also impeached the sale on the ground that it was fraudulent and collusive, and on objections founded on various alleged irregularities.

In the view taken by their Lordships, it will only be necessary to consider the first point, viz., the right of the Zemindar to sell, under the Decree in the summary suit against the heirs of Shah Ali Reza, the tenure then vested in the Appellant.

The Respondent contends that the sale was, by law, valid. He relies on the facts that some rent was in arrear, that Shah Ali Reza's name was on the Register, and his heirs in possession, and that the Appellant did not tender the amount of the arrears.

But, on the other hand, it appears, that if the heirs of Shah Ali Reza were in possession, which is somewhat uncertain on the facts, their names were not [339] put on the Zemindar's Register, and it also appears that, shortly after the commencement of the summary suit by the Zemindar, and before the Decree for sale, the Officers of the Zillah Court, in pursuance of the Decree of the 18th of December, 1854, gave the Appellant symbolical possession by planting Bamboos, which the Zemindar's Agents soon afterwards pulled up, and that the Appellant's Agent tendered the rent for December, 1854, at the Cutchery of the Zemindar, and that such tender was then refused, with the answer, that Sazawals had been appointed, and that until they were removed no rent would be received. It also appears, that the Appellant endeavoured to get his name placed on the Register of the Zemindar, and that before the sale he applied to the Zillah Judge for a Perwannah, directing the Zemindar to place his name on the Register, who refused the Order. The Appellant did not then apply to the Zemindar, and it may be inferred that he did not do so because the proceedings of the Zemindar, who had then obtained the Decree against the heirs of Shah Ali Reza, had shown that such an application was useless.

It is apparent from these facts, that the Zemindar had the fullest notice of the title of the Appellant and of his claim to possession before the Decree for sale, and that having that notice, he proceeded, without notice to him, to obtain a decree for sale, *ex parte* against the heirs of Shah Ali Reza. There can also be no doubt that the Purchaser, Sheikh Jowhur Ali (who was, in fact, the Mookhtar of the Zemindar, and purchased at a grossly inadequate price), had in the same way notice of the Appellant's title, and his proceedings. It requires very plain positive law to [340] support such a sale against the real Owner under a decree thus obtained.

The High Court, in the judgment under appeal, assume that the Sunnuds, in their terms, gave the Zemindar power to sell the tenure itself free from incumbrances; but in the event of that construction being unfounded the learned Counsel for the Respondent contended, that the Zemindar had that power either as an incident to the tenure, or by virtue of the Regulations.

No authority was shown to satisfy their Lordships that, by any known law or usage, Zemindars had the power to sell tenures of this kind for arrears of rent, as a

right inherent in or incident to the tenure, or that any such power rightfully exists, unless by special stipulation, independently of the Regulations.

A long and minute commentary was made, during the argument, upon the Regulations bearing on the subject from 1793 downwards, with the view, on the part of the Respondent, of showing that they authorized a sale of the tenure itself, free of previous titles and incumbrances, created by the defaulting tenant and his predecessors.

Their Lordships do not think it necessary to discuss in detail these Regulations, because they are disposed to agree in the main with the construction put upon them in a decision of the full High Court, which is directly opposed to this contention. The decision referred to was pronounced in an elaborate judgment of the full Bench of the High Court (the Chief Justice, Sir Barnes Peacock, presiding), in which the Regulations are fully collated and examined, *Shahabooddeen v. Futteh Ali and another* (7 Weekly Reporter, 260). This, which may be [341] regarded as the leading decision in India, has been followed by the Courts there, *Tirthanund Thakoor v. Paresman Jha* (13 Weekly Reporter, 449); *Mohesh Chunder Banerjee v. Chunder Monee Debee* (15 Weekly Reporter, 237). It is true that the Courts in these decisions had to construe Act, No. X. of 1859, and not Regulation VII. of 1799, which had then been repealed; but powers of sale analogous to those found in the Regulation of 1799, are provided in section 105, of Act, No. X. of 1859, with this difference—that the language of the latter Act is more favourable to the contention of the Respondent than that of Regulation VII. of 1799. The Chief Justice, in commenting on the Regulation of 1799, considered it to be clear, that the power to sell the tenure itself free from incumbrances, was not given by that Regulation. The Regulations principally relied on by the Respondent are, VII. of 1799, sect. 15, cl. 7, and VIII. of 1819. The seventh clause of the Regulation of 1799 relied on, declares that “if the defaulter be a dependent Talookdar, or the holder of any other tenure which, by the title deeds or established usage of the Country is transferable by sale or otherwise, it may be brought to sale by application to the Dewanny Adawlut, in satisfaction of the arrear of rent.”

The language is not well adapted to meet the case of incumbered tenures, but the words, if the defaulter be the holder of any tenure, it may be sold, may fairly mean that the tenure the defaulter holds, or has, such as it is in his hands, may be sold, and it does not seem to be a forced construction, that the decisions above referred to have put on the Act, in holding that if the tenure has passed to another, and is no longer in him, the alleged manner enabling it to [342] be sold for his debt, and that if he has an incumbered tenure, then only the interest which he has in it subject to the power of sale.

The older Regulations of 1793, 1795, and 1799 were referred to for the purpose of showing the general object to have been to give the Zemindar the same powers to recover rents from their dependent Talookdars as the Government had to recover the fixed revenue from them; but these provisions relate principally to powers of distress. The recital relied on in the preamble of Regulation XXXV., 1795 (which relates to distresses), viz., that justice required that Proprietors should have the means of levying their rents and revenues with equal punctuality as the Government, is not found in Regulation VII. of 1799; and would not justify a construction of that Regulation which would give, by an inference, a power of sale of so stringent a kind as that contended for.

Regulation VIII., 1819, section 11, cl. 1, no doubt gives an express power to sell the tenure free of all incumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives, or Assignees; but the power so given is confined to the case of tenures where the right of selling or bringing to sale for an arrear of rent, has been specially reserved by stipulation, in the engagements interchanged in the creation of the tenure.

The preamble of the Act, No. X. of 1859, shows the existence of such tenures, and the Regulation treats them as a distinct class.

It has been already pointed out that the Sunnuds in this case do not contain this special power, and that the High Court was in error in so assuming.

[343] The present case is stronger in favour of the Appellant than that cited from 7 Weekly Reporter. In this case, before the Zemindar took proceedings against the

heirs of Shah Ali Reza, the title of the Appellant had passed beyond the stage of being an incumbrance only on the tenure. He had become the absolute Owner of the tenure itself, and the heirs of Shah Ali Reza, against whom the summary suit was brought, had no title or interest whatever left in it. They were not the "holders of any tenure," to use the words of Regulation VII. of 1799, and were certainly not "Proprietors" in the words of the Regulation VIII. of 1819.

The judgment below was also grounded on the fact, that the heirs were in actual possession, and that the name of Shah Ali Reza, their ancestor, was on the Register. This was so, but they were holding possession wrongfully. Not only was their title gone, but a Decree for possession had been obtained against them, and executed so far as it was possible to do so. Their possession, therefore, was in no sense lawful, and their mere *de facto* possession was known by the Zemindar to be wrongful. With this knowledge the Zemindar could not properly treat the heirs as holders of tenure, so as to affect the rights of the Appellant, of whose title and efforts to obtain possession he had notice.

It is true the Appellant did not tender the rent which was the subject of the suit against the heirs, but on the other hand, when he tendered the rent due from the date of his Decree, at the Cutcherry, the prior rent was not demanded of him, and, on the contrary, he was told that the Zemindar's Sazawals were in possession, and that no rent would be received. [344] These facts, coupled with the other proceedings of the Zemindar's Agents, show that a further tender was useless, and, therefore, unnecessary, even assuming that such a tender ought to have been made to stop the proceedings in the summary suit against the heirs to which he was no party, which their Lordships are by no means prepared to affirm.

In recommending the reversal of the judgment under appeal, their Lordships, in effect, affirm the authority of the decision of the Full Bench in the case of *Shahabooddeen v. Futteh Ali*, referred to from the 7th Weekly Reporter, 260. It may be inferred from their judgment, that the High Court in this case would have followed that authority, if the terms of the Sunnuds had been correctly brought before them.

Their Lordships do not desire by this judgment to weaken any powers that Zemindars may, by law, possess to enforce payment of their rents. What other powers and remedies the Zemindar, Baboo Pertab Singh, had, and might have exercised, it is not necessary, nor is it now of any general importance to determine, for the remedies for arrears of rent are at present mainly provided by Act, No. X. of 1859, and subsequent Acts. The only question their Lordships are called upon to decide is, as to the validity of this sale, and they have come to the conclusion that, under the Regulations in force at the time, and under the circumstances of this case, this sale, for the reasons already given, was invalid.

Their Lordships think that the Appellant is entitled to the mesne profits from the time of the sale to Sheikh Jowhur Ali, as against him; and that in taking the account of such profits, all rent and arrears of rent due and payable to Baboo Pertab Singh and his heirs [345] should be deducted and allowed. The Appellant also claims to be entitled to a Decree for mesne profits against the heirs of Baboo Pertab Singh, on the grounds (1) that the Zemindar was acting in collusion with Sheikh Jowhur Ali; and (2) that he persisted in the sale of the Talooks, when he knew that the heirs of Shah Ali Reza, who alone were Defendants in this suit, had no interest at all in them. Their Lordships do not think it necessary to express any opinion on the charge of collusion: but considering that the Zemindar proceeded to obtain a sale of the tenure, notwithstanding he had notice of the Appellant's title, and of the Order made by the Zillah Court for giving him possession, and that such sale has been the means of keeping the Appellant out of possession, and the cause of this suit, and that he has persistently disputed the title of the Appellant, they are of opinion, that the Decree for mesne profits should be against the heirs of Baboo Pertab Singh as well as against Sheikh Jowhur Ali, but that execution should not be had against such heirs in respect of them until after failure to obtain satisfaction from Sheikh Jowhur Ali.

Their Lordships will, therefore, humbly recommend to her Majesty that the Decree appealed from be reversed, and that it be declared that the sale to Sheikh Jowhur Ali was invalid, and should be set aside, that the Appellant is entitled to possession, and to be registered as the holder of the Talooks, and that he has been so entitled since the Decree of the Zillah Court of Purneah of the 18th of December,

1854; and that it should also be declared, that the Appellant is entitled to mesne profits from the time and in manner above mentioned; and, further, that the Respondents should pay the costs of the litigation in [346] India, and if any costs have been paid in India they should be refunded, and their Lordships will direct that the Appellant should have the costs of this appeal.

[See *Brindaban Chunder Sircar Chowdry v. Brindaban Chunder Dey Chowdry*, 1874, L.R. 1 Ind. App. 185.]

RAMAMANI AMMAL, (as Mother and Guardian of MUTTU DURAISAWMI TAVER),
Appellant, — KULANTHAI NATCHEAR, and Others, — Respondents *
[July 19, 20, 22, 1871].

On appeal from the High Court of Madras.

A marriage between a Zemindar of the Malavar class, a sub-division of the Soodra caste, with a woman of the Vellala class of Soodras. Held (1) as to the *factum*, that a marriage had taken place, and (2) that such a marriage was valid by Hindoo law.

In questions of disputed facts, the rule of the Judicial Committee is, that the ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to the Courts below may commonly be; that due weight must be given to the evidence; and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed, without some grave grounds to support the imputation, as such a rejection would virtually submit the decision of the rights of others to the suspicion, and not to the deliberate judgment, of the Judge. The entire history of a family must, therefore, not be thrown aside because the evidence of some of the Witnesses is incredible or untrustworthy [14 Moo. Ind. App. 354].

The facts of the case are so fully stated, and the evidence examined in detail in their Lordships' judgment [347]—as to require no further statement than the nature of the question raised by the suit.

The suit was instituted in the Civil Court of Madura, by the Appellant (as Mother and Guardian of Muttu Duraisawmi Taver), in which the first Respondent was the principal Defendant, to obtain possession of the real and personal estate of Sivasawmi Taver, deceased, formerly of Ramnad, a sub-division Zemindar. The Respondent was admittedly the Widow of Sivasawmi Taver, but the Appellant alleged, and the Respondent denied, that she was legally married to Sivasawmi Taver, or that her Son, Muttu Duraisawmi Taver, was the Son and Heir of Sivasawmi Taver. Upon the suit coming on for hearing, the Acting Civil Judge, Mr. C. N. Pochin, decided in favour of the Plaintiff, holding the marriage valid in fact and law; but this decree was, upon appeal, reversed by the High Court at Madras, consisting of the Justices Holloway and Innes, who dismissed the suit with costs. Hence the present appeal, which was argued by

Mr. Leith, and Mr. Benjamin, for the Appellant; Sir R. Palmer, Q.C., and Mr. F. C. J. Millar, for the first and principal Respondent.

The consideration of their Lordships' judgment having been reserved, judgment was now delivered by

The Right Hon. the Lord Justice James (Nov. 20, 1871).—This is an appeal from

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colvile, the Right Hon. the Lord Justice James, and the Right Hon. the Lord Justice Mellish. Assessor,—The Right Hon. Sir Lawrence Peel.

a decision of the High Court at Madras, which reversed a Decree of the [348] Civil Judge of the Zillah of Madura in favour of the Appellant.

The suit was brought by the Appellant, as Mother and Guardian of her infant Son, to establish his right as the legitimate and sole Son and Heir of Sivasawmi Taver of Rannad, to inherit the property, movable and immovable, of the Father, valued in the plaint at Rs. 91,795. The Plaintiff claimed as a Widow, stating herself to have been the second Wife of the deceased, and made title to the sub-division zemindary of Rannad on behalf of her Son. The first Defendant was the childless Widow of the late Zemindar, according to the Appellant's representation, the senior, and to her own, his sole Widow. The other Defendant, who was joined as a Defendant on a ground not established, viz., his having possessed himself of part of the estate of the deceased after his death, was a first cousin of the late Zemindar. Both Defendants disputed the marriage of the Plaintiff and the legitimacy of her Son.

The statement of both Defendants was that the Plaintiff was a Dancing-girl, and treating that *status*, or caste, as continuing, they both insisted that she could not be the Wife of her alleged Husband, that her Son could not, since she was a prostitute, be the Son of the late Zemindar, and could not have any title to inherit, even had a marriage between the Zemindar and the child's Mother been celebrated in fact. They denied that any marriage had taken place. It is unnecessary to repeat the very language of these statements, which, as translated, is coarse and unbecoming. It is plain, that the case insisted on was that the Plaintiff herself was a Dancing-girl, not merely the child of one, at the same time when her [349] connection with the Zemindar commenced, which the Defendants represented as a connection with a Dancing-girl, a prostitute by profession, attached to the Temple service.

Their statement contains no intimation of her having abandoned that calling prior to the birth of these children, or at all. The language used, plainly imports a continuing *status*: that the Judge so understood the statements appears from the issues which he framed.

The term "Dancing-girl" was not used in the answers. A fouler name was there used, and it seems to their Lordships to have been designedly employed to mark a distinction between an intercourse with a concubine and one with a common prostitute, which might influence the decision of a question of filiation and legitimacy.

The issues were, first, whether the Plaintiff was a Vellala woman, or a Dancing-girl.

Secondly, whether the Plaintiff was legally married to the Zemindar.

The third issue was one of law as to the validity of the marriage, should it be proved.

The fourth issue was one of fact as to the second Defendant's possession of the property which he was alleged to have appropriated. This issue was found for the Defendants. The finding is not appealed against: and this part of the case, except as the charge effects the honesty of the Plaintiff's claim, need not be considered.

The Plaintiff claimed to be by birth a legitimate child of one Shunmuga Pillai, a Soodra man, of the Vellala, one of the sub-divisions of the Soodra, caste. As such she would be a Vellala woman. The [350] Defendants insisted that she was a mere Dancing-girl connected with the service of the Hindoo Idol, at a Pagoda situated at Tiruchuly, the place of her birth and of her Father's residence, who was the headman of the village. The Judge uses, in the issue which he framed, the term "Dancing-girl," as distinct from the Vellala class, to denote a particular class of women, described in treatises on Hindoo Law as incapable of contracting marriage.

The parties went to trial on the issues before stated. The proofs and conduct of the case of the Defendants were applied to and influenced by them.

That her alleged Son really was the Zemindar's Son was made by such unquestionable evidence that it was strongly pressed on their Lordships, that the Defendants had in fact never intended to represent her as not having the *status* of a concubine, or the children as not having the *status* of illegitimate children: but had only denied that she was the Wife, and that the children were legitimate. Their Lordships are unable so to read the case made by the pleadings with the light thrown upon it by the evidence of her exposing herself openly on the balcony with all the outward

marks and costume of a professional Dancing-girl, and such evidence as the following: "As Tanga Natchear is the Daughter of a Dancing-girl, I did not hear who her Father was. As she is a Dancing-girl's Daughter, who can be called her Father? I know Muttu Duraisawmi, the second Plaintiff, his Mother is Ramamani Ammal. I have not heard who his Father is." The case originally made and attempted to be established was, that of professional prostitution and of promiscuous intercourse, so that in Hindoo law and opinion, as well as [351] in English, it would be impossible to predicate any paternity of the offspring.

The statement that she was a Dancing-girl was designed to affect her case in two ways, first as to the *factum*, and then as to the legality of the alleged marriage.

The evidence that she was not a Dancing-girl was adduced by the Plaintiff, in support of her case by anticipation to rebut that of the Defendants, which their Counsel stated to have been principally directed to prove this her original condition of life. If a marriage *de facto* were proved by the Plaintiff's Witnesses, it lay on the Defendants to show conclusively that such *de facto* marriage could not legitimate the children of it, and thus, in that event, the failure to substantiate this issue would be fatal to the defence, on the question of legitimacy.

The Plaintiff called many Witnesses, twenty-four in number, thirteen of whom deposed to the marriage; amongst these, not fewer than five Witnesses of the Zemindar's family, nearly allied to him, *prima facie* at least, unimpeached and credible Witnesses, such as a Court would ordinarily desire to hear on a question of this kind in issue before it, and would be most disposed to trust, proved their actual presence at the marriage. Her Father, her whole Brother, and her half-Brother proved the Plaintiff to be of the Vellala caste, and a member of their common family.

The Civil Court of Madura, of which Mr. Pochin was then the Judge, believing these Witnesses, necessarily decided that the marriage was proved, and also that the Plaintiff never was a Dancing-girl. On appeal to the High Court, that decision was [352] reversed upon the first point. On the second point, the High Court did not come to a positive conclusion that the Plaintiff had been a Dancing-girl, but stated that they inclined to that opinion, an expression indicating distrust of the Defendant's Witnesses to the fact that several of them had actually seen her officiating in that character.

The Zemindar was not of the Vellala caste. His caste, also an inferior Soodra caste, was that of the Malavars. The union in marriage of persons of these two sub-grades of Soodras seems to have been uncommon, and the legality of such marriage was doubted at the time when the Zemindar is said to have married the Appellant. The marriage between such a man and a mere Dancing-girl has been described as "impossible." The Judges of the High Court express much doubt, whether a marriage between the Zemindar and a Vellala woman would be legal, but they do not directly affirm its illegality. On the argument of this appeal this objection was not insisted on; it was conceded on both sides that recent decisions had declared the legality of a marriage between persons of these two sub-classes of the Soodra caste. This uncertainty, which undoubtedly prevailed at one time as to the legal rights flowing from such matrimonial connections, has an important bearing on the proof of a part of this case, and will subsequently be considered.

The case before their Lordships is one of conflicting evidence and of conflicting decisions. The opinion of Mr. Pochin, the Judge who tried the case, is opposed to that of two Judges of the High Court. They differ as to the habits of natives in their domestic relations, as to the credibility of [353] Witnesses, the weight of evidence, and the proper inferences to be drawn from conduct. The decision of the case by their Lordships must necessarily involve a somewhat close examination of part of the evidence, and of the grounds of the opinions of the Judges of the respective Courts.

It was urged on behalf of the Appellant that Mr. Pochin, who saw and heard the Witnesses, could better judge of their respective claims to belief than the appellate Tribunal. On the other hand, it is stated, that as he was an European, his advantage in that respect over the appellate Court was less than that of an intelligent native Judge.

It is due to Mr. Pochin to observe, that he appears to have been extremely

diligent and laborious in the conduct of his investigation. In a case of great uncertainty and difficulty, where no evidence is exempt from suspicion, if in all parts of the case his conclusions have not the concurrence of their Lordships' opinion, such difference of opinion should not weaken his just claims to respect. The decisions of both Courts will receive the most anxious and respectful attention.

The first in order and weightiest of the objections made to Mr. Pochin's conclusions by the Judges of the High Court, as well as by the Counsel for the Respondent in their very able arguments before their Lordships, is that he had failed to observe the total improbability of the story told by Shummuga Pillay, the Father of the Appellant, as to her introduction into the family by the deceased Zemindar, and to draw the inferences which should rationally and justly have been drawn from that strange story. Their Lordships, on this part of the case, agree with the [354] judgment of the High Court, which pronounces the story of the treaty for marriage and introduction of the Bride incredible as it is told. They think that the story as told does not give a true history of the circumstances under which this Lady first came to enter and reside in the Zemindar's house; and they also think that the statement of the Father of the Appellant as to the origin of his connection with her Mother, warrants an inference not much at variance with the observations of the High Court upon it. There may have been family matters which a Husband and Father would be studious to conceal. The existence of such matters would afford an explanation of the conduct of the parties in the celebration of the alleged marriage more satisfactory than that suggested by Mr. Pochin, viz., that the inferiority of the fortune and social position of the Father of the Appellant to that of the Zemindar might account for an introduction and reception of a Bride not usual in native families, an explanation which certainly is not satisfactory to their Lordships.

The story of the marriage must be viewed as full of suspicion in its very outset, and, therefore, requiring a more than ordinary degree of jealous scrutiny, a jealousy which must extend itself to the testimony of the Witnesses of the marriage.

Their Lordships are led by the judgment under review, and by some portion of the argument that has been addressed to them, to state, as has often been stated before by this Committee, that the ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these Courts may commonly be; that is, due weight [355] must be given to evidence there as elsewhere, and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection, if sanctioned, would virtually submit the decision of the rights of others to the suspicions and not to the deliberate judgment of their appointed Judges. Nor must an entire history be thrown aside because the evidence, or some of the evidence, of some of the Witnesses is incredible or untrustworthy.

On the subject of the marriage, in fact, of the Zemindar to this Lady, the Plaintiff, their Lordships think that the judgment of Mr. Pochin is fully supported by the evidence; and that so very strong a *prima facie* case is made in favour of the marriage as to require the most conclusive evidence for its overthrow. It must be borne in mind that, whilst the evidence of the marriage given by many apparently credible Witnesses having presumably no motive to misrepresent the fact or to deceive the Court, and incapable of being themselves deceived about it, is direct and positive, that by which it is met is, for the greater part, indirect and inferential, turning on the improbability and inefficacy of the marriage of a Dancing-girl. The evidence in support of the marriage is that of numerous Witnesses of respectable position and character, members of the family, the very Witnesses whose evidence in like cases is looked for by a Court, and the absence of which weakens every case where such absence is found; confirmed, moreover, by the treatment by the Zemindar of his children as legitimate, which, [356] in the opinion of their Lordships, the marriage of his Daughter, Thanga Natchear, sufficiently proves. This treatment alone, unless answered, would, after the death of the parents, suffice to establish a claim to a direct lineal succession against a reversioner, and must receive its due weight here.

Upon the question of recognition of his children as legitimate, their Lordships are compelled to express their dissent from the conclusions of the High Court. The

marriage of the Daughter of the Rajah, as legitimate, is a fact sufficiently proved. The Husband and his Father have both been examined. The evidence of the Husband leads directly to the conclusion that he married his Wife as legitimate, concluding her to be so. He says that he would not have married her had she been the Daughter of a Dancing girl. This statement is such as might be expected from him. The Father confirms him, and presumption from experience confirms both. The Witness himself is unimpeached; on what ground, then, should his statement be set aside? The Judges of the High Court say, in effect, that as he was marrying the Daughter of a powerful man his scruples might, therefore, give way; but what is this but opposing a conjecture of the Court itself to positive testimony against its truth; the conjecture itself seems to derive no support from the wealth or power of the Zemindar, for relatively to the Husband and his family, the Zemindar was not a man high above them in fortune or rank, nor does the alliance seem to have been above the degree or the reasonable expectations of one of the Husband's family. Again, the High Court observes that the marriage was not like that of a legitimate Daughter as it was [357] not celebrated with the ceremony of the Homan, which, however, the Husband says did accompany it. He is contradicted, indeed, on this point; but though this conflict of testimony might induce doubt in the minds of the Judges, still they were not justified, in this balanced state of the evidence, in reasoning concerning the *status* of the Bride, her Mother, and Brother, on the basis of the absence of this ceremony. Other circumstances, which ordinarily attend the marriage of a legitimate Daughter, as the existence of an alliance equal and honourable, the presence of near relatives and friends on both sides were proved, and nothing, even had the ceremony of the Homan been omitted, would have indicated a marriage between unequals in degree. The other circumstances which have been argued on the side of the Appellants as proofs of recognition, by the Father of his children as legitimate, viz., the Benamee transaction, afford no certain indication of the sense in which the terms Son and Daughter were used by the Father. Their Lordships cannot, however, agree with the Judges of the High Court in thinking that these documents support an inference of illegitimacy. They are obviously Benamee transactions, so common as to require no explanation why, in a particular instance, they were adopted. In an acknowledged case of legitimate birth they would have excited no attention. They afford no sort of evidence that the Zemindar designed them at all to be a provision for children. As these children, even if illegitimate and incapable of inheriting, would have been entitled to maintenance and provision in his lifetime, gifts not exceeding such an allowance of maintenance as would have been fair and usual, would have been no material [358] advancement of their interests. It is unnecessary to enter upon any examination in detail of the family co-membership, position, and respectability of those Witnesses, members of the family, who depose to their presence at the marriage. The judgment of the High Court gives them due weight, abstractedly of the particular ground on which it justifies the rejection of their evidence. The propriety of this rejection of a whole body of evidence otherwise unimpeached, must now be considered.

The Advocate-General, who was the Counsel for the Plaintiff, had admitted that the Agent of the superior Rajah of Rahmad supplied the necessary funds for carrying on her suit. It was obviously an admission made in a spirit of rectitude, involving, as made, no acknowledgment or sense of any violation of any law or duty whatever. Such an act may be viewed in very different lights; it might bear the character of a generous support, on the part of a powerful head of a House compassionating the helpless state of a child contending for a just inheritance, and acknowledged by its Father in his lifetime as a legitimate Son.

It might, on the other hand, be capable of being viewed as a spiteful and vindictive act, an unprincipled maintenance of a wrongful suit. What presumption was there in this case to lead the mind to entertain either view? The Manager of the Rajah was not a party to the suit. His conduct was in no other respect before the Court. No ground existed for supposing him capable of what would have been a very criminal conspiracy, liable to severe punishment. His name was inserted in a list of the Defendant's Witnesses, which fact seems to conflict [359] with the statement of the pleadings, that his enmity produced the claim.

The Witnesses themselves, whom the hypothesis supposes to be all perjured, the

Court below had believed, seeing them, and observing no signs of falsehood in them. The hypothesis of the High Court is, that the Rajah's Agents had got up the case from enmity. One Witness of the Defendants, it seems, had opposed the Rajah's adoption. This was held evidence enough: and it is assumed that this Agent had influence enough to make all these *prima facie* respectable men come forward to support in Court a notoriously false case by deliberate perjury, for their guilt admitted of no concealment on the hypothesis of mere well-known concubinage and illegitimacy. Let it be conceded that the Father of the present Plaintiff had wilfully given an untrue account of the first introduction of his Daughter into the Zemindar's family, yet other grounds might be supposed, if mere supposition could in any case be made, for concealment and untruth on the subject of his family connections, which would not be inconsistent with the marriage of his Daughter to the Zemindar.

But it may be said a marriage with a Dancing-girl was incredible. The High Court has not found the fact that she was a Dancing-girl, and this foundation is wanting to their rejection of this evidence: they should first have been convinced of that. A marriage *de facto* then being established and supported by recognition by the deceased Zemindar of these children as legitimate, the very strongest evidence would be required to show that the law denied to these children their presumable legal status, [360] on the ground of their Mother's incapacity to contract a marriage. The first point taken in this part of the case was that the incapacity to inherit had been virtually admitted by the acknowledgment of the first Defendant's title as heiress.

This point was relied upon by the Judges of the High Court, and was strongly urged on the argument of this appeal. The certificate of heirship granted to the elder Widow under the circumstances and unopposed, was declared to be a tacit admission of absence of title in the Claimant in this suit. Considerable weight is due, *prima facie*, to such a submission to an adverse title as the objection supposes, but the weight depends on the just belief that the parties whose interests are affected by acquiescence possess knowledge of their right, means to enforce it, and counsels how to set about resisting, a step injurious to it, which was ordinarily in the possession or reach of either of two rival Claimants. One of the Plaintiffs in this case is an infant: the other is a Hindoo female. Against neither is it the practice of the Courts in India to press a presumption by acquiescence in a rival claim, from the mere non-contestation for a limited time of an adverse title, and especially not of such a title as this certificate evidences. The contrary doctrine has been constantly affirmed and acted on, both in Indian Courts and before this Tribunal. In addition to this it must be observed that, if a supposed acquiescence in one place be contemporaneous nearly with a claim not abandoned, it amounts to little or nothing.

The case affords ground for the conclusion that the germ of this litigation existed in the Palace at the time of the Zemindar's death, and was never [361] afterwards abandoned. The hypothesis that the claim sprung up, first, from the spite of the Rajah's Agent, is inconsistent with the occurrence in the family at the time of the Rajah's death. The Brother of the first Plaintiff was before and at the time of the death in the Palace. He sent for his Father, who came, and was present at the funeral ceremony. This summons and presence leads to the conclusion that in some mode the Lady's own family were acting on a supposed right to be included amongst the family connections. It is most improbable that the Daughter's Husband would admit her illegitimacy, and his assertion of his Wife's legitimacy would be virtually that of her infant Brother, whose maternal Grandfather and Uncle were present. The performance of the obsequies, by delegation, by the Son-in-law of the deceased Zemindar, whilst the second Defendant was at hand, who was the elder Widow's Nephew, and her Manager subsequently, leads to the same inference of a then existing claim by the child's friends. And if this claim were then being urged, though not acquiesced in, the hypothesis of its after-origin is inadmissible. There is no evidence that it was ever intentionally abandoned; for temporary helplessness and want of funds may very easily be supposed to have been the causes of inaction and delay for a time. The excuses made for the choice of the Son-in-law are feeble

and unconvincing. One relative might be, as alleged, unpunctual, but why should all be behind their time?

Can, then, this marriage *de facto* be supposed an idle, and in a Hindoo point of view, profane ceremony? Such, it is conceded on all sides, it would have been [362] if the marriage was with the Dancing-girl, in the sense of the statements and issue.

Their Lordships entirely concur with the opinion of the Judge who tried the cause that the evidence on the part of the Defendants to prove the Plaintiff a Dancing-girl at any time of her life fails. He has given his reasons for thinking her not a Dancing-girl, which it is unnecessary to repeat: they are corroborated by others of considerable weight, which at least balance the inference drawn from her name, age, and puberty. The whole Brother was a Witness. His caste is that of his Father. It is not to be presumed that his Father, the head of his village, would violate the ordinary feelings of people of his caste, and make a distinction between children of the same womb, leaving the Daughter to lead a licentious life, from which, according to the hypothesis, he had withdrawn her Mother. The children of this man's acknowledged and admitted marriage prove that the children of both connections were brought up together as one family. This theory, therefore, of her original *status* as a Dancing-girl of the Temple has formidable presumption opposed to it at its outset. The Judge has remarked on the conflicting character of the evidence given in support of it: on the non-production of the alleged Mother of the Plaintiff. Mr. Benjamin strengthened very materially the inference which the Judge drew therefrom, by referring to the abstract of the Defendants' evidence, and the unexplained omissions to produce evidence from the Temple. Their Lordships feel strongly that if a few years only before the suit, she had been an avowed public Dancing-girl attached to the [363] Temple, clear and abundant evidence of that fact might have been given. Considerable reliance was placed in the argument before their Lordships on the evidence of Abdool Khadur, which will, therefore, be considered more particularly than that of the other Witnesses, who depose to the Plaintiff having been a Dancing-girl. This Witness was represented correctly as a Government Official, as one who *prima facie* was entitled to credit as an independent and respectable person. He deposed to the Plaintiff having actually appeared and danced before him at Tiruchuly in the years 1847, 1848, and 1849. His story when subjected to a careful examination appears to their Lordships to bear a strong resemblance to those admissions which the wants of a case often produce. Being an Official his only connection with Tiruchuly was that he went on circuit there with his master. Nothing is shown to induce the belief that the Dancing-girls would more engage his attention or thoughts, than would be the case with ordinary Official persons, before whom such appearances took place to do them honour. It is not represented by the Witness that any special cause for distinguishing this particular Dancing-girl from the rest existed, that she was eminent above the others in beauty or grace, or that her after fortune fixed in his memory, what otherwise might have been a fleeting impression. Yet after the long interval of eighteen or nineteen years he is deposing to the name, parentage, and appearance of one individual Dancing-girl. This is unexplained. It may be that, if his evidence had been obtained in the careful manner in which evidence is ordinarily brought out in an English Court of Justice, these improbabilities might disappear, and [364] his evidence prove to be supportable for the reasons urged to support it before their Lordships; but their Lordships have no assurance that the evidence is capable of being supported by these considerations, that her after fortune led to the remembrance of her, or that she otherwise possessed any superiority over her associates. The Witness proceeds to give another account of the matter, for he represents that he heard from Shunmuga Pillai that she was his Daughter. "He said he kept her Mother, and also gave me his Daughter's name." No explanation has been given and none suggests itself to their Lordships' minds to account for a communication so utterly improbable. It is shown that Shunmuga Pillai had, from his first intercourse with her, withdrawn the Mother from her former life, whatever it was, and had placed her in his House. Such a communication by a Hindoo headman to a stranger and a Mussulman is opposed to all experience of native habits: when and how did it occur, what produced it? The Witness does not state, that Shunmuga Pillai was present and

pointed her out: or otherwise account for that supposed fulness of description which would identify the particular Dancing-girl. He deposes further to another conversation equally improbable and at variance with native usage; and, lastly, represents himself as casually producing this most important evidence, which, if true, would fix on the Plaintiff the *status* of a common Dancing-girl, in an interview with the Vakeel which had reference to another cause, one of his own, with nothing whatever to lead to a discovery of evidence so important to the Vakeel, and so little likely to have been then casually disclosed. Such testimony is very common, it is possible in a given [365] case that it may be true, but it is of so dangerous a nature, and presents so few claims to be believed, that evidence of the kind is little regarded even though the Witness deposing to it be in no other way discredited than as one deposing to evidence on which a Court cannot rely.

The presumption against her imputed *status*, which the marriage of the Daughter affords, and the whole evidence leads their Lordships to affirm on this point, the conclusion of the Judge below, that the Plaintiff herself was not a Dancing-girl, and was not one incapacitated to contract marriage.

The observations of Mr. Pochin concerning the habits of native families from which the Judges of the High Court dissent, seem not to have been applied by him to the case of a Concubine treated with respect and attention little inferior to that of a Wife. He was dealing with a case presented to him of a Dancing-girl, and was applying his mind to the statements, issue, and evidence before him. Both Tribunals may be correct enough with respect to that which each was considering. The High Court, however, is inconsistent with itself in some respects, for whilst it entertained the gravest doubts, whether a marriage, if celebrated, would have had any validity, it regards the acts of the Plaintiff and her advisers as unaffected by the like uncertainty. The Judges suppose the Plaintiff must have known that if a marriage had taken place, her Son would be legitimate, a matter which certainly was involved in considerable uncertainty, which their judgment shows them to have shared.

The legal presumption in favour of a child born in his Father's House of a Mother lodged, and apparently [366] treated as a Wife, treated as a legitimate child by his Father, and whose legitimacy is disputed after the Father's death, is one safe and proper to be made; and the opposing case should be put to strict proof. The legal presumption as to the *status* of Mother and Son accords with the actual finding of the Court below, which had before it very strong proof indeed of recognition and actual marriage. This decision was reversed on grounds which impute to many Witnesses *prima facie*, not likely to have committed it, a very serious criminal conspiracy, subjecting all the parties to it to severe punishment. This imputation was one unwarranted by any proofs in the cause, and militated against the ordinary rule that crime is not to be presumed.

Their Lordships will humbly advise Her Majesty that the decision of the High Court be reversed, and that in lieu thereof, an order be made dismissing the appeal to that Court from the Decree of the Zillah Judge with costs, and that the Appellant have the costs of this appeal.

[367] JOGENDRO DEB ROY KUT. *Appellant*: FUNINDRO DEB ROY KUT.—
Respondent * [Dec. 9, 1871].

On appeal from the High Court at Fort William, Bengal.

A Rajah of an impartible Raj died, leaving children by various Wives and Concubines. A suit for possession of the Raj was brought by one of the Widows, on behalf of an infant, to set aside a summary Award, under Act, No. XIX. of 1841, giving possession, and for possession of the Raj. This suit involved issues of legitimacy, and the validity of a particular form of marriage of one of the members of the family. The Sudder Dewanny Adawlut decreed in favour of the Plaintiff. Another suit was afterwards brought by a member of the family, who was not a party to the former suit, against the party in possession, which raised substantially the same issue of legitimacy, and a further question of priority to succeed by reason of the superior nature of the marriage of which the Plaintiff was the issue. The Defendant pleaded the decree of the Sudder Court as a bar to the suit. Held that the suit raised a different issue, and, acting upon *Kanhya Loll v. Radha Churn* (7 W.R., 338), that the decree in a former suit was not a judgment *in rem*, but a judgment *inter partes*.

The suit out of which this appeal arose was instituted by the Respondent for a declaration of his right to certain real and personal estates, and to obtain possession, with mesne profits. The question in the appeal was confined to the point, whether a judgment of the late Sudder Dewanny Adawlut, dated the 8th of February, 1853, was a bar to the suit.

The facts were these:—

[368] Surbo Deb Roy Kut, Rajah of Julpilgooree, was the former proprietor of the estate. He died in the month of January, 1848. He left numerous Wives, Concubines, and several Sons, among whom were Mukurund Deb, whose Mother's name was Jamoonee, and who was Father of the Appellant, and Rajendro Deb, a Minor, whose Mother's name was Bissessuree. The Respondent, Funindro Deb Roy, was born after the death of Surbo Deb Roy Kut, his Mother's name being Dhoolpee or Rutnessurry.

On the death of Surbo Deb Roy Kut, disputes as to the succession arose, and the name of the Minor, Rajendro Deb, was recorded in the Collectorate as the proprietor of the estate, under protest from the Mukurund Deb, who, on the 15th of April, 1848, made an application to the Judge of the Civil Court of the District, under Act, No. XIX. of 1841, claiming his right to succeed, and alleging that possession had been usurped by Bissessuree, as Guardian of the Minor, and that the Minor had no lawful title to the Raj. On this application possession of the Raj was awarded to Mukurund Deb. Thereupon Bissessuree, on behalf of her Son, Rajendro Deb, and in conjunction with one Hurdeb Kooer, his Uncle, instituted a suit against Mukurund Deb, in the Court of the Principal Sudder Ameen, praying for possession of the movable and immovable properties, left by Surbo Deb Roy Kut, on the ground that Rajendro Deb was the legitimate heir of his deceased Father, while Mukurund Deb was the Son of a slave-girl. By the decision of the Principal Sudder Ameen (Ahmed Buxsh) (dated the 8th of September, 1851), the suit was decreed, and an Order granted under the Act, No. XIX. [369] of 1841, in favour of Mukurund Deb was reversed, on the ground, that the legitimacy of the Plaintiff was established, and that Mukurund Deb was the Son of a slave-girl.

Against this decision Mukurund Deb appealed to the Sudder Dewanny Adawlut, and by a majority of the Court (Messrs. Dunbar, Myrton, and Mills, dissenting), judgment was given in his favour, under which he retained possession of the estate until his death.

Chundershekur Deb Roy Kut, the eldest Son of Mukurund Deb, succeeded his

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier. Assessor,—The Right Hon. Sir Lawrence Peel.

Father to the Raj and the possession, and dying without a Son, was succeeded in the year 1865 by his next Brother, the Appellant.

The present suit was commenced on the 25th of June, 1866, by Hurro Mohun Doss, on behalf of the Respondent, who was then a Minor, against the Appellant, Jogendro Deb Roy Kut, in the Court of the Principal Sudder Ameen of Zillah Rungpore. In the plaint the same allegation was made that had been negatived in the former suit, that Mukurund Deb was born of a slave girl, and the succession was claimed for the Respondent, on the ground that he was born of a married Wife of the first-class, and by the usage of the family had the heritable right. It was further alleged, that the decree of the 8th of February, 1853, was passed during the infancy of the Minor, and in his absence, and obtained by the concealment of material facts, and that the Plaintiff was not bound by that decree.

The Appellant, by his statement in answer, pleaded the decree of the Sudder Court as conclusive of his right to succeed, and denied the Plaintiff's allegation [370] as to his Mother being of a class of Wives superior to that of the Defendant's Mother.

Issues were framed by the Judge; the material one, the third, in bar of the suit, was as follows:—Whether the decision of the late Sudder Court, dated the 8th of February, 1853, in any way operated as a bar to the Plaintiff's claim, or finally disposed of any question in reference to the birth of the Defendant's Father, Mukurund Deb, and others, and had been decided in that suit, whether his (Mukurund Deb's) Mother was married according to the Brahmo, or whether she was out of the Dhasia class, and whether the decree was obtained by collusion.

Although the material allegation on which the Plaintiff relied, viz.: that he was the Son of a Wife of superior class, while Mukurund Deb was the Son of a slave-girl, had been distinctly traversed, and an issue raised thereon, the Plaintiff offered no evidence, either as to the *status* of his Mother, or on any other issue.

On the 12th of March, 1867, the Judge of Rungpore, Mr. J. C. Fowler, by his judgment on the third issue, stated that the real question was, whether or not the judgment of the Sudder Court was a judgment *in rem*. That in the case of *Rajendro v. Mukurund Deb*, the latter pleaded that he was the Son of his Mother married according to Brahmo form, and that he had been declared by his Father to be his heir. That the Sudder Court found from the evidence of the Witnesses who gave evidence in his favour, and from the documents filed, that Mukurund Deb was legitimate, and the declared heir of his Father; and that the Court did not find Mukurund Deb legitimate in accordance with the Gundhurbo form, and only found him legiti-[371]-mate upon the evidence adduced by him, and which deposed to his Mother, Jamoonee, having been married according to the ceremonies held at the marriage of women accorded to the first class. That it was quite evident that the judgment in that case did not merely decree to Mukurund Deb a title superior to the younger Brother, Rajendro Deb, but decreed him to be legitimate, and the rightful heir, and that it was a judgment which must hold good against the world; and after dealing with the allegation that the decree was obtained by fraud and collusion, which the Judge held was not proved, he declared that there was no necessity to consider the other issues, and dismissed the suit with costs.

An appeal, in *forma pauperis*, to the High Court was admitted.

By the judgment of a Division Bench of the High Court, consisting of Messrs. Kemp and Jackson, on the appeal, on the 24th of July, 1868, it was held, that the decision of the Sudder Court of the 8th of February, 1853, in the circumstances, was not binding on the Plaintiff, and reversed the decision of the Judge of Rungpore, and remanded the case to him in order that he might try the remaining issues.

The appeal was from this decree, and, in consequence of the Respondent not appearing, was heard *ex parte*.

Mr. Doyne, and Mr. A. Mortimer, for the Appellant.—The judgment of the Sudder Dewanny Adawlut, of the 8th of February, 1853, a competent Court having jurisdiction, was a judgment *in rem*, and operated as *res judicata*, and, therefore, as in the [372] case of an estoppel was a bar to the suit. *Kanhya Loll v. Radha Churn* (7 W.R., 338). *Meer Bahadoor Ali v. Mussumat Suneechuroo* (6 W.R., 157). Upon the application of the doctrine of the Civil Law in proceedings *in rem*, and the effect of a judgment operating as an estoppel, they referred to Gail Obs., p.

112; Oughton's *Ordo Judiciorum*, Vol. I., Tit. ccv.; Browne's *Civil Law*, Vol. II., pp. 363, 396 (2nd Ed.); and by the English law, to Taylor on Evidence, Vol. II. § 1847 (3rd Ed.); Starkie on Evidence, Vol. I. pp. 215, 225 (2nd Ed.); *The Duchess of Kingston's Case* (20 State Trials 355, and see note to Smith's Leading Cases, Vol. II., p. 124 [2nd Ed.]); *Meddowcroft v. Hugonin* (3 Curt. Ecc. Rep., 403; S.C. on appeal, 4 Moore's P.C. Cases, 386).

The Right Hon. Sir James Colville.—This appeal is brought by Jogendur Deb Roy Kut, the Defendant in the suit out of which the appeal arises, against a decree of the High Court, which overruled a decree of the Zillah Court, whereby a judgment in a former suit which had been pleaded was declared to be a bar to the further prosecution of this suit, and directed that the suit should be remanded to the Zillah Court for trial upon the other issues raised therein. This was the only point before the High Court, and the only question which is now legitimately before their Lordships. Mr. Doyne indeed suggested, that their Lordships might give certain directions concerning the further trial of the suit if it went back to be tried in the Zillah Court, but that course would be entirely contrary to the practice of this Tribunal. The ground of appeal to [373] the High Court was that the learned Judge was wrong in holding that the decision of the late Sudder Court, dated the 8th of February, 1853, was a judgment *in rem*, and that as such a bar to the present suit. The High Court's judgment is to this effect:—"The Judge holds that that judgment of the Sudder Court was a judgment *in rem*, declaring the title of the Defendant, Mukurund Deb, to the disputed Raj, and consequently that that judgment was a binding judgment not only against the party in that case, but against all the world; and it follows, according to the opinion of the Judge, that that judgment was decisive against the present Plaintiff, and that the present Plaintiff cannot consequently succeed." The High Court then refer to the judgment of the full bench in *Kanhya Loll v. Radha Churn* (7th Weekly Reporter, 338), in which the law was laid down that judgments of this description were not judgments *in rem*, but judgments *inter partes*. They also say: "It is evident that the issues which were raised in the former suit are by no means identical with the issues which arise in this case. The Plaintiff or his representative was in no way a party to the former judgment and was not represented in that suit, and the decree then passed can in no way be binding upon him. The decision of the Judge must be reversed and the case remanded to him, in order that he may try the remaining issues which arise in it." Therefore, it is perfectly clear, that the question before stated, is the only question which now presents itself for their Lordships' decision.

Their Lordships do not think it necessary to embarrass themselves with much discussion with respect to the nature of a judgment *in rem*, technically so called. [374] It appears to them to be extremely doubtful, whether there exists in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of Probate and the like, and which in the case of War might be exercised in matters of prize) any ordinary Court capable of giving, what can be called technically a judgment *in rem*, but they will look to the substance of the thing, and consider whether there is any reasonable ground for the contention that the effect of a judgment *in rem* ought to be given to such a judgment as that which was pleaded in this case.

Now, the circumstances of the former suit were these. Surbo Deb Roy Kut, the Father of the Respondent and Grandfather of the Appellant, died in 1850, and there arose a contest among the members of his family, children by various Wives or Concubines, as to who should succeed to the Raj, and, with the Raj, to the possession of the property. It is admitted that the succession is impartible, and on the death of a Rajah passes to the eldest of the Sons of equal rank; and it is further alleged, though not perhaps admitted, that according to the custom of the family the issue of one kind of marriage is to be preferred to the issue of another kind of marriage. On Surbo Deb Roy Kut's death, Mukurund Deb (the Father of the Appellant), the eldest of his Sons was put into possession by a summary Award of a competent Court, under the Act. No. XIX. of 1841. Upon that, Bissessuree, one of the three surviving Wives of the late Rajah, in conjunction with another person, brought a suit on behalf of her infant Son, Rujendro Deb, in order to have that Order of the Court

set aside and to recover from Mukurund Deb the possession of the [375] Raj and the possession of the property that went with the Raj. The suit necessarily involved two issues; one of them was the legitimacy of the Plaintiff, who insisted that his Mother had been married to the deceased Rajah under the Gundhurbo form of marriage. If he succeeded in proving that, he had to go a step further, and to prove that Mukurund Deb, his elder Brother, was, as he alleged, illegitimate; that he was the Son of a woman who had not been married to the Rajah at all, but the Son of a slave-girl.

The Court of First Instance found in favour of the Plaintiff in that suit. It went by appeal to the Sudder Court. The Judges of that Court were divided, but the majority found that the Plaintiff in that suit had made out his title to be legitimate by the Gundhurbo marriage; and as regards Mukurund Deb they found that he also was legitimate, though they do not appear to have found in terms that he was the issue of a marriage in the Brahmo forms, which was what he had pleaded. They seem to have thought that by reason of the declarations and acknowledgment of his Father he must be taken to be legitimate; and that, being at least in equal rank with the Plaintiff in that suit, and being the elder, he was as between those two parties entitled to succeed to the Raj.

In the present case, the Plaintiff comes forward and raises, no doubt, the same question that was raised in the former suit, as to the illegitimacy of Mukurund Deb, but he also raises the question of a priority of right by reason of the superior nature of the marriage between the Sarbo Deb Roy Kut and his Mother. The issues in the two suits, therefore, are [376] not precisely the same. But if they had been precisely the same their Lordships would still have been of opinion, that the decree in the former suit is not a bar to the further prosecution of this suit. They think that this case cannot in any degree be likened to those which sometimes occur in India, wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defendant a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. It is clear that in this case all the members of the family had conflicting interests. If such a suit, as a first suit, was brought here and tried according to the law of this Country there could not be a pretence for saying, that the judgment in it was anything like a judgment *in rem*, or that it could bind any but the parties to the suit. It would have been a mere suit for possession by a party claiming to have a preferable right to the party in possession, and having failed to establish that case by proving the illegitimacy of the other party.

It, therefore, seems to their Lordships unnecessary to consider, whether an ordinary Zillah Court in India could in any case pass a decision which would have the effect contended for at the bar in this case, viz., that of determining the legitimacy of a party against all the world. It is sufficient for their Lordships to say, that the judgment pleaded in this case in bar cannot be treated as one of that nature upon any principles, whether derived from the English law or from the law and practice of India, which can be [377] applied to it, and that they must humbly advise Her Majesty to dismiss this appeal. It is an *ex parte* appeal, and it is, therefore, unnecessary to say anything about costs.

MUSSUMAT BEBEE BACHUN.—*Appellant*; SHEIKH HAMID HOSSEIN and MUSSUMAT DURJAHUN.—*Respondents*: and MUSSUMAT BEBEE BACHUN, MUSSUMAT BEBEE SOGRA and MOULVIE ABDPOOL AZEEZ, *Appellants*; SHEIKH HAMID HOSSEIN and MUSSUMAT DURJAHUN,—*Respondents* * [Dec. 12 and 13, 1871].

On appeal from the High Court of Judicature at Fort William, Bengal.

A Mahomedan Widow, whose Husband died without issue, having been put in possession of her Husband's estate by the Collectorate Courts as a co-heir and for her deferred dower, has a lien, as a Creditor, on the estate, and is entitled to retain possession until her dower is satisfied [14 Moo. Ind. App. 384].

Rs. 40,000, held, in the circumstances of the *status* and means of the deceased Husband, and the custom of Sheikh families in Behar, not an excessive amount for deferred dower.

These consolidated appeals were brought from a decree of the High Court at Calcutta, dated the 24th [378] of December, 1863, made in two appeals, from a decree of the Principal Sudder Ameen of Zillah Behar, dated the 31st of December, 1862, in two suits, distinguished respectively as Nos. 30 and 105 of 1862.

The first suit, No. 30, was in the nature of an action of ejectment, and was instituted by the Respondents as Plaintiffs against the Appellants and others as Defendants, seeking as co-heirs with the Appellant, Mussumat Bebee Bachun, the Widow of Sheikh Willayut Ally, a Mahomedan, who died in the year 1851, to establish their right to three shares, with mesne profits, in his estate, and to obtain possession, which estate the Appellant had taken possession of on her Husband's decease.

The second suit, No. 105, was in the nature of a cross suit, and was instituted by the Appellant, Mussumat Bebee Bachun, against the Respondents, the Plaintiffs in the former suit, to establish her right to dower, viz., the sum of Rs. 40,000, and one gold mohur, alleged to have been settled on her at the time of marriage according to the custom of Sheikh families in Behar, and also to establish her right to hold the estate to secure the payment of her deferred dower, the estate having been then insufficient to pay the debts, including her dower, which had on the decease of her Husband become due and payable.

The principal points in dispute between the parties in the first suit in the Courts below and on appeal, so far as it is necessary to state them, were, first, whether the Mouzahs and other property the subject of that suit (excepting two Mouzahs named Poondarukh and Kurrarea, and certain sums of money which the Court below refused to decree to the Plaintiffs) belonged to the Appellant, Mussumat Bebee Bachun, she, as [379] alleged, having inherited a portion thereof from her Mother, and purchased the other portion with her own private moneys, partly during the lifetime of her late Husband, and partly after his death: or whether, as contended by the Plaintiffs (the Respondents) the Mouzahs and other property were the ancestral or purchased property of the deceased. Secondly, whether (in the event of the above point being found in favour of the Plaintiffs, the Respondents) the Appellant, Mussumat Bebee Bachun, was entitled to the continued possession and enjoyment of the estate, in lieu of and until payment of her dower, to the exclusion of the other heirs of the deceased; also, whether a decree could be made in favour of the Plaintiffs, the Respondents, as such alleged heirs, except as to their proportionate share of and in the residue of the estate, after payment thereof of the debts of Sheikh Willayut Ally, including the debts due by him to the Appellant, Mussumat Bebee Bachun, as his Widow, on account of her dower.

The questions between the parties in the second suit for dower were, whether the sum fixed upon the marriage of the Appellant Mussumat Bebee Bachun, as her dower.

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colville, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier. Assessor.—The Right Hon. Sir Lawrence Peel.

and exigible on the dissolution of the same by divorce or death of her Husband, was Rs. 40,000 and one gold mohur, or what other sum of money she was entitled to in respect of her dower.

By the decree of the Zillah judge (Tarrakant Biddasagur), it was decided with reference to the first suit, that the Plaintiffs, the Respondents, were entitled to three shares (the whole into four shares being nominally divided) in the estate left by Sheikh Willayut Ally; that such estate consisted of the Mouzals, etc., claimed by them in their plaint; that the two Mou-[380]-zals above named were the property of the Appellant; and that it was not proved that the sums of money claimed by them as part of such estate had ever been received by her. The decree also declared, with reference to the cross suit, that the Appellant, had not proved that the dower fixed on her marriage amounted to the sum claimed by her, and accordingly dismissed the suit with costs.

On appeal to the High Court from that part of the decree of the Zillah Judge which had reference to the first suit instituted by the Appellants in the second appeal and on objections to such appeal made by the Respondents under sect. 348 of Act, No. VIII. of 1859, the High Court, consisting of the Justices Steer and Louis Stuart Jackson, dismissed the appeal and the objections, and affirmed that part of the decree of the Zillah Judge.

The decree of the High Court, on appeal from the part of the decree of the Zillah Judge, which had reference to the cross suit, affirmed that part of the decree, with a modification to the extent of ordering and directing that the Respondents should not recover the mesne profits of the estate, except such as had accrued since the institution of the suit.

Separate appeals were brought but were ordered to be consolidated. The joint appeals were argued by Sir R. Palmer, Q.C., and Mr. Leith, for the Appellants, and Mr. Cave, for the Respondents.

For the Appellant, Mussumat Bebee Bachum, it was contended first, that she was lawfully put in possession of her deceased Husband's estate by the Collectorate [381] Court in 1851, and had by the Mahomedan law a lien for her deferred dower—*Ahmud Hossein v. Mussumat Khodeja* (10 W.R., Civ. Rul., 369); *Ameer-oon Nissa v. Moorad-oon-Nissa* (6 Moore's Ind. App. Cases, 211); *Wujah-oon Nissa Khanum v. Miza Husun Ali* (1 Ben. S.D.A. Rep., 266); *Uzeezoo Nisa v. Cabul Ali Khan* (3 Ben. S.D.A. Rep., 321); *Mussumat Wuzeerun v. Mahommed Hossein Khan* (7 Ben. S.D.A. Rep., 34); Macnaghten's Mah. Law, pp. 288-9;—and, secondly, that having regard to the *status* and means of her Husband, and the custom of the Sheikh families in Behar, the amount claimed, viz., Rs. 40,000, was not an excessive amount for deferred dower.

On the part of the Respondents it was argued, first, that the Appellant had no right to dower, or if she had any right to dower her claim was excessive; and secondly, that she had no right to possession of the real estate, *Mussumat Wuzeerun v. Mahomed Hossian Khan*, and had no lien on the estate, her claim for dower having been more than satisfied by the perception of the mesne profits of her deceased Husband's estate of which she was in possession.

Judgment was reserved and now delivered by

The Right Hon. Sir Montague Smith (Dec. 21, 1871).—The principal questions in these appeals arise from a claim made by the Appellant, as the Widow of Sheikh Willayut Ally, a Mahomedan, to a dower of Rs. 40,000 and one gold mohur, and a further claim on her part to retain possession of lands belonging to her late Husband until her dower is satisfied.

Other claims have been made by the parties in these suits, some of which have been included in [382] the present appeals, and to which it will be necessary hereafter to advert.

The Appellant, and Sheikh Willayut Ally, who both appear to have belonged to wealthy Mahomedan families in Behar, were married in 1820.

The Husband died in March, 1851, without issue, leaving the Appellant his only Widow.

It is not now disputed that, on his death without issue, the Appellant became entitled as co-sharer to one-fourth share of her Husband's estate, and that the other

three-fourths descended upon Mussumat Raheebun, a Sister of Sheikh Willayut Ally, who died shortly after her Brother, leaving the present Respondents her heirs.

In April, 1851, proceedings were instituted by the Appellant in the Collectorate Courts to obtain the entry of her name in the Register in place of her Husband's. She alleged in her petition that she was in possession by right of inheritance, and also on account of her dower. Objection was made on the part of the Respondents, but it did not prevail: and the lands were registered by the Collector in the name of the Appellant "without specification of share."

An appeal was made on behalf of the Respondents to the Commissioner, who affirmed the decision of the Collector, declaring in his Order that, if the Objectors (the Respondents) had any claim, they were at liberty to find their remedy by suing in the Civil Court.

The Order of the Commissioner bears date on the 11th of March, 1852.

These proceedings relating to the possession of the lands are material, not only to show that the Appellant obtained the insertion of her name and possession [383] soon after her Husband's death, but principally because it is clear from them that she claimed to hold not merely her one-fourth share to which she was entitled as co-sharer with the heirs, but the entire estate "on account of her dower."

The Respondents, who were parties (Objectors) in these proceedings, notwithstanding that they had the fullest notice of the Appellant's pretension to hold the estate of her dower, took no step to dispute her claim, or to disturb her possession of the entire estate, from the date of the above proceedings until the commencement of the present suits, a period of nearly ten years.

On the 31st of December, 1862, both the suits which are the subjects of these appeals were commenced, one by the Respondents as the heirs of Mussumat Raheebun (deceased), Sister and heiress of Sheikh Willayut Ally, against the Appellant (the Widow) to recover three shares of the estate, admitting her right as Widow to one-fourth share. The other was a suit by the Appellant against the Respondents to establish her claim to dower, on the alleged ground that her claim to dower might otherwise be barred by the law of limitation.

The Appellant in both suits asserted that the dower agreed to be given on her marriage was the sum of Rs. 40,000 and one gold mohur, and she claimed to hold the estate until this dower was paid: whilst the Respondents alleged that, in the family of Sheikh Willayut Ally, the dower was always fixed at 500 dirrums, and that this was the agreed amount of dower on this marriage.

The claim of Mussumat Bebee Bachun to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower, [384]—for such a right does not arise by the Mahomedan law as a consequence of the gift of dower, nor was there any agreement on the part of the Husband to pledge his estate for the dower. But the Appellant, having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower, their Lordships are of opinion, that she is entitled to retain that possession until her dower is satisfied, and the Respondents cannot recover the possession of their shares unless that satisfaction has taken place.

It is not necessary to say, whether this right of the Widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in a case of *Ahmed Hoossein v. Mussumat Khodeja* (10 Weekly Reporter, Civil Rulings, 369). Whatever the right may be called, it appears to be founded on the power of the Widow, as a Creditor for her dower, to hold the property of her Husband, of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received. This seems to have been the ground on which the claim of the Widow to retain the possession was put in *Ameer-oon-Nissa v. Moorad-oon-Nissa* (6 Moore's Ind. App. Cases, 211). Whether the dower in this case has been discharged out of the proceeds of the estate, must, of course, depend on the determination of the principal question in the cause—What is the amount of the dower?

The question raised in the second issue in the dower suit was, whether the dower was fixed at Rs. 40,000 and one gold mohur, as alleged by the [385] Widow, or at 500 dirrums, under the Mahomedan law, as contended for by the Respondents.

In the possession suit, the issue (4th) was, whether Sheikh Willayut Ally owed Mussumat Bebee Bachun Rs. 40,000 and one gold mohur for dower or not.

After a great deal of evidence had been given in the suits, the Principal Sudder Ameen held that the Appellant had not made out that the dower was fixed at Rs. 40,000; and he also held, that the statement of the Respondents that the dower was fixed at 5000 dirrums, "was conjectural."

On the appeal, the Judges of the High Court were of opinion, that they could not declare that the Appellant was entitled to demand "the immense sum of dowry which she claims"; but they say: "In a Mahomedan marriage between contracting parties of rank and influence, there must be of course some dowry, and it was probably a handsome one." They also say: "The omission of the Defendants to sue for their share of the inheritance indicates a consciousness on their part that Mussumat Bebee Bachun had a claim of dower to be satisfied from the estate, and as the amount of dower was doubtless considerable, though we cannot declare what the exact amount was, we think that, under the circumstances of the case, it will be just and equitable to order that the Defendants receive no mesne profits, except what has accrued since the institution of their suit. With this modification we confirm the judgment of the Lower Court in this case, with costs against Mussumat Bebee Bachun."

Their Lordships are unable to consider this judgment of the High Court as a final or satisfactory determination of the main question in the suit. The learned Judges, whilst holding that the evidence did [386] not satisfy them that the dower was fixed at Rs. 40,000, declare that it "was probably a handsome one," and that the conduct of the Respondents indicates that it was "doubtless considerable." It appears to their Lordships that the Widow, on the view taken by the High Court, was, at all events, entitled to a proper dower, to be ascertained according to Mahomedan law. But no attempt was made to arrive at what would be the proper dower, nor was any account taken of the proceeds of the estate. It is obvious, therefore, that the Court has set off one unascertained sum against another unascertained sum. It seems to their Lordships that this mode of settlement, if suggested to the parties as a compromise, might perhaps have been, with their assent, a fit end of the litigation; but they think it cannot properly be made the basis of a decree between hostile litigants, and, therefore, that the decree so founded ought not to stand in its present shape.

Their Lordships, in this state of things, have thought it right to look carefully at the evidence, to see, whether they can safely arrive at a conclusion which would prevent the necessity of renewed litigation; and whilst fully alive to the importance and propriety of their ordinary rule not to interfere, unless upon very clear grounds, with the findings upon questions of fact, where the Courts of First Instance and of appeal have been in accord, they think this case comes before them under exceptional circumstances, there being in truth no explicit finding upon the question of the amount of dower.

The Appellant called nine Witnesses who were present at the marriage ceremony in 1820, and these persons say that the dower agreed to be given, was a [387] deferred dower of Rs. 40,000. About an equal number of Witnesses called by the Respondents, some of whom also say they were present at the marriage, state that the dower was fixed at 500 dirrums. It is clear from the evidence that Sheikh Willayut and Messumat Bebee Bachun were both "in opulence from the time of their Fathers," and it is consequently more probable that a high sum was fixed than such a low sum as 500 dirrums, indeed the learned Judges of the High Court came to this opinion. Their Lordships would have hesitated long before holding that the Appellant had established her right to the dower she claimed, if the proof had rested only on the oral testimony of the contract; but they think that that testimony receives very strong support and corroboration from the evidence given of what was usual in the District, and also from the conduct of the Respondents themselves.

The evidence of what was customary principally came from the Respondent's Witnesses, and its truth may, therefore, be relied on. It shows that, in the Province of Behar, and in the caste of Sheiks, Rs. 40,000 was amongst wealthy people the usual dower. This amount was not invariable, but it was a very common and usual sum, and numerous instances are cited by the Witnesses. One Witness, Sheikh Shahamut

Ally, says:—"In the case of Sheiks in the Province of Behar and in Mahoonnee the custom is usually Rs. 40,000 and one gold mohur and the custom of inconsidered dowers is of recent date."

It was pointed out by the learned Council for the Respondents that, in some instances, this large amount of dower was fixed in marriages between [388] persons, who, apparently, were not wealthy; but this circumstance rather tends to corroborate the evidence that it was a usual and well-known dower than to rebut it.

Three cases, also coming from Behar, were referred to from the Reports of the Sudder Dewanny Adawlut, where this sum of Rs. 40,000 was the amount of dower. These instances cannot, of course, be regarded as evidence in the cause, but as matter of history they are consistent with the testimony of the Witnesses.

Their Lordships must not be understood to decide, that the evidence of what was customary in the District would be sufficient in itself to fix the amount of dower, for if there had been no evidence of an agreed amount, it would have been necessary to make inquiries into the usual amount of dower in the family of the Appellant; but it is impossible not to see, that this sum of Rs. 40,000 was a most usual amount to be fixed, and that fact gives probability to the statements of the Witnesses for the Appellant, who proved that such was, in fact, the dower agreed upon on this marriage.

Their Lordships are also disposed to attribute great weight to the presumptions which naturally arise from the conduct of the Respondents. It is plain that, from the pleadings in the Collector's Court, and from other transactions, they became aware shortly after Sheikh Willayut Ally's death of the claim for dower, and although they opposed the Widow's claim to possession, showing they were alive to their rights, yet after she had obtained it they took no step for ten years to interfere with her possession.

The proper inference from this conduct is, that [389] they were aware that she had a claim to a large dower, certainly to an amount far beyond the insignificant sum of 500 dirrums, which they now set up, and which, of course, must have been discharged long ago, and that they acquiesced in her holding the property for that larger dower. Knowing what her claim was, if they had wished to dispute it and to have the real amount ascertained, they might at any time have instituted a suit to obtain the possession of their shares of the estate, if the dower should appear to have been discharged. But they delayed doing so for ten years, thereby rendering the proof of the agreed dower more difficult, and perhaps relying upon that very difficulty.

Whilst the Judges of the High Court treat this conduct of the Respondents as indicating a consciousness on their part that the dower had been fixed at a considerable amount, they do not seem to have drawn the further inference, which we think may be fairly done, that it is also indicative of a consciousness on their part that what the Appellant asserted to be the amount was the true and proper amount; for if that were not so, it might reasonably be expected that they would have taken proceedings at an earlier period to dispute her claim.

In the result, their Lordships have come to the conclusion, that there was an agreed amount of dower on the marriage; and they are satisfied, concurring so far with the Courts of India, that the amount of dower set up by the Respondents has been disproved. Their Lordships further think, for the reasons given, that there is reasonable evidence to support the case of the Appellant to the dower she claims.

[390] The Appellant also objected to the decree in the suit for possession, because certain tenements alleged to be her private property (in addition to the two tenements found by the Courts below to belong to her) ought to have been declared to be hers. But no evidence could be referred to by the Appellant's Council in support of this contention, and there seems to be no ground for impeaching the concurrent decrees of the two Courts on this point.

Their Lordships will humbly report to her Majesty, that the appeals should be allowed in both suits, so far as they relate to the claim for dower; that the decrees under appeal should be reversed; and that it should be declared in both suits, that the dower agreed to be given on the marriage was the deferred dower of Rs. 40,000 and one gold mohur.

With regard to the suit for possession, their Lordships have considered, whether

they ought to advise Her Majesty to direct an account to be taken in that suit; but, considering the way in which the litigation has been conducted, that no account has ever been asked for by the Respondents, and that mesne profits were not even claimed in the suit, they think it will be more convenient to follow the course taken in the case of *Ameer-oon-Nissa v. Moorad-oon-Nissa*, cited from 6 Moore's Ind. App. Cases, 211; and to advise Her Majesty that this suit, so far as it prays possession, should be dismissed as against the Appellant, without prejudice to any suit that may be instituted by the Respondents for an account and administration of Sheikh Willayut Ally's estate, consistently with the above declaration as to the Appellant's dower.

Their Lordships are further of opinion, that the [391] Order to be made in the appeal should, as far as possible, provide against the re-opening of any of the questions which have been litigated in these suits: the Order, therefore, which they will humbly recommend Her Majesty to make will be the following:—

That the appeal be allowed, and that the decrees under appeal be reversed, and the following decree be made in both suits:—

That it be declared, that the dower agreed to be given on the marriage of the Appellant with Sheikh Willayut Ally deceased was the deferred dower of Rs. 10,000 and one gold mohur; and that the Appellant, being in the possession of the estates of the said Sheikh Willayut Ally, is entitled to retain such possession until the whole of what is due to her in respect of such dower has been paid and satisfied.

That it be further declared, that the whole of the property claimed in the suit wherein the Respondents were Plaintiffs, with the exception of Mouzah Poondareek and Mouzah Kurrareea, and the sum of Rs. 300 in the decree of the Principal Sudder Ameen mentioned, belonged to and formed part of the estate of Sheikh Willayut Ally deceased; and that the Respondents, as the representatives of Mussumat Raheebun deceased, are entitled to three-fourths of the said property, subject to the claim thereon of the Appellant in respect of her before-mentioned dower.

That it be ordered, that the suit of the Respondents, so far as it seeks to recover possession of their shares of the said estate, do stand dismissed as against the Appellant, but without prejudice to any suit that may hereafter be instituted by them for an [392] account and administration of the estate of Sheikh Willayut Ally, or to enforce their rights therein consistently with the above declarations.

That the costs of both the two suits in the Zillah and High Courts should be apportioned between the parties, according to the practice of those Courts in cases wherein a litigant is only partially successful; and that the costs (if any) which have been paid by the Appellant under the decrees under appeal should be repaid to her.

That the causes be remitted to the High Court, with directions to carry out this Order.

The Appellant having failed as to part of the subjects of her appeal, no costs will be given in these appeals.

[393] BABOO LEKRAJ ROY,—Appellant; BABOO MAHTAB CHAND and Others,—Respondents * [Dec. 14, 15, 1871].

On appeal from the High Court of Judicature at Fort William, Bengal.

Suit against the Guardians of a Minor, to recover moneys alleged to be due from the estate of the Minor's Father. The Guardians compromised the suit and the Deed of Compromise was confirmed by the Court. After sixteen years, the Minor, being then of age, brought a suit against the Guardians to recover the amount paid under the Deed of compromise, alleging that the former suit was a fictitious one, and the compromise fraudulent and

* Present:—Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier. Assessor,—The Right Hon. Sir Lawrence Peel.

collusive between the Plaintiff and his Guardians. On appeal, held, by the Judicial Committee, reversing the judgments of the Courts in India, (1) that, in the circumstances, the Guardians, in their discretion, were justified in making the compromise to protect the Infant's estate, and (2) that the burthen of proving the allegation that the former suit was fictitious and collusive, was upon the Plaintiff, and in the absence of *prima facie* evidence by him that no debt was due from the Father's estate, the *onus probandi* was not shifted on the Defendants to negative such allegation.

The questions in dispute between the parties in this case were: First, whether a Ruffanamah, or Deed of compromise, was made collusively and fraudulently against the first Respondent, by his Guardian, when he was a Minor; secondly, whether there was any sum owing from the estate of one Laljee Mull, which formed the subject matter of the compromise [394] and lastly, whether the *onus probandi* lay upon the Plaintiff, who sought to impeach the transaction as collusive and fraudulent, or the Defendants.

The facts and circumstances of the case are fully stated in their Lordships' judgment.

The appeal was argued by Mr. Field, Q.C., Mr. Leith, and Mr. W. C. Mozumdar, for the Appellant, and Sir R. Palmer, Q.C., and Mr. Doyne, for the Respondents.

The authorities cited were:—

Upon the question of the power of a Guardian to deal with the estate of his Ward to protect the estate, *Humoonpersaud Pandey v. Mussumat Babooee Munraj Koonweree* (6 Moore's Ind. App. Cases, 393), and *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh* (10 Moore's Ind. App. Cases, 454); and

As to the presumption of law with respect to the debt arising from the non-production of the account Books, *Gray v. Haigh* (20 Beav., 219).

Their Lordships having reserved judgment, it was now delivered by

The Right Hon. Sir Robert Collier (Dec. 21, 1871).—Salamut Roy, a Merchant and Banker, employed Laljee Mull as the principal Manager of his business. On the death of Salamut Roy, Laljee Mull continued to manage the business, which was carried on [395] in the name of Surbeshurry, the Widow, and Lekraj Roy, the infant Son of Salamut Roy. Laljee Mull adopted Mahtab Chand, the infant Son of his Brother, Inderjeet Mull, and appointed by Will Inderjeet Mull and Gunga Pershaud, a Gomastah in his service, the Guardians of his adopted Son. Laljee Mull died in August, 1845, and on the 26th September, 1845, a certificate under Act, No. XX. of 1841 was duly granted to the Guardians, notwithstanding the opposition of Surbeshurry.

In January, 1846, Surbeshurry, as the Mother and Guardian of Lekraj Roy, instituted a suit against Inderjeet Mull and Gunga Pershaud to recover from the estate of Laljee Mull the sum of Rs. 176,152. 7 as. 4 p., being the amount of alleged defalcations or misappropriations on the part of Laljee Mull. After various proceedings had taken place in this suit, and Witnesses had been examined on both sides, it was settled by a Ruffanamah, or deed of compromise, whereby it was agreed that Rs. 74,000 should be paid by the Defendants, in instalments. This Ruffanamah was filed on the records of the Court on the 11th of January, 1847, and confirmed by a decree.

Mahtab Chand came of age in October, 1861, and on the 3rd January, 1863, commenced the present suit against Lekraj Roy, the Son of Surbeshurry (who had died in 1850) to recover from him, all that had been paid, together with interest thereon, under the above Deed of compromise, amounting to Rs. 68,753. 15 a. 6 p., on the ground that the suit of 1846 was a fictitious one, and that the [396] compromise of it was fraudulent and collusive between Surbeshurry and the Guardians of Mahtab Chand.

Judgment was given in the Plaintiff's favour, to the full amount of this demand, in the Zillah Court; and that judgment was subsequently affirmed in the High Court. Against this judgment the Defendant appeals.

There is no allegation of fraud against the Defendant, who, at the time of the transaction which is impeached, was a child of ten years old. The Plaintiff took

upon himself the burden of establishing fraud and collusion on the part of the Defendant's Mother, and his own Guardians, one of whom was his natural Father. It was contended that, inasmuch as the Guardians were dealing with the property of an infant, it was incumbent on the Defendant to show that such dealing was for the infant's benefit; and the case of *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonwerce* (6 Moore's Ind. App. Cases, 393), followed by *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh* (10 Moore's Ind. App. Cases, p. 154), were referred to in support of this proposition. But it is to be observed that, in the latter case, fraud on the part of the Guardians was clearly established, and that in the former, the question turned on the power of Guardians to charge an infant's estate by way of loan or mortgage, whereas no such power is here in question, inasmuch as it was the manifest duty of the Guardians, who were also Administrators of the estate (having received a certificate in pursuance of [397] Act, No. XX. of 1841), to pay all just debts of the Testator.

Their Lordships have carefully examined the evidence on the part of the Plaintiff, and are unable to find in it anything amounting to proof, that either the institution of the suit, or the compromise, was fraudulent or collusive. Although the greater part of the proceedings in that suit have been destroyed, it is sufficiently plain from what remains that it was to all appearance a contested suit, and that it had proceeded to the point of depositions being taken on both sides before it was compromised under a decree of the Court. The evidence by which the Plaintiff seeks to set aside that decree which had been in force for sixteen years is, that Gunga Pershaud filled the double character of Guardian of the Plaintiff and Gomastah to Surbeshurry, that Interjeet Mull was a man of weak understanding, under the influence of Gunga Pershaud, and that it was publicly known at the time that the settlement was unjust. The latter description of evidence was inadmissible, while the former could at the most raise a certain amount of suspicion, not approaching to proof, or even presumption, of the *mala fides* of Gunga Pershaud, while, on the other hand, there is a strong presumption against Interjeet Mull entering into a conspiracy for the purpose of defrauding his own Son.

Their Lordships have further examined the evidence of the Defendant, with a view to ascertain, whether it supplies the defect of proof on behalf of the Plaintiff. It undoubtedly appeared that the Defendant absented himself in order to escape ex-[398]-amination, that he withheld the account-books in his possession until peremptorily required to produce them, and abstained, without explaining why, from calling some persons still alive who are described as forming an assembly of Arbitrators, to whom the accounts of Laljee Mull were submitted before the compromise in the former suit. It is further stated by the Judge of the Zillah Court, that the accounts when produced disclosed upon the face of them only a balance of about Rs. 18,000 as due from Laljee Mull, upon which two observations arise—first, that whatever the defalcations of Laljee Mull may have been, they would not necessarily have appeared on the mere inspection of the Books; and, secondly, that if a defalcation to the above amount appeared on Laljee Mull's own showing, the Defendant would be entitled to retain at the least that amount. We do not dwell on the deposition of the Witness called by Gunga Pershaud, apparently with the view of contradicting the Plaintiff's case, which was, that Interjeet Mull was a tool in his (Gunga Pershaud's) hands, and of exonerating himself by throwing the whole responsibility of the transaction upon Interjeet Mull. Although the Plaintiff, if he had proved a case of fraud, might have been justly entitled to contend that it was not answered by that of the Defendant, still their Lordships cannot regard the case of the Defendant as supplying that proof of fraud which the Plaintiff failed to adduce, and without which the compromise of 1847 could not be set aside. It is undoubtedly the duty of Guardians scrupulously to regard the interest of Minors in dealing with their [399] estates, and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer if a notion were to prevail, that Guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill-founded; and such a notion might prevail if the compromise of a claim of debt confirmed by a decree of a Court were to be set aside after sixteen years without distinct proof of fraud.

Their Lordships fully subscribe to the rule which has been more than once laid

down, that a very strong case on the part of the Appellant is required to induce them to set aside the finding of two Courts on a question of fact. In this case, however, they are of opinion, that the Judge of the Zillah Court fell into an error in point of law, in assuming that the burden of proof of the debt lay upon the Defendant. The burden of proving his allegations that the suit was fictitious and the compromise fraudulent and collusive lay upon the Plaintiff; and an element in that proof, without which his case amounted to nothing, was the non-existence of a debt. It rested, therefore, with him to give, at all events, some *prima facie* evidence of this before the burden of proof was shifted to the Defendant. Inasmuch as this error seems to have influenced the decision of both the Indian Courts, who, in the opinion of their Lordships, have given undue weight to the non-appearance of the Defendant (a mere child at the time of the transaction in question), and to his reluctance to produce the Books, their Lordships [400] consider that they are not infringing the rule above referred to by deciding in favour of the Appellants.

On these grounds their Lordships will humbly report to Her Majesty, that the decrees of the High Court and of the Zillah Court ought to be reversed, and that in lieu thereof a decree ought to be made dismissing the Respondent's suit with costs, and their Lordships will direct that the Appellants have the costs of this appeal.

[401] HYDER HOSSAIN,—*Appellant*; MAHOMED HOSSAIN and ALI HOSSAIN,—*Respondents* * [Dec. 23, 1871; Jan. 14, 1872].

On appeal from the Court of the Judicial Commissioner of Oude.

The mere fact that a member of a Mahomedan family in Oude was, for fiscal purposes, registered as sole owner of an estate, is not evidence of his exclusive right to the property. Such presumption from registration may be rebutted by evidence showing that the property was enjoyed in common by the family.

Semble: Act. No. XVI. of 1865 passed after the institution of proceedings before the Land Revenue Officers in Oude has a retrospective operation [14 Moo. Ind. App. 404].

In the absence of substantial error, either in the finding of the facts, or in the principles of law applied in cases depending on local customs and local inquiry before the Land Revenue Officers in Oude, where the proceedings are not strictly conducted, the Judicial Committee will look to the merits and apply the rule not to disturb the judgment appealed from, unless they are satisfied that the judgment is materially wrong [14 Moo. Ind. App. 410, 411].

This appeal was preferred from an Order of the Court of the Judicial Commissioner of Oude, dated the 2nd of December, 1868. That Order confirmed a [402] previous Order of the same Court, made on the 16th of September, 1868, and reversed the Order of the two lower Courts, by which the Order of the Court of first instance in favour of the Respondents had been set aside.

The parties were Mahomedans, and their rights in respect to succession regulated by Mahomedan law.

The controversy in this litigation was as to the Respondents' hereditary title to one-half of the village of Beloulee, in the Province of Oude, which was registered in the sole name of Ahmud Hossain (who died pending the appeal and was represented by the Appellant), and their consequent right to have such title recognized in the papers of the land Settlement of Oude, which was in progress at the time of the occurrence of the dispute. The village of Beloulee was admitted to have formerly belonged to one Sheikh Aleemoollah.

The object of the suit, the issues raised, and the various stages of the proceedings

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colville, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier. Assessor,—The Right Hon. Sir Lawrence Peel.

in the Courts below so fully appear in their Lordships' judgment as not to require any further statement.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant.

Their Lordships, without calling on Mr. Doyne, who appeared for the Respondents, delivered judgment by

The Right Hon. Sir James Colvile.—This is one of the appeals that have lately been [403] brought from Judgments or Orders of the Revenue Officers engaged in making the Settlement of the land Revenue for the Province of Oude. The present case has been before several of the Revenue authorities, who have passed conflicting decisions upon it.

In October, 1864, the Respondents claimed to be entitled, as Proprietors, to one moiety of a village named Beloulee with its appurtenant Hamlets, and to be treated accordingly in the Settlement then in progress. This claim was originally advanced by distinct plaints or petitions in respect of different Hamlets, but these were consolidated into one suit by an Order of the extra Assistant Commissioner, Mahomed Hossain Khan, dated the 23rd of February, 1866; and the subject matter of the litigation may be treated as the village Beloulee.

The title asserted by the Respondents was, that the village had originally belonged to one Sheikh Aleemoollah, their great Grandfather; that he had a Daughter, Khyreyutoonissa, who left two Sons, viz., Lootf Hossain, the Father of the original Appellant, and Enayut Hossain, Father of the Respondents, who, as his representatives, were the proprietors of an undivided moiety of the village.

The case of the Appellant was that, on the death of the common ancestor, Sheikh Aleemoollah, the entire interest in the village had somehow become vested in his Widow; that she, about the end of the last century, transferred it by Deed of gift to Lootf Hossain, who thenceforward held it as sole proprietor up to the time of his death, when it passed to his Son, the Appellant; and that during all that period the Respondents and their Father had no proprietary interest [404] in it, being at most dependents of the other branch of the family.

It was admitted, or hardly disputed on the part of the Respondents, that, after Sheikh Aleemoollah's death, his Widow first, and after her death Lootf Hossain, and after him the Appellant, had been registered as the persons responsible for the revenue assessed, from time to time, on the village; and, so far, as the ostensible proprietors of it. But it was insisted, that this was merely an arrangement for fiscal purposes (see *Mussumat Thurkrain Sookraj Koowar v. The Government*, ante [14 Moo. Ind. App.], p. 112), and that notwithstanding the registration in the name of one member of the family on behalf of the others, both branches continued jointly to possess the village, and to enjoy the revenues of it.

It is to be observed, that a suit so framed, though tried by the Revenue authorities, and in the course of proceedings for effecting a Settlement of the public revenue, does not, in the Province of Oude, merely determine who is to be Lumberdar, or the person entitled to engage for the payment of revenue, leaving the party excluded a remedy in the Civil Courts. Under the provisions of Act, No. XVI. of 1865, which, though passed after the commencement of this particular suit, seems to have a retro-active effect, such a suit involves a final adjudication on the question of proprietary right.

The following was the course of the litigation now brought under the review of their Lordships:—

The issues originally settled in the suit were,

First, did the Plaintiffs (the Respondents) ever receive the profits of the village or not?

Secondly, did the Plaintiffs live in common with the Defendant or separately?

[405] Thirdly, did the Defendant give the Plaintiffs Rs. 881 for their Sister's marriage, in 1264 F. or not? and

Fourthly, did Mussumat Hyat Bebee make over this village with others to the Defendant's Father Lootf Hossain, and cause the engagement to be executed in his name, in virtue of which he remained in sole possession without the partnership of Enayut Hossain, and after his Father's death, did the Defendant himself remain in uninterrupted possession, or not?

On the 1st of February, 1866, Mahomed Hossain, the extra Assistant Commissioner, decided the case in favour of the Respondents.

On the 19th of June, 1866, this decision was reversed by the Settlement Officer, Major Chamier, on the ground that it was partly based upon the result of inquiries made out of Court, and the case was remanded for trial on the following issues:—

First, whether up to 1263 F. (1856) commensality existed between Plaintiffs and Defendant, and did Plaintiffs participate in the profits?

Second, if so, did the Plaintiffs enjoy a portion of profits by right or by favour?

Third, whether estoppel was created by the Plaintiffs having enjoyed Seer?

On the 7th of May, 1866, Mahomed Hossain, having tried these issues, again decided the case in favour of the Respondents.

There was a second appeal to the Settlement Officer, who, on the 19th of June, 1866, reversed the decision of this native Officer and dismissed the Respondents' claim.

[406] This Order was confirmed on appeal by the Commissioner of the Lucknow Division (Major Barrow) on the 21st of September, 1866.

The cause, in the ordinary course of things, would next have gone before the Financial Commissioner, but Major Barrow having been intermediately raised to that office, it was transferred to the Judicial Commissioner, Sir George Couper, who, on the 16th of September, 1868, proceeding mainly on a recent decision of the late Financial Commissioner, Mr. Davies, reversed the Orders of Major Chamier and Major Barrow, and affirmed the decision of the Courts of first instance in favour of the Respondents.

This ruling was afterwards reviewed by Mr. Tucker, who succeeded Sir George Couper as Judicial Commissioner, and was confirmed by him on the 2nd of December, 1868.

These conflicting judgments, and the argument addressed to their Lordships on behalf of the Appellant, clearly show, that the question between the parties is not merely one of fact, but one involving the *ratio decidendi* in cases of the like nature.

The judgment of Major Chamier and Major Barrow proceed upon certain former rulings of the Revenue Courts in Oude. These are not before their Lordships, but their effect seems to be, that the principle of the Settlement was to be based on the maintenance of the proprietary right as it existed prior to, and at the time of the annexation of the Province to British India in 1856; that if, under the Kings of Oude, one member of the family had been registered as the sole Owner of the estate, and the [407] person responsible for the revenue assessed upon it, it lay upon those who claimed to be jointly interested in it to show, not merely that they had received some indefinite and casual sums out of the profits, or even certain Seer lands by way of maintenance, but that the ostensible Owner of the estate had accounted to them for the aliquot share of its profits receivable by the Owners of the share claimed. These two Officers seem accordingly to have come to the conclusion that, inasmuch as the proof of joint interest, given by the Respondents in the Court of first instance to whatever it amounted, fell short of this, their claim ought to be dismissed, and the ostensible title of the Appellant allowed to prevail.

The decision, however, of Mr. Davies, on which the Judicial Commissioners proceeded, is admitted on all hands to have qualified the former rulings.

In that case it appeared, that the party claiming a joint interest against the party who was the ostensible proprietor, had held 71 beegahs Seer land, and had also received sums averaging Rs. 86. And Mr. Davies' judgment, after stating the question to be, whether the Respondent had, by the adverse possession of the Appellant, been excluded from his inheritance under the Mahomedan Law, proceeds thus: "Under the Mahomedan Law, Grandsons are entitled to equal shares. Under the custom of the Country one Shareholder represents the family before the Government, and manages the estate. It is by no means a general practice to give each sharer an account of his share of the profits at the close of the year. No safe inference against a Shareholder can be made from the omission. It was very frequently the case for acknowledged sharers to take [408] only a sufficient sum for their own expenses; but this involved no relinquishment of their rights, nor did any cause of action arise until some quarrel took place between the parties." And from these propositions he inferred, first, that there was a legal presumption in favour of a Grandson claiming against another Grandson, and that the *onus* of proof should

properly be placed on the one claiming to be sole possessor, contrary to law and custom; and, secondly, that in the case before him the Appellant had cut the ground from under his feet by paying to the Respondent, in addition to Seer, a sum of money of a fluctuating amount.

If their Lordships are called upon by the present appeal to overrule the decision of Mr. Davies, and to restore the rule supposed to be established by the earlier cases, they must decline to do so. That decision, after full discussion, was followed in this present case both by Sir George Couper and by Mr. Tucker; the principle which it lays down, having been thus sanctioned, has probably governed other Settlement cases since decided; and it appears to their Lordships to be far more consistent with equity and common sense than a hard and fast rule requiring the party who claims a joint interest to prove that the registered proprietor has duly accounted to him for his proportionate share of the profits. In so far as it depends upon the custom of Mahomedan families holding lands within the former kingdom of Oude, it receives some corroboration from the findings of the Mahomedan Officer (presumably conversant with such customs) who tried this case, in the first instance, before the date of Mr. Davies' judgment.

[409] It remains to be considered, whether the principle of that judgment has been correctly applied to the present case.

It was argued for the Appellant, that he has not been allowed an opportunity of proving the alleged Deed of gift to his Father. There was nothing, however, to prevent him from proving this Deed, if he had the means of doing so, on either of the two trials before the native Officer. He chose, however, then, to rest his case on the Order, or copy of the Order, which, at most, proves no more than that, with the consent of the family at the time, the village, which had been entered in the Revenue Register in the name of the Widow of Sheikh Aleemoollah, was transferred into that of Lootf Hossain on the suggestion that he had been appointed by her as her successor. Their Lordships apprehend that such an arrangement was not uncommon; nor, if proved, would it, under the ruling of Mr. Davies, or even according to the stricter rule of their earlier cases, be conclusive against the claim of those who might contend that they had nevertheless continued to retain a joint interest in the property. The decisions differ only as to the degree of proof required, and as to the party on whom the burthen of proof lies.

It is no doubt true that, before Major Chamier, the Appellant's Pleader proposed to give further evidence in support of his client's title under the alleged Deed of gift; and that that Officer, who had decided the other issues in favour of the Appellant, refused to admit it, stating, "I consider that the fresh plea of gift should not be entertained at this late stage of the case." But their Lordships are far from think[410]-ing that this refusal would have been improper had the decision of the Settlement Officer on the merits been the other way. And, however that may be, it appears to them that no substantial injury has been done to the Appellant by it. For it is clear, that the real issue between the parties is, whether, notwithstanding the title registered on the Revenue records, both branches of the family continued, as a joint family, to possess and enjoy the village. If that were made out, very little credit would be due to an ancient Deed of gift, by whatever proof supported, since it would be inconsistent with the proved possession, and enjoyment of the estate.

Have then joint possession and enjoyment been established in the degree which satisfies the ruling in Mr. Davies' case? Their Lordships are not insensible to the looseness of much of the evidence taken before the native Officer. But they are of opinion, that there was before him legal evidence which (if believed) would warrant his findings, at least to the extent that the Seer land was enjoyed by the Respondents of right and not by favour, and that their *status* was not that of dependents but of co-proprietors, although the sums drawn by them from the profits may have fluctuated in amount, and not have been the subject of a regular accounting. This would satisfy the ruling of Mr. Davies, though it might not satisfy the requirements of the earlier cases on which Major Chamier and Major Barrow proceeded.

Their Lordships, in considering this appeal, have felt that, in cases of this nature, wherein the procedure is somewhat loose, and the merits depend [411] much upon the local custom and local inquiry, it is even more necessary than it is

on appeals from the decisions of the Civil Courts in the Regulation Provinces to act on the principle of not disturbing the judgment under appeal unless they are satisfied that it is substantially wrong.

Here, after full consideration of the arguments for the Appellant, they have been unable to satisfy themselves that there is substantial error, either in the finding of the facts or in the principle of law that has been applied to them, and, therefore, they have come to the conclusion that, without calling on the other side, they ought to advise Her Majesty to affirm the Decree or Order of the Judicial Commissioner of Oude and dismiss this appeal with costs.

[412] MUSSUMAT ANUNDEE KOONWUR, Widow of GUNPUT LAL,—*Appellant*; KHEDOO LAL,—*Respondent*; MUSSUMAT MANKEE KOONWUR,—*Appellant*; KHEDOO LAL,—*Respondent*; MUSSUMAT POONPOON KOONWUR,—*Appellant*; KHEDOO LAL,—*Respondent* * [Jan. 16, 17, 18, and 19, 1872].

On appeal from the High Court of Judicature, at Fort William, in Bengal.

Cesser of commensality is strong, though not conclusive, evidence of partition of joint family property, and removes or qualifies the presumption of Hindoo Law, that the acquisition of property by a member of the family is made by means of the joint estate, but the *onus probandi* lies on a member of the family setting up separation to prove that the property was acquired by himself after separation, and not from estate of the joint family [14 Moo. Ind. App. 422].

A Hindoo had only self-acquired estate. Previous to his death his three Sons separated in food and left their Father's house, living separately. Held, that although there was a cesser of commensality, the normal condition of an individual Hindoo family did not, from the evidence, operate as a complete separation, and property purchased after the separation in the name of one of the Sons, and business carried on in the Son's name, declared to be benamée, and that the same and the profits derived from the business formed part of the joint family estate [14 Moo. Ind. App. 422].

If no intelligence is received during twelve years, concerning the existence of a man who has travelled to a Foreign Country, the presumption by Hindoo Law is that he is dead [14 Moo. Ind. App. 414].

Where a member of a joint Hindoo family, of weak mind, went on a pilgrimage, and was not heard of for twelve years, and his death, therefore, presumed, his share of the family estate by the Mithila law falls into the general estate, and his Widow is entitled only to maintenance [14 Moo. Ind. App. 414, 430].

These consolidated appeals were brought from a decree of the High Court, which reversed a decree of the Principal Sudder Ameen of Behar.

[413] The Respondent was the Plaintiff in the Court below, and the object of the suit was to obtain a declaration of his right to a share of an estate which he claimed to be joint family property, and to have his share allotted to him; the Defendants contending that it was not joint property, but their separate acquisition after the separation of the family.

The facts and the argument on the appeals, which were heard together, are fully stated in their Lordships' judgment.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant; and Mr. Cowie, and Mr. J. D. Bell, for the Respondent.

* Present: Members of the Judicial Committee:—The Right Hon. Sir James William Colville, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier. Assessor:—The Right Hon. Sir Lawrence Peel.

In the course of the arguments, I Strange's "Hindu Law," pp. 199, 200 [Ed 1830], was referred to, as showing from the evidence in the suit that the family was a divided Hindoo family, and Strange's "Hindu Law," Vol. I., pp. 131, 166, 188, as to the presumption of death after twelve years' absence.

Judgment was reserved and now delivered by

The Right Hon. Sir James Colville (March 26, 1872).—In this case three distinct appeals against a Decree [414] of the High Court of Bengal have been consolidated, and heard as one appeal. The principal questions raised are, what was the *status* of the Hindoo family of which the Appellants and the Respondent were members; and whether certain acquisitions are to be regarded as part of the estate of the late head of the family, or as the separate property of the individual member in whose name they stand, and by whom they were ostensibly acquired.

The following is the history of the family in question. Choonee Lal, the Father, who died in October, 1851, had for many years carried on business as a cloth Merchant at Sahibgunj, in Zillah Behar, within that part of India in which Hindoos are governed by the Mithila Law. At the time of his death this business was carried on in his sole name; but he had previously, and up to the year 1851 or 1852, been in partnership, first with one Rhadha Lal, and, after the death of that person, with his Son, Sreekishen.

All parties are agreed, that he had no ancestral estate, and that whatever property belonged to him was of his own acquisition. He had three Sons, viz:—Gopal Chund, the Respondent, Khedoo Lal, and the Appellant, Gunput Lal. About 1839, and after his Sons had reached man's estate, he married a second Wife, who survived him.

Gopal Chund, the eldest Son, became of unsettled, if not of unsound mind, in or before the year 1848, when he left his home as a Beiragee, or religious medicant, and wandered away on pilgrimage, to various holy places. His Wife, the Appellant, Mussumat Mankee Koonwur, tendered some evidence in this suit to show that he had been seen alive as [415] late as 1858, and might be still alive; but both the Indian Courts, discrediting that evidence, have come to the conclusion, that he had not been heard of for twelve years before the date of the first Decree; and proceeding on the presumption of Hindoo Law, have treated him as then dead (see Strange's "Hindu Law," Vol. I., p. 188). There is nothing however to show that he did not survive his Father. He had no male issue, and is represented on the record by Mussumat Mankee Koonwur, who, if he be dead, would, as his Widow and heiress, be entitled to succeed to his separate estate.

Gunput Lal, the younger Son, has died since his appeal from the decree of the High Court was allowed. He, too, had no male issue, and his appeal has been revived by his Widow and heiress, Mussumat Anundee Koonwur. He left, however, a Daughter, Mussumat Poonpoo Koonwur, who has an infant Son, Lulloo Baboo; and she is an Appellant against the Decree in respect of the interest which she claims in part of the property in dispute. Khedoo Lal, the Respondent, and the Plaintiff in the suit, has at least two Sons, Brij Bhookun Doss, and Muhamed Lall, of whom mention is made in the suit, but who are not parties to it.

From this statement of the family it follows, that the property of which Choonee Lal died possessed, whatever it was, descended to his Sons living at the time of his death, in equal shares. If Gopal Chund were then dead, the estate would descend to Khedoo Lal and Gunput Lal in equal moieties. And even if Gopal Chund is to be taken to have survived his Father, but to have died subsequently, and before a partition, his [416] share, according to the Mithila law, would pass to his Brothers, to the exclusion of his Widow, who would be entitled only to maintenance. This does not appear to be contested. The question in dispute is, which, if any, of the various acquisitions of the family, standing in the separate names of different members of it, are to be treated as part of the estate of Choonee Lal, and descendible to his heirs.

The suit was commenced by the Respondent on the 1st of November, 1859. It was originally brought against Gunput Lal and his Daughter, Mussumat Poonpoo Koonwur, described as the Mother and guardian of Lulloo Baboo; and the plaintiff treated the share and interest of Gopal Chund as vested in his two Brothers. The Appellant, Mussumat Mankee Koonwur, however, intervened as an Objector in respect

both of the share in his Father's estate to which Gopal Chund, if alive, was entitled : and of that part of the property claimed, which she insisted was his separate estate. And by an Order of the Principal Sudder Ameen, in whose Court the suit was brought, she was made a Defendant.

The plaintiff claimed a moiety of all the property specified in the schedule annexed to it, and valued at upwards of two lacs of rupees, the Respondent alleging that he had been dispossessed of it. Some objections have been taken to the frame of the suit on the ground that the Respondent has not included amongst the subjects of it that property which is held by him and his Sons in their respective names. But their Lordships are of opinion that, on a fair construction of the plaintiff in connection with the Respondent's written statement, which will be afterwards referred to, it must be held that he [417] does offer to account for the whole of what is so held as part of his Father's estate.

The plaintiff, though it prays for delivery of possession, seems to be framed rather with a view to obtain a declaration of the partitionability of the disputed subjects, than to carry out a partition by metes and bounds of the estate to be consummated by the delivery of actual possession.

The following are the issues settled in the suit :—

First, whether, according to the statement of the Plaintiff, the whole of the property in dispute belongs to the paternal estate and is undivided ; or whether, according to the averment of Gunput Lal and Mussumat Mankee Koonwur, Defendants, part belongs to the paternal estate, and part has been acquired by Gunput Lal and Gopal Chund during the time of their separation and messing apart.

Second, whether the property mentioned in the written statement of Mussumat Poonpoon Koonwur belongs to her or not.

Third, whether Gopal Chund, the Husband of Mussumat Mankee Koonwur, is missing, or whether he is residing nearer in the North-western Provinces ; and if he is missing, whether the claim of the Plaintiff to a moiety is right or not : and,

Fourth, whether the estimate of the effects, and goods and chattels in litigation, and the amount expended, is correct or not.

Before considering these issues and the evidence applicable to them, their Lordships think it desirable to pursue the history of the family.

It is admitted on both sides that, when his two elder Sons came of age, Choonee Lal opened for each a separate Cloth shop, and established him in it. [418] The precise dates at which these shops were opened are not quite certain. The Respondent admits them to have been in existence before 1835, and the Appellants insist, that they were established before 1829.

According to Mewa Lal, a Witness for the Respondent and the Brother of his step-mother, they were established in the years 1829 and 1831. The Respondent appears to have followed his Father's example and to have opened two other Cloth shops, one in the name of each of his Sons. He insists, however, that all these shops and their profits were and are part of Chonee Lal's estate ; whilst the Appellants, of course, contend that each was and is the respective property of the person in whose name the business was carried on, Choonee Lal having no interest therein. Gunput Lal, the third, remained for some time in the Cloth shop of Choonee Lal and Rhadha Lal, but, as he says, only as a Gomastah employed at a salary of Rs. 50 *per mensem*. Afterwards, and about the year 1844, a banking firm was opened in the names of Gunput Lal and Sreekrishen Lal, which was carried on in their names until 1850, when Sreekrishen Lal retired, and the business was thenceforward, and until the death of Choonee Lal, carried on in the names of Choonee Lal and Gunput Lal. The question what interest, if any, Choonee Lal had in this concern is one of the material issues in the cause ; the Respondent contending, that the beneficial interest in the half-share during the partnership with Sreekrishen Lal, and the whole interest after the dissolution, belonged to Choonee Lal ; the Appellants insisting, that he never had any interest in that Kotee, the half-share originally, and afterwards the whole, being the separate and self-acquired [419] property of Gunput Lal. Again, both parties are agreed that, at the time of the death of Choonee Lal, his three Sons had ceased to live in commensality with him, or with each other. But the time at which such separation took place is in dispute, the Appellants contending, that it was complete in 1829, and the Respondent insisting, that each Brother withdrew from the state of

commensality with his Father at a different time, viz., Gopal Chund about the year 1839, the Respondent about 1846, and Gunput Lal as late as 1852.

The state of the landed property standing in the names of the different members of the family is as follows:—

The Respondent, in his written statement, says that Mouzahs Budem, and Hurchundpore, and Rughoonathpore, and Jhekutea, in Pergunnah Kotumba, and two Houses and a Coachhouse situate in Street, No. 4 of Sahebgunj, were all acquired with the profits of the Cloth-dealer's shop bearing his name, and were then "under his control." These, as was before stated, do not form part of the properties specified in his plaint; but they are covered by the general conclusion of his written statement, which is in these words: "The conclusion is, that all the properties and effects, and moneys, and common articles of this estate bearing the name of your Petitioner's Father, or of any of the Brothers, or of any of the Sons, constitute the estate left by, and that acquired with the funds of, my Father." Of the landed properties specified in the plaint, some are admitted to be part of Choonee Lal's estate. But as to the rest, Mouzah Tillhara and an upper-roomed House in Sahebgunj, in which [420] the banking Kotee has been carried on, are claimed by Mussumat Mankee Koonwur as the separate and self-acquired property of her Husband, Gopal Chund. Other parts are alleged to be the separate and self-acquired property of Gunput Lal; whilst the several properties specified in her written statement are claimed by Mussumat Mankee Koonwur as "her exclusive property, with which neither the Respondent nor Gunput Lal has any concern."

Before considering the conflicting claims to these properties, it seems to their Lordships to be desirable to ascertain and determine, if it be possible, when the Brothers first became separate in food from their Father and each other—in other words, when that commensality, which is the normal condition of an undivided Hindoo family, ceased.

The finding of the High Court on this point is as follows:—

"We are of opinion that, from the admissions of the parties, and the dates of the purchases of the Houses in which the different Sons were established by their Father, the three Sons began to live separate from their Father at different dates, concurrent with or subsequent to their Father's second marriage in the year 1246 (A.D. 1839), in which year the eldest Son, Gopal Chund, got a House to himself, while Khedoo Lal and Gunput Lal went into separate Houses in the years 1253 (A.D. 1846) and 1259 (A.D. 1851) respectively. We think, too, that there was from those dates an undoubted separation in food between the Father and each Son as he left the paternal house." The Appellants contend that, as early as 1829, the three Brothers had all become separate in food from their Father and from each [421] other, and have argued at the Bar that the fact has been so found by the Principal Sudder Ameen.

The judgment of the Principal Sudder Ameen does not, as their Lordships read it, expressly fix the date of the separation; but its general effect is undoubtedly on this point more consistent with the case of the Appellants than with that of the Respondent. The evidence in the cause is conflicting and far from satisfactory. The finding of the High Court seems to proceed upon the several dates of the purchases of the Houses in which the three Brothers ultimately came to live; and to assume that each Brother withdrew singly and at a different time from the state of commensality. This does not appear to their Lordships to be probable. On the other hand, the Witnesses for the Appellants, speaking with the usual inaccuracy of native Witnesses as to time, are not agreed as to the date of the separation. Thanoo Chowdhree puts it as late as 1834; Goureesunkur makes it as late as 1832. On the other hand, Gunga Ram Kandoo, though a Witness produced by the Respondent, supports, on this point, the case of the Appellants. Mewah Lal says, "I do not recollect the year, but when the family increased Choonee Lal provided his Sons with separate Houses and paid their expenses." On the evidence, their Lordships are by no means satisfied that the separation took place so early as 1829. On the other hand, they do not think that the date of each Brother's separation can safely be determined by the date of the purchase of the House in which he ultimately lived. They are disposed to think, that the separation took place on or shortly after the second marriage of Choonee Lal in 1839.

[422] Another observation which arises upon the evidence in the cause, is that this

cesser of commensality, whenever it took place, does not appear to have operated as a complete separation of the different members of the family, or to have prevented Choonee Lal from continuing to exercise many of the functions which would ordinarily belong to the head of an undivided Hindoo family. The whole family continued to reside in the same Town. Some of the Witnesses depose that marriages and other family ceremonies continued to be performed in Choonee Lal's House, and at his expense, as they would have been had no separation taken place. And this testimony is confirmed in the case of the marriage of Mussumat Poonpoon Koonwur, the daughter of Gunput Lal, by a passage in the correspondence which will be afterwards referred to. Again, it appears by the evidence, that after Gopal Chund went away, his separate establishment was broken up, and his Wife and family returned to live under the same roof with Choonee Lal.

The cesser of commensality is only material to the determination of the issues in the cause, in so far as it removes or qualifies the presumptions which the Hindoo Law might otherwise raise, that an acquisition made in the name of an individual Son of the family was made by the head of the family, and as part of the family estate. According to their Lordships' view of the evidence, it is not proved to have taken place at the date of some of the acquisitions which are in question in this suit; and the effect to be given to it, in weighing the conflicting evidence concerning transactions of a date subsequent to that at which it took place, is necessarily [423] diminished by such evidence as that which has been just referred to.

Their Lordships will, in the first instance, following herein the example of the High Court, consider the evidence touching the earliest of the acquisitions in question—Mouzah Tilhara.

That property was purchased in the year 1835, at a revenue sale, in the name of Gopal Chund, for Rs. 4400. Their Lordships, for the reasons above-stated are disposed to believe that, at that time, the cesser of commensality relied upon had not taken place. They will, however, consider the evidence relating to this property, independently of any presumptions which might arise from the fact that the family was then joint in food. It may further be admitted, that there is no documentary evidence corroborative of the assertion made by some of the Respondent's Witnesses that the purchase money was paid out of the funds of Choonee Lal; and further, that if the Shop carried on in the separate name of Gopal Chund was his own separate property, he may well at that date have been in a position to pay out of the accumulated profits of that Shop a sum of Rs. 4400. It happens, however, that we have evidence concerning the enjoyment of this estate, which is wanting as to the other properties in dispute.

It has been proved, that this property between the years 1841 and 1855-56, was under several successive leases demised to Nundcoomar (one of the Respondent's Witnesses, and the Brother of Choonee Lal's second Wife), sometimes jointly with other persons, sometimes alone. One of the leases, that granted to Nundcoomar on the 10th of December, [424] 1849, of course purports to be granted in the name of Gopal Chund, and is signed by him. But it is also countersigned by Choonee Lal. It was, indeed, suggested at the Bar, that the Choonee Lal whose name is so subscribed, being described as Putwarree of Mouzah Sahibgunj, was not the Father of Gopal Chund, but some other person of the same name. Their Lordships, however, see no reason for adopting that conclusion. A circumstance of far more importance is, that Nundcoomar has produced a long series of Letters addressed to him as tenant of this property by Choonee Lal in his lifetime, and after his death by Gunput Lal. The genuineness of these Letters their Lordships have no reason to doubt. They cover a period from the years 1841 to 1856-57, when the tenancy of Nundcoomar terminated. Many of them, therefore, are anterior in date to the year 1848, when Gopal Chund left his home, and were written at a time when there is no reason to suppose he was of unsound mind or incapable of managing his affairs. It is, however, impossible, in their Lordships' opinion, to read these Letters without coming to the conclusion, that they were such as the real Owner of the estate would write to his tenant, and that they are inconsistent with the case made by the Appellants, viz., that Kusba Tilhara was the separate property of Gopal Chund, and was only managed for him and his family after his insanity had declared itself first by his Father and afterwards by his Brother, Gunput Lal. In the earlier years, rent and produce are acknowledged

by Choonee Lal as received by him on his own account, without reference to Gopal Chund.

In the Letter, which is dated in 1252 or 1845, A.D. [425] he writes: "Pay Meer Gholam 6 rupees for rent of Shop occupied by Baboo Gopal Chund for three months, and place it to my account, and it will be deducted from the rents."

In the Letter, which is dated in 1845, he complains of the rent being in arrear: requires 800 C. Rs. to be sent immediately, and says, "Do not delay, as I am desirous of sending the revenue to Patna. Till the revenue is sent and the receipt taken my mind is not at ease, because it affects my landed property." A Letter written in 1843 is cited by the Judges of the High Court. It may be inferred from it both that Choonee Lal, as the head of the family, was about to celebrate the marriage of Mussumat Poonpoon Koonwur, the Daughter of Gunput Lal, and that he was requiring the tenant of Kusba Tilhara to send part of the produce of the estate to be used on that occasion.

In the Letter written in 1852, he reproaches Nundcoomar with being in arrear, and says "You are well aware that I was in need of expenses this year; it would have been proper for you to have advanced 10 rupees more by way of assistance; you might have taken credit in the following year;" and he threatens Nundcoomar with a proceeding in the nature of a distress. This is the language rather of the Owner of the estate than of a Trustee for the Master and absent proprietor.

In like manner, after the death of Choonee Lal, Gunput Lal writes in the character of proprietor, not in that of Manager for the absent Gopal Chund. He considers what repairs should be made; threatens his Uncle when in arrears, and reproaches him with having ill-used the Ryots and dependents. In the Letter, No. 393, he, too, requires produce to be sent [426] for the marriage of Baboo Laljee's Daughter, with which Gopal Chund would seem to have no concern. In the Letter, No. 395, he writes, "You requested me to write a Letter to Patna that you should deposit the rents of Kusba Tilhara there; but I have no desire that money should be deposited there, as a large sum of mine is deposited there; therefore, I request you to send in cash the rent of Kusba Tilhara up to Phagun, instalment in full and soon."

Again, No. 387, written in 1856, is a remarkable Letter, for it not only gives various directions which imply ownership, but it contains the following passages, which seem to point to the joint interest of the Respondent in this property: "Uncle, I have been laid up with fever, therefore, I have sent Khedoo Lal's Brother for inquiry." And again, "Uncle, I have already written to you the full particulars: I have also explained to Khedoo Lal's Brother: please give Khedoo Lal your good opinion regarding any point he might ask and act accordingly."

Their Lordships can find no trustworthy evidence that either Choonee Lal or Gunput Lal, whilst thus acting and writing, accounted for the rents of this property to Gopal Chund or to Gopal Chund's family: and finding the direct evidence on the part of the Respondent thus corroborated, they concur in the conclusion of the Judges of the High Court, viz., that Kusba Tilhara was purchased by Choonee Lal on his own account, though in the name of his eldest Son.

Their Lordships will next proceed to consider what is the effect of the evidence as to the banking Kotee established in 1844, from which a considerable part of the family wealth seems to have been derived. [427] The Appellant, Gunput Lal, has contended broadly that in this Kotee, Choonee Lal had no interest. It is, however, unquestionable that, after the dissolution of the partnership with Sreekrishen Lal, the business was carried on in the joint names of Choonee Lal and Gunput Lal: and the Principal Sudder Ameen, though his decree in other respects was averse to the Respondent, gave effect to the ostensible title, and held that Choonee Lal had a half-share in this Kotee. Gunput Lal has represented that, after the establishment of his Brothers in separate Shops, he remained in his Father's original Shop as a Gomastah at Rs. 50 per mensem. It is very difficult to believe that, by his earnings in this capacity, or by means of any other separate employment, he accumulated money enough to pay, in 1836, Rs. 7500 for the lease of Koorikhar: to pay the price of the 8 annas of Gorabhurat purchased in his name in 1842: and finally to establish this Kotee. It seems to be far more probable that this business, which was originally carried on in partnership with Sreekrishen Lal, the partner of Choonee Lal in the cloth shop, was, in fact, established and carried on by Choonee Lal, though in the

name and with the aid of the personal services of his youngest Son. At all events, it lay upon Gunput Lal, in whose dominion the Books of this concern were, to show far more clearly than he has done that his Father had either no interest, or only a limited interest, in this concern. And upon the evidence as it stands, their Lordships can find no sufficient grounds for dissenting from the conclusion of the High Court that the banking-house was, at the time of his death, the sole property of Choonee Lal.

In their Lordships' opinion the fate of the appeals [428] must be determined by the findings upon these two questions—the real ownership of Kusba Tilhara and the interest of Choonee Lal in the banking Kotee. For, whilst the Respondent has broadly contended, that everything which stood in the name of any member of the family belonged to Choonee Lal; so the Appellants have as broadly contended, that nothing was Choonee Lal's except that which stood in his own name; and that benamie transactions were unknown to the family. It is hardly possible upon the evidence to draw a definite line between these two cases. The difficulty of doing so is greatly increased by the finding as to the Kotee; since, unless he had the separate interest, which he says he had, in that Kotee, it is difficult to see whence Gunput Lal derived the funds by means of which many of the purchases in his own name were made. Their Lordships are not insensible to the difficulties of the other side. If the evidence as to the Shops carried on in the separate names of Gopal Chund and of the Respondent and his Sons had stood alone, their Lordships would have inclined to the opinion, that they were separate property. It is, however, to be observed as to these, that the Respondent admits that the separate Shops opened in his name or in the names of his Sons, and all the investments made out of the profits of these shops form part of the joint family estate; and their Lordships for the reasons above given have found that Mouzah Tilhara, the principal and almost the only property alleged to have been purchased by Gopal Chund out of the profits of his Shop, was in fact purchased by Choonee Lal in the name of his Son. The Ikrah-namah, again, though it does not touch directly any of the properties in dispute, affords [429] a strong inference in favour of the theory of separate interests and separate transactions; and it is difficult to explain why so elaborate a contrivance should have been adopted in order to shift property belonging to the Father from the name of one Son to that of another. The case is one which a native Punchayet composed of persons conversant not only with native customs, but with the circumstances of this family, knowing what questions to put to the parties, and what accounts to call for, and capable of understanding such accounts when produced, would probably have been more competent than any Court of Justice in India or England to try satisfactorily. Their Lordships have, in this case, felt much doubt and difficulty in dealing with a record, the value of which is by no means in proportion to its bulk, and with the conflicting judgments of two Indian Courts. But, upon the whole, and for the reasons above stated, they have come to the conclusion, that it is their duty to advise Her Majesty not to disturb the carefully considered judgment of the High Court, so far, at least, as relates to the acquisitions of the family in the lifetime of Choonee Lal. As to those which have been made after his death, the eight annas of Backergunj, purchased in Gunput Lal's name, cannot be supposed to have been purchased otherwise than out of the family funds in Gunput Lal's hands. There is more difficulty in respect of the lease of Koorkihar, which has been renewed in the name of the Appellant, Mussumat Poonpoon Koonwur. But their Lordships are of opinion, that she has failed to show, as she might have shown, that this renewal was paid for by her own funds. They believe, on the evidence, that the money came from Gunput Lal, and if it came from Gunput Lal [430] it must be presumed, like the purchase-money of Backergunj, to have come from the family funds. Therefore, on this point also, their Lordships think the judgment of the High Court should be affirmed.

On the argument of the appeal it was contended for the Appellants, and admitted on behalf of the Respondent, that the Decree of the High Court would in any case require some qualifications. Their Lordships are also of that opinion; but, as at present advised, they are not sure that it will require any alterations except the introduction of a declaration that the separate shops carried on in the separate names of the Respondent, and of his two Sons, and also the landed properties ad-

mitted by the Respondent to have been purchased out of the profits of those shops, and to be under his control, are also part of the estate of Choonee Lal, deceased; and that in estimating the half-share of the Respondent in that estate, he should give credit for those assets, and any other portion of the estate in his possession or control.

Having regard to the necessary alterations in the Decree, and to the nature of the suit, their Lordships think that each party should bear their own costs of the appeal.

The form of the Decree, as altered, in pursuance of their Lordships' recommendation, will be as follows:—

It is ordered and decreed that the Decree of the Lower Court be and the same is hereby reversed, and the suit of the Plaintiff, Khedoo Lal, for a half share of all the property real and personal left by his Father, Choonee Lal, deceased, decreed: And it is declared that the estates and landed property standing [431] in the names of Gopal Chund and Gunput Lal, or of any other person or persons, benamtee, or in trust for them or any of them, are the property of the said Choonee Lal deceased, and acquired with his funds: And it is further declared, that the lease of Mouzah Koorkihar was renewed with the funds, not of Mussumat Poonpoo Koonwur, but of the family, which were then entrusted to the Defendant, the said Gunput Lal: And it is further declared, that the banking house, as well as the House property claimed, were the sole property of the said Choonee Lal deceased: And it is further declared, that the Shops carried on in the separate names of the said Plaintiff Khedoo Lal, and of each of his two Sons, and Mouzahs Budun, and Hurchundpore, and Rughoonathpore, and Jheketea, in Kotumba, and the two Houses and Coach-houses in Street No. 4 of Sahabgunj, which are all mentioned in the written statement of the Plaintiff, Khedoo Lal, and any other property standing in the names of the Plaintiff and of his two Sons, or any of them or of any other person or persons, benamtee, or in trust for them or any of them, were also the property of Choonee Lal, and part of his estate: And it is further declared, that the Plaintiff is entitled to a half-share of the estate of his Father Choonee Lal deceased: but that in estimating such half-share the Plaintiff is to be charged with the value of such of the above-mentioned properties as are in the possession or control of him or of his said Sons or any of them, and with mesne profits thereof: And it is further declared, that the said Plaintiff is entitled to recover Rs. 17,575. 13a., being a moiety of the sum of Rs. 35,151. 10a., being part of such estate, and fixed by the Lower Court as the [432] mesne profits of the said Banking house: And it is further declared, that the said Plaintiff is also entitled to a half-share of all mesne profits obtained from the landed property left by the said Choonee Lal deceased since the date of his demise. And it is further declared, that the Defendant, Mussumat Mankee Koonwur, the Wife of Gopal Chund, one of the Sons of the said Choonee Lal deceased, who is said to be missing, is entitled to maintenance out of the said estate, which will be awarded by the Lower Court in execution, if required: And it is further ordered and decreed, that the said Defendant, Mussumat Anundee Koonwur, as the Widow and heiress, according to Hindoo law, of the said Defendant, Gunput Lal (now deceased), from and out of the estate and effects, if any, which may have come into her hands or into her possession, do pay the said Plaintiff the sum of Rs. 3012. being the amount of costs incurred by him in the High Court of Bengal, with interest thereon at the rate of twelve per cent per annum from the date of the Decree of the said High Court to the date of realization thereof: And it is further ordered and decreed, that the said Defendant, Mussumat Anundee Koonwur, as such Widow and heiress in like manner, and from and out of the same estate and effects, do pay to the said Plaintiff the costs incurred by him in the Lower Court, with interest thereon at the rate aforesaid, from the date of the Decree of the said Lower Court to the time of realization.

[433] MUSSUMAT AMEEROONNISSA KHANUM and MUSSUMAT PARBUTTY,—
Appellants: MUSSUMAT ASHRUFOONNISSA. —*Respondent* * [Jan. 19, 20, 1872].

On appeal from the High Court of Judicature at Fort William, in Bengal.

B., a Mahomedan married woman, but separated from her Husband, contracted an irregular marriage with V., and cohabited with him for many years, until her death. V., during the time he so cohabited with B., purchased an estate, which was registered in his name as the Owner. Eleven years after the date of the purchase, B. and V. being then both deceased, a suit was brought by the then Shajada Nusheen to recover the estate bought by V., on the ground, that it was purchased by him benamee with moneys which belonged to the Shajada Nusheen or lay Owner of an Imambarah, or a superintendent of a Mahomedan religious establishment, which he assumed to be. Held, upon the evidence (1) that it was not a benamee transaction, as the purchase-money was partly V.'s and partly obtained by gifts from B. to V.; and (2) that it was not from the proceeds of a misappropriation by her as Trustee of the Imambarah, as she was lay proprietor, and had power of disposition, and, therefore, that the doctrine of resulting trusts did not apply.

This suit was instituted by the Appellants, Mussumat Ameeroonnissa Khanum, as Guardian of one Sha Baker Reza, and Mussumat Parbutty, to recover possession of Talook, Nisf Ambey in Pergunnah Bhaugulpore with mesue profits, and the only question raised on the issues was, whether Velayet Hossein, the Purchaser at a sale for arrears of Government revenue of the above Talook, under whom the Respondent derived title to the Talook, had bought it with his own money or with trust funds belonging to one Belkissoonnissa Begum, who was the Shajada [434] Nusheen (a) from whom the Appellants derived title, and which they alleged belonged to the Imambarah at Karagolah, of whom the infant, Sha Baker Reza was the then Shajada Nusheen. The case made by the Appellants in the plaint was, that the Talook was purchased by Velayet Hossein, while *de facto* acting as Shajada Nusheen, from the income of the Imambarah, which, on the death of Belkissoonnissa Begum, devolved on her Husband, and from him to the Appellants.

The Principal Sudder Ameen of Bhaugulpore (Moulvie Syud Mahommed Wuhudessen), gave judgment on the 6th August, 1862, and stated his opinion to be, that Velayet Hossein could not himself have had the money for the purchase of the Talook, as it appeared that he never had sufficient means for that purpose, but that it was not improbable that Belkissoonnissa Begum, with whom he cohabited, might have, out of her means and her bounty towards him, supplied him with the money to purchase for himself.

On appeal to the High Court, a division Bench, consisting of the Justices Steer and Jackson, gave judgment on the 3rd of October, 1863. The Judges differed from the Principal Sudder Ameen upon his finding on the facts, but affirmed his decree. The material part of the judgment of the Court was as follows:—"The case, which upon the testimony of their better Witnesses, the Plaintiffs seek to establish is this; that Velayet Hossein married (irregularly indeed) the Lady Belkissoonnissa Begum, and became, [435] *ipso facto*, Shajada Nusheen of the Imambarah; that, as such, he instructed his Mooktar to bid for the Talook; that, on his being declared the Purchaser, Belkissoonnissa Begum's Dewan hurried up from Karagola to deposit the earnest money and afterwards to pay the balance of the purchase-money; that this was done wholly from the sale of gold mohurs, Sicca rupees, and gold and silver articles, and that the Dewan paid it in himself; that Velayet Hossein was all this time at Karagolah; that the certificate of sale was made out in his name; that Belkissoon-

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier. Assessor,—The Right Hon. Sir Lawrence Peel.

(a) A person who has a right of superintending a religious establishment; literally, he who sits on the carpet used for prayer. See Baillie's Dig. Muh. Law, 598, note.

nissa Begum, on hearing of this, expressed her displeasure: that, however, she was formally invested with the teeka as proprietor, but that nevertheless she never exercised any of the rights of proprietorship, but Velayet Hossein continued in possession and after the lifetime of Belkissoonnissa Begum till he died. Also, that Velayet Hossein had been a needy person, merely raised into a position of comfort by his connection with Belkissoonnissa Begum, and not possessed of any resources out of which he could have made this purchase." And the Court proceeded to show what, in their opinion, were the circumstances of improbability which forbade their accepting this version of the affair. "We think," the Court observed, "it needless to inquire into the exact resources possessed by Velayet Hossein at the time he made the purchase, and still less necessary to record any surmises as to the precise manner in which the purchase was arranged. We think there is no evidence to show, that Velayet Hossein had Belkissoonnissa Begum's instructions to buy this Talook for her, and had no evidence on which it would be safe to rely showing that Velayet Hossein had used money belonging to that Lady in the purchase. And as the agency ought to be quite clear, or the trust [436] money distinctly traced, we should not be justified, under the circumstances of this case, in taking the Talook out of the Defendant's hands to put it into those of the Plaintiff. Consequently, we affirm the judgment of the Court below, dismissing the Plaintiff's suit with costs of the appeal and interest thereon. We have been obliged to go into the evidence more fully than is usual in the case of a judgment affirmed upon the merits entirely, because it did not appear, that the Judge in the Lower Court had exercised his mind upon that evidence, and we cannot help observing how little in accordance with the precise law of procedure, or with sound principles of judicial practice, this suit has been directed below."

The appeal was from this Decree.

Sir R. Palmer, Q.C., Mr. Leith, and Mr. Doyne, for the Appellants, and Mr. Forsyth, Q.C., and Mr. J. D. Bell, for the Respondent.

On the question, whether the purchase was a benamee transaction, and the purchase-money derived from the trust moneys of the Inambarah, while the Purchaser lived with the Shajada Nusheen, it was insisted, by the Appellants, that the purchase-money was from the trust funds and that there was a resulting trust, as Velayet Hossein was *de facto* Shajada Nusheen. The cases of *Goopeekrist Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53, 74), *Sreemanchunder Dey v. Gopalchunder Chuckerbutty* (11 Moore's Ind. App. Cases, 28), *Fazl Buksh Chowdry v. Fukeeroodeen Mahomed Ahassum Crowdry* (*ante* [14 Moo. Ind. App.], p. 234), upon the doctrine of Benamee purchases, were referred to.

[437] Judgment was delivered by

Sir Montague Smith.—This is an appeal from a judgment and Decree of a division Bench of the High Court of Calcutta which affirmed the Decree of the Principal Sudder Ameen of Bhaugulpore, dismissing the suit of the Appellants. The suit was brought to recover possession of the Talook, Nisf Ambey, which had been purchased by Velayet Hossein in his own name as long ago as the year 1848. The suit was not commenced till the 16th of February, 1859, nearly eleven years after the purchase.

The suit is brought upon the alleged ground, that the moneys with which the purchase was made were not the moneys of Velayet Hossein himself, but of a Lady named Belkissoonnissa Begum, with whom he was living as her Husband. It was admitted by Sir Roundell Palmer, that it was not a benamee transaction; that Belkissoonnissa Begum had not desired that the estate should be bought in her name, and that there was no intention on her part to purchase an estate for herself; but Sir Roundell Palmer put the case on the ground that the money, although it was her money, belonged in fact to an Inambarah, of which she was the Owner, as a sort of lay Owner, and that there was a resulting trust in favour of the Begum, in consequence of the money with which the estate was purchased having been so provided.

Now, it is plain, that if the money did not come from the source indicated, or if the purchase was made in the name of Velayet Hossein, with the consent of Belkissoonnissa Begum that it should be so purchased for him, there is then no resulting trust. The very principle of a resulting trust is, that the property has

been purchased with money belonging [438] to another, with an implied trust that it should belong to that other person to whom the money also belonged. But if it was the intention of the person to whom the money belonged that there should be no such trust, then, of course, no such implied trust could arise, because it is only a trust by implication, and the presumption would then be met by the facts.

The facts of the case are extremely simple. It seems that Belkissoonnissa Begum was a Lady of good family and considerable fortune and that one of the properties which she had was the Imambarah. She was, when young, betrothed to her Cousin, Sha Ali Reza, but it seems, either that she never cohabited with him, or that at all events she lived in his House but for a short time, and then they separated. The cause of the separation appears to have been, that Sha Ali Reza refused to pay her dower, and the Mother of Belkissoonnissa Begum then withdrew her from his House. That being her position, in the year 1842 she formed relations with Velayet Hossein, and it appears that she lived with him as her Husband until her death in January, 1849. It is plain, that during the period of seven years which elapsed whilst they were so living together, Velayet Hossein, although he might not have been possessed of property at the time when these relations commenced, had probably during that period gifts from her, or he may have been allowed to receive the income of her property and to appropriate a part of it to his own use. It appears that in the year 1848 the Lady was in failing health, and in that year this purchase was made. It appears to have been a purchase made at a revenue sale, and the purchase was made in the name of Velayet Hossein. All the instruments of title were made out in his name, and he was [439] registered as the Owner of the estate. This happened ten months before the death of the Begum.

Now, an instrument has been put in and relied on by both sides, a Mookternamah, dated the 15th of April, 1848, in which Velayet Hossein appoints four persons as his Mooktars to purchase and pay for this estate, and one of those persons is Mudum Gopal, who was the Dewan of the Begum, with whom he was living.

It is said, that there is evidence that the earnest money and the consideration money were provided by the proceeds of jewels and other valuables which belonged to the Imambarah, and their Lordships cannot fail to see that the case, as originally put, was, that Velayet Hossein was the Shajada of the Imambarah, and that he had used the money which he held as Shajada in trust for the Imambarah, to make this purchase. The first two issues were framed to raise those questions, but the principal Sudder Ameen has found, and he seems in that to have been well grounded upon the evidence, that there was no existing Imambarah in the sense of any place of worship which might be said to have its property belonging to it, as distinct from the ownership of the Begum; that it was a sort of lay Imambarah, and that, although he may have called himself Shajada, as he does in this document, it really was more a title of honour which he had assumed, or a nominal appointment of Shajada, than any real *status* which he had or anything which put him in the position of a Trustee for an Imambarah as distinguished from any property which his wife had. The property of the Imambarah belonged to the Begum, as her other property would do, and, as was admitted by the learned Counsel for the Appellant, she might have disposed of it as she thought fit.

Now, first of all, did the High Court come to a [440] wrong conclusion in saying, that it was not proved to their satisfaction that the money which paid for this estate was the proceeds of the property of the Belkissoonnissa Begum? There is a good deal in the evidence to show that the jewels belonging to the Belkissoonnissa Begum were brought to Bankers and others and sold, but a great deal of that evidence is hearsay, and the Court seems to have come to this conclusion, for they say, "Although there is some evidence which if entirely believed would establish that the money did come from that source, yet, taking all the circumstances of the case into consideration, we cannot act upon it; we cannot say with sufficient certainty that that evidence is true." One circumstance upon which they strongly rely is, that this suit was brought after the deaths of all the parties who knew the transaction and who could have explained it. Belkissoonnissa Begum was dead; Velayet Hossein was dead; the Dewan was dead. Those three persons knew exactly what the transaction was; and, certainly, when the suit is brought to set aside a purchase which was made eleven years before, which has remained unimpeached

from the time when it was made until the institution of the suit, every Court would be bound to look with very great jealousy at the evidence which is brought forward in order to support such a case.

But assuming that the High Court are not well founded in the conclusion to which they came, that no part of the money was proved to have come from the proceeds of the sale of the jewels belonging to the Belkissoonnissa Begum, still their Lordships think, that there was evidence to support the conclusion of fact to which the Principal Sudder Ameen arrived, and therefore, that it is unnecessary to decide the question which the High Court took upon themselves to deter [441]-mine. What the Principal Sudder Ameen thought of the case was this, that some of the money might have come from the Belkissoonnissa Begum, but he said, in effect, "Assume that it did so come; there is to my mind very strong evidence from the facts of the case, that that was a gift on the part of the Belkissoonnissa Begum, and that she intended to do something for the benefit of the man who had been living with her for seven years." Her Husband, Sha Ali Reza, had in fact been the cause of her separation from him by his refusal to pay her dower. She had formed relations with Velayet Hossein as a second Husband, although it was not a marriage which was warranted by law; still he lived with her as her Husband, and apparently upon very good terms. It was, therefore, very natural, if she found that she was in bad health, that she should have been desirous to make some provision for his benefit. It is also, their Lordships think, extremely probable that he had money of his own, for several Witnesses speak to his having had money of his own at various periods after his marriage, though he may not have been a man in good circumstances before. The evidence upon which the conclusion is founded, that she gave him some of the money, and that he bought this estate in his own name with her consent, is found in her acquiescence during her lifetime, and their Lordships also think it is found in the acquiescence of Sha Ali Reza after her death. Sha Ali Reza was certainly not sleeping upon his rights. He was living near these parties. He instituted a suit to set aside a Deed of gift which was set up by Velayet Hossein, but he took no steps during his lifetime to impeach the purchase; there is the strongest inference to be drawn from his acquiescence in it. What could have been [442] the ground of his acquiescence? The ground of his acquiescence must have been, that he knew that the purchase which was made by Velayet Hossein was not made for his Wife, but was made, with her consent, for Velayet Hossein himself. One Witness for the Appellant, named Enayet Hossein, gives evidence which fortifies the view taken by the Principal Sudder Ameen. He says of Velayet Hossein, "he had not means formerly, but when he got married at Karagolah he became rich," and then he says, "the possession of Sha Walayet Hossein since his purchase continued without opposition, and after the sale the Bebee of the Sha died at Bhaugulpore. I cannot say after how long she died. She used to live with her Husband and she did not claim the Talook." There is thus strong evidence of her acquiescence, as well as of all the persons most interested in the transaction. The purchase was made by her own Agent, who was appointed for that purpose by Velayet Hossein, and she appears to have been perfectly satisfied afterwards. It seems, also, to their Lordships that the whole history of the parties, and the probabilities of the case strongly confirm the view originally taken by the Principal Sudder Ameen.

It was contended that this view of the case was not raised by the issues.

Their Lordships would be disposed to decide the appeal upon the substantial merits, unless they had reason to suppose the parties had been misled by the form of the proceedings; and although it may be true that the above view is not expressly stated, they think it in effect involved in the first two issues, which were founded on the hypothesis of the misappropriation of the property of the Imambarah by Velayet Hossein, as Shajada, and [443] the same view is open upon the general question raised in the third issue.

On these grounds, therefore, their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court of Judicature, and to dismiss this appeal with costs.

RADHABENODE MISSER.—*Appellant*: KRIPA MOYEE DEBEA.—*Respondent* *
[Jan. 22, 1872].

On appeal from the High Court of Judicature, at Fort William, in Bengal.

A loan transaction in 1837 was effected by two Deeds—first, a Kabala, an absolute Deed of sale, and secondly, an Ikrarnamah, or Deed of agreement, constituting a mortgage. The Ikrarnamah provided, that if the Mortgagor paid, within ten years, a lump sum at the rate of 12 per cent. interest, he was to recover back the estate and the balance of collections, less charges. The Mortgagee entered into possession. No interest on the principal sum was paid at the time stipulated, and in 1859, a redemption suit was brought by the Mortgagor's heir and for possession. Held, (1) that the Ikrarnamah did not take the case out of an ordinary mortgage transaction: (2) that Ben. Reg. XV. of 1793 did not apply, and an account directed to be taken of what had been received by the Mortgagee, upon the footing, that the interest which accrued, from time to time, was to be set off against the rents and profits received, and the Mortgagee only to account to the Mortgagor for the rents, profits, and interest which he might have received, over and above the interest then due to him on the mortgage.

Semble: Sect. 6 of that Regulation is repealed by sect. 7, Act No. XXVIII. of 1855.

This suit was brought by the Appellant against the Respondent, and others, claiming as the nearest male heir of his late maternal Uncle, Mundolall Surma Roy, who died childless, leaving the Defendant, Pran Monee Debea, his Widow, who by her answer, waived all right and title as nearest heir to his estate in favour [444] of the Appellant: to redeem and recover possession of certain immoveable property mortgaged for a term of ten years by Mundolall Surma Roy to Kalee Prosad Roy (since deceased), under two contemporaneous Deeds, called a Kabala, or Bynamah Deed of sale, and an Ikrarnamah, or Deed of agreement; alleging that the profits from the rents of the property with interest thereon, calculated at the rate of 12 annas per cent. (or 9 per cent.) per annum, had accumulated in the hands of the Respondent, and that the aggregate amount thereof then exceeded the amount of the mortgage loan, viz., Rs. 11,000, together with interest thereon calculated at the higher rate, Rs. 12 per cent. per annum, which remained due and owing; and praying that the aggregate amount of the last-mentioned principal sum and interest might be deducted from the aggregate amount of the accumulated profits and interest, and that the balance which was alleged to be the sum of Rs. 30,323, should be paid to the Appellant.

The Respondent by her answer submitted, first, that the profits of the mortgaged estate were less than the interest payable: secondly, that, in the circumstances, the law did not apply to the case of a Mortgagee in possession of mortgaged lands, or limit the receipt of interest out of the collections to an amount equal to the principal; and thirdly, that the collections had not exceeded the principal, but were much less.

The material question involved was, whether the ordinary rule in taking accounts between Mortgagor and Mortgagee prevailed and applied in the present case, as held by the High Court: or [445] whether an express stipulation, agreed to by the parties by the Ikrarnamah, should be given effect to and enforced, as decreed by the Principal Sudder Ameen in his judgment.

The Ikrarnamah, after providing that the rent of the property mentioned in the Bynamah "will remain in the trust of the Purchaser," stipulated amongst other things as follows:—

"Sixth paragraph. After sending the rents of the Mehals inserted in the said Bynamah into the Collectorate, and after the deduction of salary, expenses, consum-

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mation, etc., of the entire year, whatever profits will be left when I (the Vendor) will liquidate the principal and interest, then I (the Vendor) will receive the money which is deposited, with interest at 12 annas per cent.

"Seventh paragraph. I have sold the Mehals for Rs. 11,000 into the hands of the Purchaser for a term of ten years; after the expiry of the term when I (the Vendor) will pay up in one lump sum the principal, with interest, at 1 per cent., then I will take back the Mehals inserted in the said Bynamah.

"Tenth paragraph. For the purpose of realizing the rents of the Mehals inserted in the Bynamah, a Mohurrir will be employed, and the said Mohurrir shall yearly adjust the jumma kurch accounts to me (the Vendor) and I (the Vendor) shall write my acknowledgment on the aforesaid jumma kurch; the Purchaser shall have nothing to do with the balance of rents, it will be in my hands."

By the judgment of Mr. James Reily, the principal Sudder Ameen, it was declared, with reference to the last-mentioned stipulation in the Ikrarnamah and Bynamah, as follows:—"I have only to determine now how the interest shall be calculated. The Plain-[446]-tiff asks for a sum equal to the principal that may have accumulated. The principal Defendant contends, that the collection was not enough to pay the interest of the loan, and that they are entitled to interest on the loan for the entire period of twenty-nine years. Macpherson, in his Book on Mortgages, basing his opinion on the precedents of the Sudder Court, states 'that in taking these accounts interest is as a general rule allowed on the payments of both parties; but there are two modes, in either of which the accounts may be made up. They may be permitted to run on from the date of the loan to the date of the settlement, interest being allowed to the one party on the whole sum lent, and to the other in the sums realized over and above the interest to which the Mortgagee is entitled from the date of realization, or the amount collected by the Mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year, and then being allowed from year to year only reduced interest on the reduced principal.' Mr. Macpherson adds that 'any agreement made by the parties as to the manner of accounting will be enforced, if not in itself illegal.' Referring to the contract between the parties I find it stipulated that 'after paying the Government revenue, and deducting the expenses, the Seller shall return the purchase-money, with interest; then the Seller shall receive whatever may have gathered as accumulated of the profits, with interest, at the rate of 12 annas per cent. The account, therefore, should be drawn up in accordance with the conditions adopted by the parties; that is, to give the Plaintiff interest on his profits for the entire period, and to give the Defendant interest for the entire period; but the Court is [447] precluded by Law—sect. 6 Ben. Reg. XV. of 1793 (a)—from awarding, in any case whatever, a greater sum for interest than the amount of the principal. Holding, therefore, to the original stipulation made between the parties, except in so far as it may contravene the Law, the amount will be as follows." The judgment then stated the figures at length, showing a balance of Rs. 23,613 8a. 4gds. to be due to the Appellant, and which sum was, accordingly, decreed to be paid to him by the Respondent.

From this Decree the Respondent appealed to the High Court, consisting of Messrs. H. V. Bayley and A. A. Roberts, which Court, on the 6th of October, 1863, delivered judgment as follows:—"The question to decide is, whether the transaction was a mortgage to which the law and rulings of this Court, as to accounting in cases of mortgage, can apply? If this be a mortgage, then the argument of the Defendant,

(a) Sect. 6 of Ben. Reg. XV. of 1793, is as follows:—"If the interest on any debt, calculating according to the rates allowed by this Regulation, shall have accumulated so as to exceed the principal, the Courts are not in any case whatever (excepting the cases specified in section 12), to decree a greater amount for interest than the amount of such principal."

The suit in this case was brought in 1859, and sect. 6 of Ben. Reg. XV. of 1793, seems repealed by the 7th sect. of the Act, No. XXVIII. of 1855, which enacts that "Nothing hereinbefore contained shall prejudice or affect the rights or remedies of any person, in respect of any act done, or contract entered into, previously to the passing of the Act."

the Appellant, arising from the contention that it is a loan and deposit only, and that repayment by deposit in money is a condition precedent to any right accruing to the Plaintiff, must fall, and whether the calculation of interest due and payment must be made in the manner laid down by [448] this Court for cases of mortgage. We think the following passage from Macpherson, *Law of Mortgage* [3rd ed.], indicates a fair test and guide to the answering the question, whether the transaction was a mortgage or not:—'So long as the nature of a transaction is naturally such as to stamp it as belonging to a particular class of mortgages, the same, calling it by a different name, will not transfer it to another class. In one case, where there was an absolute sale, but the Purchaser gave an *Ikrarnamah*, with condition that if the Vendor repaid the purchase-money, and interest, by a fixed day, the Purchaser would reconvey the estate to him: it was contended, that this was a redeemable sale only, and not a mortgage by conditional sale, nor governed by the rules applicable to such mortgages.' But the Court held 'redeemable sales' and 'mortgages by conditional sales' were in their nature identical, and merely different modes of expressing the same things, and that, therefore, a redeemable sale could be foreclosed only in the same manner as a mortgage or conditional sale would be. Applying this rule to the facts of this case, we have here, the Plaintiff borrowing from the Defendants Rs. 11,000, and making an absolute Deed of sale, varied by another *Ikrar* (which is the most common practice in this Country for providing an equity of redemption), and making the transaction unmistakably nothing but a redeemable sale, identical with a mortgage. Although there is the expression, that the Rs. 11,000 be repaid, by a deposit of the amount, with interest, and the profits are to accumulate at interest, until the loan be repaid, and then refunded to the Borrowers, we look upon this as nothing that can alter the essential and substantial character of the transaction—that of a [449] redeemable sale. Thus, under the facts of this case, and the rule above cited, which in our view is applicable to these facts, this transaction is of the character of a mortgage, and not, as urged by the Defendant, in his appeal, a loan to be repaid by deposit of cash, and in no way of the character of a mortgage. The case must, therefore, be governed on this point, as also in regard to the principle of accounting and crediting payments first to interest, by the law and rulings of this Court, on these points. That law, and those rulings, are so clearly laid down in pages 248 to 254 of the 3rd edition of Macpherson's *Law of Mortgages*; and in respect to the calculation of interest in pp. 243-4, that we need only refer the Principal Sudder Ameen to those passages, and desire him to re-adjust the account according to those rules. The realization should be first credited to interest, and then the account made up as laid down in the above-cited rules. In this account, the Defendant is to have credit by deductions, on account of Mohendropore, as found, to be set apart for the maintenance of both Widows. Should the Principal Sudder Ameen think it necessary, upon this remand, to provide a local inquiry, in order to ascertain what the Defendant may have realized, it will be open to him to do so. Costs to follow the eventual result of suit."

The appeal was from this Decree.

Sir R. Palmer, Q.C., and Mr. Leith, for the Appellant, and Mr. Doyne, for the Respondent.

The arguments turned entirely upon the construc-[450]-tion of the stipulations contained in the sixth and tenth articles of the *Ikrarnamah*. Ben. Reg. XV. of 1793, sect. 6; Act, No. XXVIII. of 1855, sect. 7, and Macpherson's *Law of Mortgages*, pp. 243, 248, 254 [3rd ed.], referred to in the judgment of the High Court, were cited.

Their Lordships' judgment was delivered by

The Right Hon. Sir Robert Collier.— In this case the question admits of being very shortly stated. It is this, whether the ordinary rules applicable to mortgages expressed in the passages in Mr. Macpherson's *Book on the Law of Mortgages*, referred to by the High Court, do or do not apply to the present case? It was contended, that they did not apply to the present case because their application is expressly excluded by an Agreement between the parties; and if their Lordships had come to this conclusion they would, undoubtedly, have given effect to terms of that Agreement.

The construction of the Agreement which is contended for on the part of the Appellant is this, that the Mortgagee on his part is entitled to the payment of the principal and of the interest on the debt, but that the payment of interest which properly would accrue, at all events annually, carry no interest itself, which no doubt is the ordinary rule. On the other hand it is said, that the Mortgagor is entitled to call the Mortgagee to account for the whole of the annual proceeds of the property, less the expenses of collection, and that each of the annual payments of the proceeds of the property is chargeable with interest; so that while on the one hand the Mortgagor can charge the Mortgagee with all the annual proceeds [451] of the estate, those annual proceeds carrying interest, the Mortgagee on the other hand can only charge the Mortgagor with the debt and the interest, the latter not carrying interest, the result of which is certainly somewhat extraordinary—that, whereas in this case, it appears very clear, that the mortgaged property was an insufficient security, and that the proceeds of it fall short by some Rs. 400 a year of the interest on the principal sum, yet, nevertheless, after a long period of time, the Mortgagor, not having paid a farthing of the principal or interest, is entitled to a large balance from the Mortgagee. Of course the parties might have so agreed, if they pleased, but their Lordships would be loth to put such a construction upon the Agreement unless they were compelled to do so by very plain words.

On looking at this Agreement, more especially at the 6th and 10th paragraphs, which have been referred to, and to the precise terms of which it is not necessary to refer again, their Lordships, on the whole, think, that these paragraphs and the Agreement generally, which is drawn by no means in clear terms, are not inconsistent with the supposition, that the parties intended that the interest might be set off, from time to time, against the rents and profits, and that the Mortgagee was only to account to the Mortgagor for any rents and profits and interest on the same which he may have received over and above the interest due to him upon the debt.

Their Lordships being of opinion, that that interpretation is not inconsistent with the contract, according to the best construction they can give to it, it follows, that the rule stated by Macpherson on mortgages is not excluded by the terms of this Agreement.

[452] Their Lordships think it right also to add that, even assuming the construction which has been contended for on the part of the Appellant, certainly an unusual one in Agreements of this kind, their Lordships are not prepared to say, that the High Court was wrong in determining that such a construction was applicable only to the first ten years, and that if the Mortgagor chose at the expiration of that period to avail himself of the Regulations which permit the redemption of mortgages after the expiration of the term stipulated for, he must come in under the general terms of those Regulations which prescribe the equitable conditions required to be satisfied.

Their Lordships are also of opinion, that Regulation XV. of 1793, sect. 7, does not apply to transactions of this kind.

Under these circumstances, their Lordships will humbly advise Her Majesty that the decision of the Court below ought to be affirmed, and this appeal dismissed with costs.

[453] RAM GOPAL ROY, and Others,—*Appellants*; GORDON STUART AND CO., Secretaries to the Bengal Coal Company, PERSHAN CHUNDER CHATTERJEE, and Others,—*Respondents* * [Jan. 25, 26, 1872].

On appeal from the High Court of Judicature, at Fort William, in Bengal.

With respect to the admissibility of copies of Grants or Deeds in evidence, the practice in the Mofussil Courts differs from the procedure in England, and is not governed by the strict rules which there prevail, when the question is, whether a copy ought to be submitted to the jury; but it is the duty of the

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Judge before admitting a copy of an original document as evidence, to consider what weight and value should be given to it, and to test its authenticity by satisfying himself, that the grounds for not producing the original are well founded so as to let in the copy as secondary evidence [14 Moo. Ind. App. 460, 461].

A copy of a copy of an original Sunnud, registered, and proved in another suit, admitted as evidence.

It is the rule of the Judicial Committee in questions of boundaries, which depend upon local investigation and local inquiries, not to interfere with the findings of the Courts below, unless they are clearly satisfied, that there has been some plain miscarriage in the conduct of the inquiry and the decisions of the Courts [14 Moo. Ind. App. 460].

The questions raised in this appeal were first, one respecting boundaries, involving a claim by the Appellants to 4975 beegahs of land as part of Mouzah Gopalpore, but resisted by the principal Respondents, as being part of and within their village [454] of Gopeenathpore, and secondly, the practice, in a question of title relating to land, of the Mofussil Courts admitting copies of a Grant or Deed as evidence of the original.

The Respondents claimed possession of about 5600 beegahs of jungle land, as falling within the boundaries of their village of Gopeenathpore. Of the entire area in dispute the Revenue Authorities had, by a survey Award, given possession to Government of 4975 beegahs and 625 beegahs to the Appellants, as proprietors of Mouzah Gopore. The suit was brought to set that Award aside. The Judge of Bheerbhoom, Mr. O. W. Malet, was of opinion, that the Plaintiffs had failed to prove their alleged boundaries, and that they were also barred by the Act of limitation of suits, and dismissed the suit as against both the Government and the Appellants. On appeal to a division Bench of the High Court, consisting of the Justices Steer and Levinge, that Court held, that limitation did not apply to the case, and that the Appellants had proved their boundaries to include the land in dispute, and reversed the Decree of the Court below, decreeing to the Respondents the whole area sued for both as against the Government and the Appellants.

The appeal was from this Decree. The Respondents, Gordon Stuart and Co., alone appeared as Respondents in support of the Decree of the High Court.

Mr. Leith, for the Appellant, argued two points:—First, on the question of fact, in respect to the boundaries, whether the 4975 beegahs in dispute, [455] formed part of Appellants' Mouzah, Gopalpore, under which they claimed title under a Sunnud from a former Rajah of Burdwan, or of the tenants of the Mouzah Gopeenathpore, and,

Secondly, he contended that, as the suit, being founded upon an original Sunnud, dated 1195 B. E., which purported to have been made by the then Rajah of Burdwan, and the same having been challenged as spurious by the Appellants in their answer, the Respondents were bound to produce and prove the Sunnud, or give satisfactory evidence of the loss of the same, so as to entitle them to put in as evidence a copy of the Sunnud, citing on this point *Syud Abbas Ali Khan v. Yadeem Ramy Reddy* (3 Moore's Ind. App. Cases, 156). He further contended, that the copy of a copy of the original Sunnud, in the absence of evidence showing the loss, and that it was a true copy, could not be received as secondary evidence; and further, that the Appellants were not parties to a former suit in which the copy had been admitted by the Court, and that the judgment in that case did not operate as *res judicata*.

Sir R. Palmer, Q.C., and Mr. Doyne, for the Respondents, were not called on.

Their Lordships' judgment was delivered by

The Right Hon. Sir James Colvile.—The property in question in this suit is a large tract of jungle land lying to the north of the Great Trunk Road in Zillah Bheerbhoom. There have been several Claimants to portions of this land, besides the present Appellants and the Respondents, and some of them were originally parties to this [456] suit. Therefore, in order to see how the Appellants and Respondents stand to each other, it may be desirable shortly to consider the proceedings which led to the suit.

There was a dispute as early as the year 1828 between the Chatterjees family, whose title is now vested in the principal Respondents, the Bengal Coal Company, and one Ram Narain Mitter, through whom the Appellants derive their title, concerning the right to this land, but at that time the dispute appears to have been limited to some 1600 beegahs of land. The Government authorities attached this land, and their possession seems afterwards to have extended itself, in some way or another, to the whole of that which was claimed in this suit, 5600 beegahs. When the Trunk Road was made in the year 1841 there was another dispute between the parties as to who were entitled to compensation for the small portion of jungle which was taken on each side of the Road, and, so far as any recognition of title went, the Appellants seem to have been preferred on that occasion. They received some small sum which was awarded for compensation under an Ikrar, binding them, in case the opposite party, or any other party, should prove a title to it and come against the Government for it, to repay it.

Then came the proceedings which immediately led to this litigation, proceedings which were connected with the Government survey in 1857. There was then the ordinary dispute between the Chatterjees, or the Bengal Coal Company as then representing the Chatterjees, on the one side, and the Roys, the Appellants, on the other, and the several other parties who claimed parts of the Forest as annexed to their undis[457]-puted Mouzahs, and also the Government, claiming to hold, by some title or another, or by virtue of that occupation which had begun in 1828, a large portion of the land. Mr. Deputy Collector Ross appears to have gone upon the land, and to have made local inquiries, and on the 18th of June, 1857, he made an Award giving the land, or the greater portion of the land, to the Bengal Coal Company as representing the Chatterjees. The opposite party appealed to the Collector, who, acting upon his view that the principal document produced by the Chatterjees, or the Bengal Coal Company, was spurious, and that it did not correspond with an earlier document which was admitted to be the foundation of the Chatterjees' title, set aside that decision of Mr. Ross. There was an appeal from his decision to the Commissioner, and an appeal from the Commissioner to the Sudder Board of Revenue, but the result was, that those authorities upheld the Collector's Order. Another Deputy Collector was directed to make a further apportionment and Award of the land among the parties, and the result was that this last Officer, on the 16th of July, 1858, awarded 625 beegahs of the waste land in dispute to the Appellants, and the remaining 4975 beegahs to the Government.

The result of these revenue proceedings was to put the parties to whom those lands were awarded actually, or constructively, in possession, but also to leave to the opposite party the power of impeaching the revenue Award, and of recovering possession of the lands by a regular suit, if instituted within three years of the date of the Award, and accordingly this suit was so brought for that purpose.

The Government appear to have now dropped out [458] of the litigation. The Zillah Judge, who was the Judge of first instance, dismissed the Respondents' suit wholly on the ground, that they had failed to prove their title, and he also held, that the suit as against the Government would have been barred by the Act of Limitation, inasmuch as they had been in possession of this land since the time they took possession of it in the year 1828; certainly for more than twelve years. There was an appeal from that decision to the High Court, and on that occasion, it seems to have been almost admitted before the High Court, that the Government had not really any title to the land. The High Court, moreover, held that the decision as to the Act of Limitation was erroneous, inasmuch as the possession of Government had been founded on the attachment of 1828, which was in the nature of taking possession in trust and for the benefit of the party who should succeed in establishing a title to the land. Government appears to have acquiesced in that view, and certainly have not appealed from the Decree which gave the land which had been awarded to them by the Revenue authorities to the Bengal Coal Company, the Plaintiffs in this suit, and the Respondents on this appeal. The other parties, who were also made parties to the suit, and who claimed portions of the land, which were the subject of the Award of the Revenue authorities, seem also now to have abandoned their respective claims, and the litigation is, therefore, reduced to a question between the Appellants and the Respondents, the Bengal Coal Company. Nor can the Appel-

lants, if they were to succeed on this appeal, do more than obtain the dismissal of the Respondents' suit, and thus obtain an affirmance of their right to hold the 625 beegals [459] of land. They cannot in this suit assert a title to the larger portion of the land, which the Respondents have recovered from Government.

It is obvious, from what has been already stated, that the question is simply one of boundary. The Appellants claim title under Government, which held khas a large portion of Forest land situate in this District and apparently never included in the Decennial Settlement. Out of this land, no doubt, that estate which is admittedly in the possession of and belongs to the Appellants has been carved. On the other hand, the Chatterjees derive title under a Mocurrery grant from the Rajah of Burdwan, and it must be held, that the land so granted to them was part of the settled estate of the Rajah of Burdwan. It has appeared to their Lordships, in the course of this discussion, that a more easy, at least a more satisfactory, mode of deciding this dispute might have been found in the ascertainment (if that were possible) of the real boundaries between the settled mehals of the Rajah of Burdwan, and the Forest lands which remained after the Perpetual Settlement in the hands of the Government, because it is clear that, on the one hand, the Chatterjees claim nothing except what they got from the Rajah of Burdwan, and, on the other hand, that the Appellants claim nothing except what they derived from the Government. That, however, has not been the course which the parties have thought fit to take. They have, however, adduced a good deal of the evidence generally given in boundary cases; the issue being—what are the boundaries of the estate of Gopeenathpore, which is the Mocurrery of the Chatterjees, and has now passed to the Bengal Coal Company, and what is the true boundary of the [460] estate of Gopeenathpore, which is in the undoubted possession of the Appellants.

It has frequently been said at this Board, that of all the questions which are brought here from India, there is no question of fact which is so improper to be brought for final decision by this Tribunal as a question of boundary, since the decision of that question, particularly where the boundary line is to be run through a Forest or a tract of waste land, must depend so much upon local investigation and local inquiry, and on that sort of knowledge which only Officers in India, who are conversant with such disputes, can acquire. Accordingly, their Lordships will never interfere with the finding of an Indian Court upon a question of boundary unless they are clearly satisfied, that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make the grounds for an Order reversing or varying the decree. This case, no doubt, has been argued very much on that assumption. The long argument of Mr. Leith has turned mainly upon the miscarriage, or rather the alleged miscarriage, of the High Court in dealing with a particular document, viz., the copy of the confirmatory Sunnud, which has been so much impeached.

We will at once go to the consideration of that document. With reference to the general question of the admissibility of copies, and the mode in which the Courts in India deal with them, their Lordships are desirous to make some observations. It has been repeatedly ruled here, that these questions are not to be dealt with by the strict rules that would prevail at a *Visi prius* Trial in England, where the [461] question is, whether the document ought to be submitted at all to the jury. The way in which evidence is brought in in India almost precludes that rule. On the other hand, their Lordships are undoubtedly of opinion, that when a copy has been in any way received, and it becomes the function of the Judge to consider what weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original; that there should be some account given of the original, and sufficient reason assigned why the original is not produced, and why the parties rely upon the copy. In all cases, the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question and the weight and value which he will attach to it. There is, no doubt, a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit, as in the case cited by Mr. Leith of *Syud Abbas Ali Khan v. Yadeem Ramy Reddy* (3 Moore's Ind. App. Cases, 156), is actually brought upon the

instrument of which a copy is tendered, and the whole cause of action depends on the proof of the original instrument. In the latter case strict proof may properly be required.

Dealing with the present document, their Lordships are not prepared to say, that the High Court has miscarried, in so far as it has come to a conclusion that this document is genuine. It is a very ancient document. It cannot for one moment be contended, that it was fabricated for the purposes of this [462] suit. No doubt what we have actually on the record is a copy of a copy, but it is a certified copy of a document which is shown, though a copy, to have been produced in the earlier suits. The degree of credit which it has acquired in those suits, and the effect which has been given to it in those suits, may be more open to question; and there is no doubt great weight in many of the observations of Mr. Leith, that those decisions did not positively affirm the genuineness of the document or proceed wholly on the document so as in effect to involve the decision of its genuineness. On the other hand, it is to be observed, that it was produced in one of those suits against the Rajah of Burdwan; that it was not impeached or treated as other than a genuine document, and it is impossible to say that it did not, by being then produced, acquire some degree of merit.

The effect of the document as against Mr. Leith's Clients is of course another question. If the document is treated as a genuine instrument, it does not at all follow, that of itself it would prove the title of the Respondents against the Appellants, because it is a mere statement by the Rajah of Burdwan that those are the boundaries of what he professes to grant, and it is impossible to conceive cases in which, if there had been a conflict between the Rajah of Burdwan and the Government as to the boundaries of his zemindary, this assertion of a right to grant all the land comprised within the boundaries specified would be no evidence against the Government that this zemindary extended so far; it is at most a proof of an early assertion on the part of the Rajah of Burdwan that the land which he purported to grant in Mocurrery to the Chatterjees did extend so far. Their [463] Lordships conceive that the reason why this has been treated as the turning point of the case is, that the supposed spuriousness of the document and its assumed inconsistency with the earlier documents were the grounds upon which Mr. Lawford, the Collector, reversed the finding of Mr. Ross, the Deputy Collector, a decision which led to the final adjudication of the Revenue authorities, which is impeached by the suit. In their Lordships' opinion, this decision of Mr. Lawford cannot be supported. For the reasons already given, their Lordships think, that the document is not spurious. Nor can it be properly said to be inconsistent with the earlier document. It contains something which the earlier document did not contain, but it contains nothing which is inconsistent with the earlier document. It gives boundaries which the other did not give, but it does not give boundaries which differ in any degree from any which the earlier document gave either expressly or by implication.

It is, however, to be observed, that the decision of the High Court does not rest upon that document wholly, or indeed further than this, that if the document be genuine, it gets rid of that reversal of Mr. Ross's Order, and throws the parties back into the position in which Mr. Ross's Award would have left them. The judgment of the High Court proceeds upon the whole of the evidence in the cause which appears to their Lordships to be amply sufficient to support the finding of the Court. There is, first, Mr. Ross's own finding, the result of this local investigation on the spot. It is confirmed to a certain degree by the other local investigation which takes place by the Ameen, and their Lordships cannot but [464] remark, that unless there be very good grounds for dissenting and differing from those reports made upon local investigations, the Courts even in India, and *a fortiori* the Court in England, in dealing with boundary questions, ought to give great weight to them and to be guided by them. Supposing, then, that the *onus* of proof in this case was much heavier on the Plaintiff than it really was, there was ample ground for saying, that he had proved enough to throw the Defendants upon proof of their title; and looking at the petition which limits the amount of their holding to the 1800 odd beegahs, and to the other circumstances remarked upon by the High Court, their Lordships find it impossible to come to the conclusion that the High Court was not amply warranted in the finding to which it came and in reversing the decision

of the Zillah Judge, which appears to their Lordships to rest upon very unsatisfactory grounds, and to treat the case as if the whole question turned upon the Sunnud.

Their Lordships, therefore, must humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

[465] KRISTO KINKUR ROY and Another,—*Appellants*; RAJAH BURRODA-CAUNT ROY and Another,—*Respondents* * [Jan. 22, 23, 1872].

On appeal from the High Court of Judicature at Fort William, in Bengal.

Review of the authorities with respect to the period of limitation, under sects. 19 and 20 of Act, No. XIV. of 1859, applicable to Decrees of the High Court made on appeal from the Courts in the Mofussil, in applying to the Lower Courts for process of execution of the High Court's Decree [14 Moo. Ind. App. 481, 484].

A Decree of the High Court affirming, on appeal, a Decree of the District Court, is subject to the three years' limitation prescribed by sect. 20 of Act, No. XIV. of 1859, and operates as a bar to the issue of process of execution by the Lower Court, if not applied for within three years, unless "some proceeding," as provided by that section of that Act, has been taken to keep alive the High Court's Decree [14 Moo. Ind. App. 484].

In March, 1862, a Decree was made by a Mofussil Court, which, on appeal, was affirmed by the High Court in June, 1863. An appeal from the High Court was interposed to the Queen in Council, and pending such appeal a petition by both parties was presented in April, 1865, to stay proceedings for two months to effect a compromise, which did not take place, and afterwards, in the same year, no steps having been taken, the High Court, in May, 1866, struck out the appeal. In 1867, the Decree-holder applied to the Lower Court for execution of the Decree, but that Court refused to issue execution on the ground, that the Decree was barred by the three years' limitation provided by sect. 20, and such holding was confirmed on appeal by the High Court. Held, by the Judicial Committee, following *Maharajah Dheeraj Mahtab Chund, Bahadoor v. Bulram Singh* (13 Moore's Ind. App. Cases, 479), that when the parties consented to the petition to stay proceedings there was such a *contestatio litis* touching the appeal to England as constituted "some proceeding," provided for by sect. 20 of the Act, No. XIV. of 1859, and took the case out of the operation of the three years' limitation provided by that section [14 Moo. Ind. App. 495].

Whether Her Majesty's Order in Council, made on an appeal from the High Court, not being strictly a Decree of a Court, but an act done by the Queen by virtue of Her prerogative, upon the recommendation of a Committee of Her Privy Council, which prescribes what shall be the final Decree in the suit, and leaves it to be executed by the ordinary process of the Courts in India, is subject to the Limitation of suits Act, No. XIV. of 1859, *Quære?* [14 Moo. Ind. App. 492, 493].

In this case, the question turned upon the construction of the 19th and 20th sections of the [466] Limitation of suits Act, No. XIV. of 1859 (*a*), involving the

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier. Assessor,—The Right Hon. Sir Lawrence Peel.

(*a*) These sections were as follows:—

Section 19. "No proceeding shall be taken to enforce any Judgment, Decree, or Order of any Court established by Royal Charter, but within twelve years next after a present right to enforce the same shall have accrued to some persons capable of releasing the same, unless in the meantime such Judgment, Decree, or Order shall have been duly revived, or some part of the principal money secured by such Judgment, Decree, or Order, or some interest thereon shall have been paid, or some

point, whether the three years' under sect. 20, or twelve years' limitation under sect. 19, of that Act operated as a bar against a Decree-holder in [467] applying for execution to enforce a judgment of the Lower Court, which had been affirmed on appeal by the High Court.

The facts which gave rise to this question were shortly these:—

On the 25th of March, 1862, a Decree was made by the Zillah Court of Moorshedabad in a suit instituted by the Appellants against the Respondents under an Agreement for maintenance in her favour.

The first Respondent, Rajah Burrodacaunt Roy, appealed to the High Court, and that Court, on the 8th of June, 1863, dismissed the appeal with costs, and affirmed the Decree of the Lower Court.

The Rajah then appealed to Her Majesty in Council, but pending such appeal, a compromise was proposed, and on the 8th of April, 1865, the Rajah petitioned the High Court to stay the proceedings on the appeal for two months to enable the compromise to be carried out, which was consented to by the Appellants.

The proposed compromise was not carried out, but the Rajah, in April, 1865, paid Rs. 500 on account of the sum decreed.

On the 9th of May, 1866, Mr. Justice Kemp ordered the appeal to be struck off for want of prosecution.

On the 22nd of April, 1867, the Appellants ap-[468]-plied to the Lower Court for execution of the Decree, the amount sought to be recovered being Rs. 18,240, and costs, after giving credit for the Rs. 500 paid as before stated.

Upon such application for execution, the Judge passed the following Order:—

“On presentation of this petition the Petitioner's Vakeel was called upon to show *prima facie* ground that this decree was not barred by sect. 20 of Act, No. XIV. of 1859, since it was passed on the 8th of June, 1863, and no step had been taken to keep it in force. The only proceeding taken points to one since taken by the Debtor in the High Court, preliminary to appealing to Her Majesty's Privy Council. It would appear that that Court postponed passing any Order on the Debtor's petition for leave to appeal, because it was brought to its notice that the parties were inclined to compromise the suit. The Debtor allowed his petition to be struck off by default, and the Creditor has taken no steps to keep the Decree in force. Under these circumstances, I am of opinion, that execution cannot be taken. The application cannot be admitted.”

The Appellants, on the 26th of June, 1867, appealed from such Order to the High Court, on the following grounds:—First, that their application was clearly in time, being within three years from the 9th of May, 1866, when the judgment Debtors' appeal to the Privy Council was struck off, and an operative Decree secured to them, and that the Court below was wrong in disallowing execution on the ground of limitation. Secondly, that their application for execution was likewise within three

acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his Agent, to the person entitled thereto, or his Agent, and in any such case no proceeding shall be brought to enforce the said Judgment, Decree, or Order, but within twelve years after such revivor, payment, or acknowledgment, or the latest of such revivors, payments, or acknowledgments, as the case may be; Provided that for three years next after the passing of this Act every Judgment, Decree, and Order which may be in force at the date of the passing of this Act shall be governed by the law now in force, anything therein contained notwithstanding.

Section 20. “No process of execution shall issue from any Court not established by Royal Charter to enforce any Judgment, Decree, or Order of such Court, unless some proceeding shall have been taken to enforce such Judgment, Decree, or Order, or to keep the same in force within three years next preceding the application for such execution.

Section 21. “Nothing in the preceding section shall apply to any Judgment, Decree, or Order in force at the time of the passing of this Act, but process of execution may be issued, either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire.”

years of the 8th [469] of April, 1865, on which date they had presented a petition in the Privy Council appeal case, and the appearance in that case was a proceeding sufficient to keep their Decree in force; and thirdly, that the Court below was wrong in applying in three years' limitation to their Decree, which was substantially a Decree of the High Court; at all events, in respect of the costs awarded by the High Court.

On the 27th November, 1867, the High Court, the Justices Jackson and Hobhouse presiding, rejected the appeal, save as to granting execution for the costs awarded by the High Court on the dismissal of the appeal.

The judgment of Mr. Justice Louis S. Jackson was in these terms:—"The Appellants in this case obtained their decree in the Zillah Court on the 25th of March, 1862. That decree was affirmed on appeal by the High Court on the 8th of June, 1863, the Appellant being ordered to pay the costs of the appeal. The effect of that decision being, I apprehend, to leave the Plaintiff at liberty to execute his original Decree within three years from 8th of June, 1863, as provided by section 20, of Act, No. XIV. of 1859, and also to give him a Decree of the High Court, which he might execute for costs of the appeal within the time limited by law for the execution of Decrees of that Court. The law in force on that subject is the Act above cited, No. XIV. of 1859, in which no particular Courts are specified; but the Courts of Judicature in British India are distinguished as Courts established by Royal Charter, and Courts not established by Royal Charter. The 19th section of the Act provides for execution of [470] Decrees of the Courts established by Royal Charter, and the 20th and 21st sections provide for the like matter in respect of Courts not so established. At the time of the passing of that Act the chief appellate jurisdiction in this Country over the Courts in the Mofussil, was vested in the Sudder Dewanny Adawlut, which was a Court not established by Royal Charter, and the Decrees of that Court would unquestionably be executed under the provisions of sections 20 and 21. At that time the only Court in Bengal established by Royal Charter was the late Supreme Court. Both these Courts were, in accordance with the Imperial Statute, 24th and 25th Vict. c. 104, sect. 8, abolished on the establishment of the High Court, which is a Court established by Royal Charter, and which made the Decree under consideration. By the 11th section of the Act cited all provisions then in force in India, of any Acts of the Legislature of India, which at that time were applicable to the Supreme Court at Fort William, become applicable to the High Court. Apparently, therefore, a Decree of the High Court, as a Decree made by a Court established by Royal Charter, falls under the 19th section of Act, No. XIV. of 1859; and if that section be regarded as a provision applicable on the 1st of July, 1862, to the Supreme Court, it became on that day applicable to the High Court by reason of its establishment. A doubt at one time occurred to my mind, whether the provisions of section 19, which, when it was passed, undoubtedly referred to Decrees of original jurisdiction, should not be still restricted in its operation to such Decrees. But I find nothing in the Act of Parliament which discriminates between the different jurisdictions [471] of the Court, so as to warrant any such restriction; section 12 does not contain any such matter. Nor, indeed, can I see any reason why the Decrees of the High Court in its appellate side should have a less extended efficacy or vitality than those of the same Court in its original side. The proceedings in both being governed by the Code of Civil Procedure, to which the law of limitation is at least very nearly allied. It is objected to as an anomaly, that while the High Court has merely inherited the power of the late Sudder Court, in respect of appeals from the Mofussil Courts, and while the Sudder Court was included in the three years' rule, the High Court, which has succeeded to the functions of the late Supreme Court merely for the purpose of original jurisdiction, should use for the purposes of what may be called its Sudder jurisdiction, a provision applicable to the Supreme Court's Decrees in original suits. But this observation seems to me to rest upon a fallacy. Those who make it assume that the High Court has two parts, of which one represents the late Supreme Court, and exercises its powers, the other representing the late Sudder Court, with the jurisdiction and authority of that Court; whereas in fact the High Court is one amalgamated Court, possessing and exercising all jurisdiction, and every power and authority whatsoever in any manner vested in any of the abolished Courts (24th and 25th Vict. c. 102, sect. 9), and I am of opinion, that when

any power vested in the late Supreme Court can be usefully brought to the aid of the court acting in its appellate jurisdiction, it would be our duty to exercise such power. Otherwise the 11th section of the Act of Parliament would have been quite differently worded, and it would have [472] been enacted that provisions applicable respectively to the Supreme and Sudder Courts should apply according as the Court was exercising original or appellate jurisdiction. I cannot, therefore, but hold that the Plaintiff was entitled to execute his Decree for costs of the High Court within twelve years, as declared by the 19th section of the Act, No. XIV. of 1859. This, however, does not extend to the Decree below, which was affirmed by the High Court, and it remains only to consider, whether execution of that Decree was barred, as the Judge decided, by the terms of section 20. The only proceeding to which the Plaintiff could refer us, as having been taken by him within three years next preceding the application to execute, was the filing of a petition during the proceedings of an appeal to Her Majesty in Council, which was commenced by the Defendants, but not prosecuted. The petition set forth that the parties intended to compromise, and asked for a delay, which was granted, and the appeal was afterwards struck off the file, on the Appellants failing to proceed. The filing of this petition, it appears to me, cannot be looked upon as a proceeding to enforce the judgment, or to keep it in force, and consequently execution of that Decree was properly refused. The Judge's decision must be modified in accordance with our opinion.

The judgment of Mr. Justice Hobhouse, after shortly stating the facts, was as follows:—"I agree in the Order which my Brother Jackson would give in this case. The point taken in its special appeal is, that the Decree, execution of which was applied for, was, if not altogether, at least as to costs, a Decree of the High Court, that the High Court is a Court estab-[473]-lished by Royal Charter, and that the period of limitation which is applicable is not the period of three years under section 20, but the period of twelve years under section 19 of the Act, No. XIV. of 1859. I entertain no doubt but that the Decrees of 1862 and that of 1863 are two distinct and separate Decrees, of different Courts. The Decree of the High Court of 1863 affirmed that of the Court below, and, therefore, the Decree of this latter Court remained in its integrity. But the Decree of the High Court went further, it did that which the Decree of the Lower Court could not have done: it directed that the costs incurred in proceedings before itself should be paid by the Appellant. It is very true, as contended by the learned Counsel, Mr. Montriou, that when an appeal is dismissed by the High Court, or any appellate Court, costs at least, as a matter of course, follow; but the Decree for such costs is not the less in fact a Decree of the appellate Court, and the mere circumstance, that, under the rules of the Code of Civil Procedure, the Decree has to be put in execution in another Court (section 362) does not alter the character of the Decree,—it is still a Decree of the appellate Court. I hold, then, that the Decree of the High Court of 1863, is on the one hand a distinct Decree, but that on the other hand it is a Decree for costs of that Court only. The next question is, whether section 19, or section 20, of Act, No. XIV. of 1859, contains the law applicable to execution. [The learned Judge read the sections, *ante*, p. 466 and proceeded.] The Decree in this instance is a Decree of the High Court on its appellate side, and the High Court is a Court established by Royal [474] Charter, and it follows within the unmistakable meaning of words that the limitation prescribed in section 19, of twelve years, is the limitation applicable to the Decree before us. But Mr. Montriou contends, that the High Court on its appellate side, in this particular case, is merely exercising the power which the Sudder Dewanny Adawlut would have exercised; that when the Act, No. XIV. of 1859, was passed, the provisions of section 19 applied as clearly only to the Supreme Court as the provisions of section 20 did to the Sudder Dewanny Adawlut; that it follows, that the provisions of the latter section apply now to the case before us, and that to hold otherwise would be to hold that one law applied to one part of what is substantially one and the same Decree, and another law to another part. There can, I think, be no doubt that, up to the 1st of July, 1862, when the present High Court was established, Decrees of the Sudder Dewanny Adawlut were governed by the limitation contained in section 20, and Decrees of the Supreme Court by that of section 19; and it would seem to follow that when the present High Court was intended to stand in the place of the Sudder Dewanny Adawlut on the one side, and of the Supreme

Court on the other, it could only have been intended that the law of limitation which applied to the Sudder Dewanny Adawlut and the Supreme Court respectively, before they were amalgamated, should apply to the Court which took their places after they were amalgamated. And, to my mind, there is a manifest absurdity in the idea, that a Decree which, if it had been given by the Sudder Dewanny Adawlut on the 30th of June, 1862, would have been privileged to but three years' limitation, should [475] because it was given by a Court under a different name, but which still represented the same Sudder Dewanny Adawlut, on the 1st of July, 1862, be privileged to twelve years' limitation. I cannot, therefore, doubt but that it was the intention of the Legislature that Decrees of the High Court passed in appeal from Courts not established by Royal Charter, should be subject to the limitation prescribed by section 20 of the Act. But I think it would be quite unjustifiable in us, sitting as interpreters of the law, to follow what we believe to be the intention of the Legislature, when the terms of the law are directly in conflict with such supposed intention. And here it seems to me the terms are quite plain. Section 20 is declared distinctly to apply to Decrees of Courts 'not established by Royal Charter,' section 19 to Courts 'established by Royal Charter.' The High Court is a Court established by Royal Charter. The Decree before us is a Decree of the High Court for costs of that Court. I hold, therefore, that, inasmuch as the Decree of date June, 1863, is a Decree of a Court established by Royal Charter, and inasmuch as the Appellants have proceeded to execute it within twelve years, they are in time, and I would set aside so much of the judgment of the Court below as refused Appellants permission to execute it."

From the Decree founded on the judgment of the Court the present appeal was brought.

Mr. J. D. Bell, and Mr. J. Cutler, for the Appellants.—The High Court was wrong in applying the limitation of three years prescribed by section 20 of Act, No. XIV. of 1859, instead of giving effect to the [476] 19th sect. of that Act. Our contention is, that the Zillah Court's Decree of the 25th of March, 1862, became by the Decree of affirmance of the High Court, of the 8th of June, 1863, a Decree of a Court established by Royal Charter, in which execution could, under sect. 19 of the Act, No. XIV. of 1859, issue within twelve years from the passing of the original Decree, as held by the Bengal High Court in *Chowdhry Wahid Ali v. Mullick Mayet Ali* (6 Ben. L.R. 52), *Ishan Chunder Chowdhry v. Jugrohuree Chowdrain* (8 W.R. (Civil Rulings) 267). So by the High Court in Bombay, *Ba'pura v. Krishna v. Madhavre Ra'ma v.* (5 Bom. High Court Rep. 214), and also in Madras, *In re Arunachellathudayan, In re Veludayan* (5 Mad. High Court Rep. 215). The High Court was established by Royal Charter in 1862, and pursuant and by virtue of the Imperial Statutes, 24th and 25th Vict. c. 104, and 28th Vict. c. 15, the appellate branch of that Court was a Court established by Royal Charter, as the previous Supreme Court of Calcutta had been. It would be a strange anomaly, if the Decree of the High Court were to be treated as to Decrees, enforceable, as to the Order for payment of costs, within twelve years, but not enforceable as to the part of the Decree declaring the Court below to be correct, because no proceeding was taken to keep the same in force within three years; yet such would be the effect of the ruling by the High Court. Such law or limitation, however, does not apply, for the Decree was suspended by the pendency of the appeal to Her Majesty in Council, and no proceedings to obtain execution of such Decree could have been successfully taken until the appeal was [477] dismissed. The appearance on the 8th of April, 1865, in the proceedings on the proposed appeal to England by the Appellants, was within the meaning of the 20th sect. of the Act, No. XIV. of 1859, and constituted "some proceeding" to keep the Decree of the Lower Court in force, within three years preceding the application for execution. That was the construction put on this section by this Tribunal in *Maharajah Dheeraj Mahtab Chund, Bahadoor v. Bulram Singh* (13 Moore's Ind. App. Cases, 479, 488); and by the High Court in *Bhubaneswar Debi v. Mahendra Nath Chowdhry* (3 Ben. L.R. 33, Appx.); *Syud Khan v. Jumal Beebee* (5 W.R. (Miss), 19); *Ram Sahaye Singh v. Dejun Singh* (6 W.R. (Miss), 98); *Bipro Doss Gossain v. Chunder Seekur Butta-charjee* (7 W.R. (Civil Rulings), 251). Moreover, the petition of the Respondent of the 8th of April, 1865, must be taken as an admission that the debt mentioned in the Decree was due, so as to entitle the Appellants to a further term of three years from that date for the issue of process of execution.

Sir R. Palmer, Q.C., and Mr. Doyne, for the Respondents.—It was never intended, by the 12th section of the Statute, 24th and 25th Vict. c. 104, to make provisions, previously applicable only to the Decree of the Supreme Court, a Court of first instance, applicable after the 1st of July, 1862, to a Decree of the High Court, the new appellate Tribunal, which was substituted for the Sudder Dewanny Adawlut in appeals from the Mofussil Courts. That is plain from the enactment in that section, that “from [478] and after the abolition of the Courts, the High Court shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and all previous proceedings in the former Court shall be dealt with as if the same had been in the High Court.” That is apparent, as it would not be in accordance with the saving part of that section, which declares “that any such proceedings might be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively.” The words of the 19th sect. of Act, No. XIV. of 1859, “any Court established by Royal Charter,” are confined to Courts so established and then in existence in Bengal, Madras, and Bombay. To hold otherwise would give rise to the “manifest absurdity” referred to by Justice Hobhouse, but which he considered himself bound by law to carry into effect; we submit, therefore, first, that the provisions of sect. 19 of Act, No. XIV. of 1859, are not applicable to executions of Decrees of the High Court; but, secondly, if that section be applicable to such Decrees, it applies only so far as the judgment appealed against has held it to be so applicable, namely, to such additions to, or alterations, of the judgment of the Zillah Court as might be decreed by the High Court. By analogy, in this Country, a Decree of the House of Lords is a Decree of the Court of Chancery. The cases of *Choudhry Wahed Ali v. Mullick Mayet Ali* (6 Ben. High Court Reps. 52), *Ba’pura v. Krishna v. Madharva Ra’na’v* (5 Bom. High Court Reps. 214), *In re Arunachellathudayan* (5 Mad. High Court Reps. 215), cited by the Appel-[479]lants, are distinguishable from this case. In respect to the three or twelve years’ limitation in applying to carry the Decree into execution by the Appellants, we contend, that the limitation was, by sect. 20, three years, and that the limitation of twelve years prescribed by sect. 19, was never intended to be extended to Decrees of the High Court.

Judgment having been reserved, was now delivered by

The Right Hon. Sir James Colville (Feb. 3, 1872).—This appeal, though the facts of it lie in an extremely narrow compass, has raised several questions of general importance and considerable difficulty.

The Appellants, on the 25th of March, 1862, obtained a judgment against the Respondents for the sum of Rs. 9500, with interest, from the date of the plaint, and costs of suit on a claim founded on an Agreement to pay to the Appellant, Kristo Kinkur Roy, an allowance of Rs. 900 per annum by way of maintenance.

The Respondent, Rajah Burrodacaunt Roy, appealed against this Decree to the High Court of Calcutta, but by the Decree of that Court made on the 8th of June, 1863, it was ordered and decreed, that the Decree of the Lower Court should be, and the same was thereby affirmed; and that the Defendant Appellant, should pay to the Plaintiffs Respondents the sum of Rs. 350, being the costs of the appeal, with interest thereon at the rate of twelve [480] per centum per annum from the date of the Decree to the date of realization.

A petition of appeal to Her Majesty in Council against the Decree was then presented by the Rajah. He tendered security for costs, and the usual reference was made to ascertain its efficiency. But the security was never perfected. On the 8th of April, 1865, he presented a petition to the Court, suggesting that negotiations for a compromise between him and the Appellants were pending, and praying that proceeding in regard to the appeal to England might be stayed for two months. On the same day the Appellants filed a petition consenting to that application, and praying that the two months should be granted. The Court, on the 4th of August, 1865, made an Order “postponing the case for two months, as there were hopes of the parties coming to an amicable settlement.” The two months expired on the 6th of October, and nothing came of the negotiations: and, on the 9th of May, 1866, the High Court struck the appeal off the file in default of prosecution.

On the 22nd of April, 1867, the Appellants made their first application to the Zillah Court for execution against the Respondents. Their application was in the tabular form prescribed by section 212 of the Code of Procedure, which requires the date of the Decree of which execution is sought to be mentioned with other particulars. The only Decree so specified was the Decree of the 25th of March, 1862. But the fact of its affirmance on appeal was stated in the next column, and the amount sought to be levied included the Rs. 350 decreed by the [481] High Court as the costs of the appeal. On the 27th of April, 1867, the Zillah Judge rejected the application for execution, on the ground, that it was barred by section 20 of Act, No. XIV. of 1859, no step having been taken since the 8th of June, 1863, to keep the Decree in force within the meaning of that section.

The Appellants appealed from that decision to the High Court, which Court, on the 27th of November, 1867, ruled, that in so far as the Appellants sought to realize the amount decreed to them by the original Decree, their application for execution fell within the three years' limitation of the 20th section; but that, inasmuch as their claim for Rs. 350, the costs of the appeal, rested on the Decree of the High Court, and that was a Court established by Royal Charter, they were entitled, under the 19th section of the Limitation Act, to sue out execution for that amount at any time within twelve years from the date of that Decree; and the case was sent back to the Zillah Court with instructions to deal with it accordingly. The Appellants have brought this appeal against so much of this Order as held that their right to execution for any part of their demand was barred, but there has been no cross appeal against that part of the Order which was in their favour.

The argument on this appeal has raised the following questions:—

First, is the execution of a Decree of the High Court made on appeal from one of the Courts in the Mofussil to be governed by the 20th or by the 19th section of Act, No. XIV. of 1859? or, in other words, [482] is it subject to the three years' or to the twelve years' rule of limitation?

Secondly, what is the effect of a Decree of the High Court affirming a Decree of a Zillah Court? Is it to be taken to incorporate the latter in itself, so that for the purposes of execution, the Decree to be executed is to be taken to be a Decree of the High Court?

Thirdly, if, on any ground, the Decree to be executed in this case is to be deemed subject to the three years' limitation, had anything sufficient to keep it in force within the meaning of the 20th section been done within three years of the date of the application for execution?

Upon the two first and general questions there have been conflicting decisions by the High Courts in India.

The Order under appeal appears to have been the earliest which decided that Decrees of the High Court were within the 19th section. It has been followed at least in one case in Bengal decided as lately as the 6th of September, 1870, *Chowdhry Wahed Ali v. Mullick Mayet Ali* (6 Ben. L.R., p. 52); and it has been recognized as sound law by the High Court of Bombay in the case of *Ba'pura v. Krishna v. Madhavra Ra'ma'r* (5 Bom. High Courts Reps., 214). But in two cases, *In re Arunachellathudayan* and *In re Veludayan* (5 Mad. H.C. Apps., 215), decided by the High Court of Madras, on the 4th of March, 1870, it was ruled by Chief Justice Scotland, and Mr. Justice Bittleston (apparently without any dissent on that point on the part of the other Judges composing the [483] Full Bench of the Court), that a Decree of the High Court made on appeal from a Mofussil Court, is not a Decree of a Court established by Royal Charter, within the meaning of the 19th section of the Limitation Act, and is a Decree subject to the provisions of the 20th section of that Act. It may be observed that, neither in these Madras cases, nor in that decided at Bombay, was the determination of this question essential to the decision of the Court upon the particular appeal before it; since in none of them had the period of three years' limitation, if calculated from the date of the Decree of the appellate Court, expired. This ruling, however, of Chief Justice Scotland, appears to have led to a reconsideration of the question by the High Court of Bengal.

Their Lordships find that in a case, *Ram Churn Bysack v. Luckhee Bornick*,

not cited at the Bar during the argument (which is to be found among the Full Bench rulings of the High Court of Bengal in the 16th volume of the Weekly Reporter, p. 1; the 12th of June, 1871), a Division Bench of the High Court referred for the determination of the Full Bench two questions, in the following terms:—First, whether a Decree of the District Court affirmed on appeal by the High Court becomes a Decree of the last-mentioned Court; and, secondly, whether execution of that Decree of affirmance passed by the High Court is to be governed by the provisions of section 19 of the Limitation Act, No. XIV. of 1859, or section 20 of that enactment, *i.e.*, whether the rule of three years or of twelve will apply. The Full Bench, consisting of the late Justice Norman (then acting as Chief [484] Justice), and the Justices Loch, Bayley, Macpherson, and Dwarkanath Mitter, unanimously decided the first of these questions in the affirmative; and ruled on the second, that when, under section 361 of the Code of Procedure, a Decree of the High Court on its appellate side is transmitted to the District Court, which passed the first Decree in the suit for execution, it will have the effect of a Decree of such Court, and must be executed within the period limited by the 20th section of Act, No. XIV. of 1859.

The preponderance, therefore, of authority in India is now in favour of the proposition, that the execution of Decrees of the High Court, made on appeal from the District Courts, is subject to the three years' rule of limitations.

Their Lordships are of opinion, that this conclusion is correct.

The object of Act, No. XIV. of 1859, was to carry out a recommendation made many years before by the Law Commissioners for India, by passing one general law of limitation applicable to all Courts in India. It is hardly necessary to remark that the Legislature, in framing the Act, had then to deal with two distinct judicial systems—the one consisting of what had been the Courts of the East India Company, and may here be called the Mofussil Courts; the other, the Courts established in the Presidency Towns and elsewhere by Royal Charter, and administering to all within their jurisdiction, subject to certain statutory exceptions and modifications, the law of England. The law of limitation which governed the former was to be found in the Regulations which had no force within the Presidency Towns; whilst the law of limitation which governed [485] the latter consisted of the Statute of James the First, together with such other portions of the Statute Law of England applicable to the subject (if any) as had been introduced into India, and the general rules touching the effect to be given to lapse of time which depend on the decisions of the Courts in England. It is not surprising that, in framing a law designed to be common to both systems of judicature, it was deemed necessary to make certain exceptions to the general rule of uniformity. And it may be presumed that, in dealing with this matter of execution, the Legislature was moved by certain reasons which approved themselves to the minds of those who were conversant with the administration of justice in the Mofussil, to subject the execution of the Decrees of the Mofussil Courts, whether of appellate or of original jurisdiction, to the three years' limitation; whilst, on the other hand, being pressed by the weight and value which the Law of England gives to a judgment or Decree of a superior Court, it determined not to reduce the period for enforcing the Decrees of the Supreme Courts to less than twelve years. Hence the distinction made by the 19th and 20th sections of the Act, in which the term "Courts established by Royal Charter" was obviously used not by reason of anything inherent in every Court established by Royal Charter, but simply because it was thought to define (whether happily or not it is needless to inquire) certain existing Courts, *viz.*, the Supreme Courts in the three Presidency Towns, and the Recorders' Courts in the Straits Settlements, and possibly to include other Courts of similar constitution and functions, which might thereafter be established. The same term, it may be observed, [486] is to be found in the preamble of Act, No. VIII. of 1859 (the Code of Procedure), which, when first passed, was not intended to have operation in the Supreme Courts.

That being so, we have to consider how the question is affected by the subsequent amalgamation of the two systems of Judicature, and the establishment of the High Courts by Letters Patent under the powers given by the 24th and 25th Vict. c. 104, and the 28th Vict. c. 15. It will be convenient to speak only of the High Court of Bengal. The general scheme of the amalgamation was to constitute

one general Court, of which the Judges sitting in various divisional Courts were to exercise the functions both of the Supreme Court and the appellate Mofussil Courts (the Sudder Dewanny Adawlut and the Sudder Nizamut Adawlut), all of which were abolished.

The powers and jurisdiction of the Supreme Court, with some slight modification of the latter, were transferred to the High Court, to be exercised by it as a Court of original jurisdiction; and the powers and jurisdiction of the appellate Mofussil Courts were transferred to it, to be exercised by it as an appellate Court. But the law to be administered by it as a Court of original jurisdiction was substantially that previously administered by the Supreme Court; whilst that to be administered by it on appeal from the Mofussil Courts was necessarily that of those Courts. The Code of Procedure (Act, No. VIII. of 1859) was indeed made the procedure of the Court in its original as well as in its appellate jurisdiction, and superseded the procedure which had previously obtained in the Supreme Court. But that Code did not touch the subject of limitation, [487] which continued to be regulated by Act, No. XIV. of 1859.

So far, therefore, there can be no ground for inferring that there was any intention on the part either of Parliament or of the Crown to alter the period within which a Decree made on appeal from a Mofussil Court could be executed. The Decree, like the Decree of the former Sudder Dewanny Court, was to be sent down to the Lower Court, and entry to be made of it in the register of the Lower Court, and execution sued out there. Every reason of policy which induced the Legislature to require that execution to be issued within three years was, presumably, as operative after the amalgamation of the Courts as it was before that event. Accordingly, one of the learned Judges who decided the case now under appeal, has admitted that his construction involved consequences "absurd" in themselves, and, presumably, contrary to the intention of the Legislature. He felt, however, bound by the words "Courts established by Royal Charter." It seems to their Lordships, considering the date and history of the Limitation Act, No. VIII. of 1859, that the High Court of Madras, and the High Court of Bengal in its decision of the 12th of June, 1871, were warranted in holding that the High Courts, though unquestionably "Courts established by Royal Charter," in the broad and general sense of the term, were not when exercising their appellate jurisdiction from the Mofussil Courts, such Courts within the meaning of Act, No. XIV. of 1859.

There remains the difficulty occasioned by the use of the words "such Court," which has been adverted to in some of the Indian cases. But if those words [488] be held to import the Court issuing the process of execution, *i.e.*, the Zillah Court, the difficulty would equally have applied to the Decree of the former Sudder Court, which, not being the Decree of a Court established by Royal Charter, would have been subject to no rule of limitation. It seems necessary to construe the words "such Court" as meaning "any Court not established by Royal Charter within the meaning of the Act." On the whole, therefore, though it is to be regretted that the Indian Legislature did not, upon the amalgamation of the Courts, provide more precisely for the application of the Limitation Act, and possibly of other Statutes to the new Court, their Lordships are of opinion, that the first question ought to be determined in accordance with the rulings of the High Court of Madras, and the Full Bench of the High Court of Bengal. The sound and convenient rule is undoubtedly that the Court which has to execute the Decree of the High Court, should be governed by the rules which govern the execution of its own Decrees, and their Lordships do not feel constrained by the words of the Statutes or of the Letters Patent to adopt the contrary construction.

If this be so, the consideration of the second question is not necessary for the determination of this appeal: since it is admitted, that the period of three years, if calculated from the date of the Decree of the High Court, had expired before the application for execution was made.

Nor, indeed, is the general question, upon which there have also been conflicting decisions in India, of much practical importance; since it is admitted, that the date from which the three years are to be calculated is the date of the Decree of the appellate Court; [489] whether that Decree is to be treated as the Decree to be executed; or the appeal of which it is the termination is to be deemed "a proceeding taken to keep the original Decree in force." That an appeal prosecuted to a Decree

would be such a proceeding is shown both by the judgment of the Full Bench delivered by Chief Justice Peacock, in the case of *Bapoo Doss Gossain v. Chauder Seekur Buttacharjee*, (7th W.R., p. 521); and also by the Judgment of this Board, delivered by Lord Cairns, in the case of *Maharajah Dheeraj Mahtab Chand Bahadoor v. Bulram Singh* (13 Moore's Ind. App. Cases, pp. 479, 488).

The state of the Indian authorities upon the general question seems to be this. In the case before us, the High Court obviously proceeded on the principle, that a simple decree of affirmance did not so incorporate the mandatory part of the original Decree as to make, for all purposes, the Decree of the appellate Court the sole Decree to be executed. And this ruling appears to have been followed in the case of *Chowdhry Wahed Ali v. Mullick Mayet Ali* (6 Ben. High Court Reps. p. 52), in which it was ruled that, in order to make the Decree of the appellate Court the final Decree in the suit for all the purposes of execution, it was necessary, that it should have decreed a material modification of the original Decree. The rule, so expressed, seems open to the objection of vagueness. The Full Bench of the High Court of Bengal, however, in the decision of the 12th of June, 1871, already referred to, has ruled that, whether the Decree of the Lower Court is reversed, or modified, or affirmed, the Decree passed by the appellate Court, is the final Decree in the suit; and, [490] in the words of Mr. Justice Mitter, "as such the only Decree which is capable of being enforced by execution." And that is in accordance with the Madras decision already cited. Chief Justice Scotland's words are "whether that Decree be in affirmance, or reversal, or modification of the Decree appealed from, it becomes the final Decree in the suit, and therefore the Decree enforceable by execution."

The function of an appellate Court is to determine what Decree the Court below ought to have made. It may affirm, reverse, or vary the Decree under appeal. In the first case, it leaves the original Decree standing, superadding, it may be, an Order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given.

In all these cases the Decree of the appellate Court may be regarded either as a direction to the Lower Court to make and execute a Decree of its own accordingly, or as an independent Decree, whether it is to be executed by the appellate Court or by the Lower Court. In the latter case a further question arises, viz., whether the original Decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the Decree of the appellate Court as the sole Decree capable of execution, or whether both Decrees should be treated as standing, execution being had on each in respect of what is enjoined by the one, and not expressly enjoined by the other.

In this Country the nature and effect of a Decree on appeal would seem to vary according to the [491] nature of the Decree under appeal, the constitution of the appellate Tribunal, the proceedings in appeal, and the fact whether the record or merely a transcript is brought up. The determination, however, of the question before their Lordships must depend on the provisions of the Indian Code of Procedure. It is clear that, under that Code, whatever Decree is executed, is to be executed by the Lower Court, in which the record remains, or to which it is to be returned.

But sections 360, 361, and 362 (a), which prescribe the form of the Decree of the

(a) "Section 360. The Decree of the appellate Court shall bear date the day on which the judgment was passed. It shall contain the number of the suit, the names and descriptions of the parties, Appellant and Respondent, and the memorandum of appeal, and shall specify clearly the relief granted or other determination of the appeal. It shall also state the amount of costs incurred in the appeal, and by what parties and in what proportions such costs and the costs in the original suit are to be paid.

"Section 361. A copy of the Decree or other Order disposing of the appeal, certified by the appellate Court or the proper Officer of such Court, and sealed with the seal of the Court, shall be transmitted to the Court which passed the first Decree in the suit appealed from, and shall be filed with the original proceedings in the

appellate Court, direct a copy of it to be entered on the Register, and treat that Decree as a Decree to be executed, seem to exclude the notion that it is a mere direction to the Lower Court to pass and execute a certain Decree.

[492] If the question were *res integra*, their Lordships would incline to the view taken by the Judges of the High Court in the present case, viz.: that the execution ought to proceed on a Decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, that, for the reasons already given, the question is not of much practical importance, their Lordships will not express dissent from the rulings of the Madras Court, and of the Full Bench of the Bengal Court, further than by saying, that there may be cases in which the appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a Decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a Decree of affirmance so much of the Decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded Decree.

From a passage in the judgment of Mr. Justice Mitter, already referred to, it appears to have been decided in India, that what are there termed "the Decrees of the Privy Council," are not subject to any law of limitation. That question is not before their Lordships; and if it ever arises, must be determined on its own merits.

The ground of the decision seems to have been, that the Order of Her Majesty in Council being an act done by virtue of Her prerogative, it was not competent to the Indian Legislature to limit the time within which that Order could be enforced. [493] Their Lordships desire to say, that they are not prepared, without full argument and consideration, to accept this ruling as correct. Should the question ever be brought here, it will have to be considered, whether the Order in Council, which is not, properly speaking, the Decree of a Court, but an Order of Her Majesty made on the recommendation of a Committee of Her Privy Council, does more than prescribe what shall be the final Decree in the cause, leaving it to be executed by the ordinary process of the Courts in India. It may well thus finally ascertain and define the rights of the parties without relieving them from the obligation imposed upon them by the general law of enforcing those rights with due diligence,—a matter with which the prerogative has no concern.

The result of what has been said is, that the determination of this appeal must depend on the third question, viz., whether any proceeding sufficient to keep the Decree in force within the meaning of the 20th section, was had between the 8th of June, 1863, and the 22nd of April, 1867, the date of the application for execution. It has been argued, that the presentation of the petition of appeal to England, was "such a proceeding," and that the period of limitation was to be calculated from the 9th of May, 1866, when that petition was finally dismissed.

It was further argued, that the filing by the Appellants of the petition consenting to the Respondent's application for further time to prosecute his appeal was "such a proceeding," and that the time was to be calculated from the date of that petition (the 8th of April, 1864), or from the 4th of October, 1865, when the two months granted expired. Their Lord-[494]-ships are of opinion, that there is no ground for the first contention; that the Respondent's petition of appeal, being a proceeding taken in order to destroy the Decree, cannot of itself be treated as a proceeding to keep it in force; and in this opinion they are supported by all the Indian authorities cited, except the observations of Mr. Justice Holloway in the Madras case. It is, however, admitted, that had the appeal to England been allowed, the present Appellants, being Respondents to it, and, as such, supporting the Decrees,

suit, and an entry of the judgment of the appellate Court shall be made in the original register of the suit.

"Section 362. Application for execution of the Decree of an appellate Court shall be made to the Court which passed the first Decree in the suit, and shall be executed by that Court, in the manner and according to the rules herein before contained for the execution of original Decrees."

would have been entitled to sue out execution at any time within three years at least after the final dismissal of that appeal.

The appeal, it is true, never was allowed, but during the period between the date of the presentation of the petition and that of its dismissal, the allowance of the appeal depended on the Respondents' compliance with the rules which regulate the admission and allowance of appeals to England; and the Appellants had a right to intervene and see that there was a compliance with these rules, particularly with such of them as relate to security, and, in the event of non-compliance, to insist on the dismissal of the petition. In their Lordships' opinion there is, in this case, sufficient evidence that the Appellants did so intervene. The petition, by which they consented to the application for two months' further time, is pregnant evidence of this fact; for unless they had then been active parties to the proceedings their consent would have been unnecessary. Their Lordships, therefore, though they would have been glad to have had fuller evidence of what was actually done in this matter, have come to the conclusion, that there was, at that time, such a *contestatio* between the parties [495] touching the allowance of the appeal to England, as suffices to bring this case within the principle laid down by Lord Cairns in the case of *Maharajah Dheeraj Mahtab Chand, Bahadoor v. Bulram Singh* (13 Moore's Ind. App. Cases, p. 479) already referred to, and to relieve their Lordships from the necessity of depriving the Appellants of the fruits of what appear to be just Decrees by the application of the Act of Limitation.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal ought to be allowed; that the Orders of the Zillah Judge and of the High Court ought to be reversed; and that the Appellants ought to be declared entitled to sue out execution of the Decrees, and to recover also the costs of the proceedings in execution in both the Indian Courts. They will also be entitled to the costs of this appeal.

[496] MUSSUMAT BUHUNS KOWUR, *Appellant*; LALLA BUHOOREE LALL, and JOKHEE LALL,—*Respondents* * [Jan. 24, 1872].

On appeal from the High Court of Judicature, at Fort William in Bengal.

A Purchaser of the equity of redemption sold in execution of a Decree, who had obtained a certificate as Purchaser, under sect. 259 of the Code of Civil Procedure, Act, No. VIII. of 1859, brought a suit for redemption and possession against the usufructory Mortgagee under a Deed of *zur-i-peshgee* (usufructory mortgage). Held (reversing the Decree of the High Court), that the Act, No. VIII. of 1859, was simply a Code of Procedure, not affecting existing law, and that the fact of the Plaintiff's title being certified as Purchaser was not conclusive by sect. 260 of that Act, to debar the Defendant who was in possession from pleading, that he was the real Purchaser, and that the Purchase was made benamee for him by the certified Purchaser (as benamee transactions are not prohibited by sect. 260, or *per se* illegal), so as to ascertain the title of the certified Purchaser.

Semhle: Sect. 260 is confined to a suit brought against a certified Purchaser, and does not embrace a suit brought by him against a party in possession [14 Moo. Ind. App. 524, 525].

The question raised in this case was whether, under sections 259 and 260 of Act, No. VIII. of 1859 (*a*), [497] the Code of Civil Procedure, in a suit brought by the certified Purchaser to redeem certain mortgaged lands, the Defendant, the

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colville, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier. Assessor,—The Right Hon. Sir Lawrence Peel.

(*a*) The sections above referred to are as follows:—

259. "After a sale of immovable property shall have become absolute in manner aforesaid, the Court shall grant a certificate to the person who may have been

Mortgagee in possession, was entitled to set up as a bar to the suit a plea that, although the Plaintiff was in fact such certified Purchaser, yet he had made the purchase benamee, on behalf of the Defendant, and was, therefore, not entitled to sue.

The circumstances, out of which the suit which raised this question arose, were as follows:—

In the year 1844, one Motee Soondery Dassee, as Proprietress of Talook Doondhur, executed a *zur-i-peshgee*, or usufructuary mortgage, of her Talook to Brij Lall Opadhia, the Husband of the Appellant, since deceased, under which he obtained possession, which after his death the Appellant retained.

In January, 1847, Brij Lall Opadhia and another obtained a money decree in respect of a different loan transaction personally against Motee Soondery Dassee for a sum of upwards of Rs. 16,000.

One Ajoodhia Persaud had obtained a Decree against Brij Lall Opadhia, and interest of the Decree-holder was purchased by Gunga Persaud Tewary, as the Appellant contended, on behalf of the Debtor, Brij Lall Opadhia.

Gunga Persaud Tewary having sued out execution in his own name of his purchased Decree against the interest of Brij Lall Opadhia in the money Decree obtained by him against Motee Soon-[498]-dery Dassee, the latter was, on the 21st of January, 1861, sold in execution, to the Respondent, Lalla Buhooree Lall, for the sum of Rs. 1000.

At the time of the sale the Respondent, Lalla Buhooree Lall declared that he purchased on his own account, and an Order issued giving him a certificate accordingly, and afterwards on the 10th of July, 1863, on his application another Order was issued for the substitution of his name for that of Brij Lall Opadhia to enable him to proceed to execution against the Debtor's property.

On the 16th and 24th of July, 1863, on the application of Lalla Buhooree Lall, Orders for the attachment of Talook Doodhur issued from the Judge's Court, and by another Order of the 29th of August, 1863, the sale of that Talook was fixed for the 5th of October, on which day the sale took place, and the Talook was sold to the Respondent, Lalla Buhooree Lall, as the highest bidder for Rs. 9500.

On the 11th of December, 1863, the Judge ordered that a certificate should be granted to Lalla Buhooree Lall, according to the terms of section 259 of Act, No. VIII. of 1859. And on his subsequent application for possession in December, 1865, an Order for possession was passed, and the Ameen charged with that duty reported that he had given him possession on the 10th of March, 1866.

On the 5th October, 1866, the present suit was instituted by the Respondents, Lalla Buhooree Lall and Jokhee Lall (who was a sharer in the first Respondent's purchase), against the Appellant and others. The plaint was framed simply as one for redemption of the mortgaged Talook Doodhur, and alleged, that the mortgage debt had been already [499] satisfied by the usufruct, and offered, if this should not be so, to pay any balance remaining due.

So far as concerned the question of law raised by the appeal, the Appellant, as principal Defendant, by her answer pleaded, that the Respondent, Lalla Buhooree Lall, had purchased benamee on behalf of her Husband, whose Mookhtar she alleged he was.

Evidence was taken upon the question of fact raised by the first issue, viz.:—whether Lalla Buhooree Lall was the actual or nominal Purchaser.

The Principal Sudder Ameen of Zillah Gya (Moulvie Itrut Hossein), by his judgment, dated the 3rd of June, 1867, held, upon the evidence, that it was satisfactorily proved, that the Respondent, Lalla Buhooree Lall, was, in fact, the Mookhtar of Brij

declared the Purchaser at such sale, to the effect that he has purchased the right, title, and interest of the Defendant in the property sold, and such certificate shall be taken and deemed to be a valid transfer of such right, title, and interest."

260. "The certificate shall state the name of the person who at the time of sale is declared to be the actual Purchaser, and any suit brought against the certified Purchaser on the ground, that the purchase was made on behalf of another person not the certified Purchaser, though by agreement the name of the certified Purchaser was used, shall be dismissed with costs."

Lall Opadhia, that the latter was the actual Purchaser of the 8½ annas share, and that the Respondent was only the nominal Purchaser; and that the Appellant was not prevented by anything contained in the 260th section of the Act, No. VIII. of 1859, from setting up her defence to the suit of the nominal Purchaser, and that inasmuch as the purchase of the property in dispute by Brij Lall Opadhia had been proved, the suit for possession of the property by the Respondent, Lalla Buhoree Lall, the nominal Purchaser, was not admissible, and ordered the suit to be dismissed with costs.

The Respondents appealed to the High Court and in their grounds of appeal, stated, first, that under sect. 260 of Act, No. VIII. of 1859, and C. O., dated the 29th of July of the same year, the allegation in the answer, of purchase in a fictitious name was inadmissible; that the actual Purchaser was the person whose name was inserted in the certificate; [500] and that it was contrary to law and equity to contend that the plaintiffs were nominal purchasers. Secondly, that the reference made to the decision, dated 19th of August, 1866, relating to the case of Koonj Beharee Lall by the Principal Sudder Ameen in his judgment as an authority was wrong, that decision relating to a contention regarding an auction sale of property under the provisions of section 22 of Act, No. I. of 1835. Thirdly, that the purport of the decision of the 3rd of February, 1866, had been misunderstood by the Principal Sudder Ameen, as in that decision the principle laid down was, that if the person who obtained the certificate brought a suit for possession, or any action brought against him on the ground of ejection by him, then, in either case, he should have the benefit of the rule laid down in section 260, of Act, No. VIII. of 1859; and fourthly, that the *onus* of the proof rested with the principal Defendant, who alleged herself to represent the real Purchaser; and that the Court below had not disposed of that point.

The hearing of that appeal took place on the 16th of July, 1868, before a Division Bench of the High Court, consisting of the Judges Bayley and Macpherson, when they reversed the Decree of the Principal Sudder Ameen, and remanded the suit, directing accounts to be taken between the Plaintiff, the Respondent, Lalla Buhoree Lall, as representing the Mortgagor, and the Appellant as representing the Mortgagee. The judgment of the Court, delivered by Mr. Justice Macpherson, stated that, as regarded the question of fact, they had arrived at the same conclusion as the Lower Court, that the Respondent, Lalla Buhoree Lall, was not the real Purchaser of the share at the sale, in execution of the Decree, but [501] that the purchase thereof was made by the late Brij Lall Opadhia in the Respondent, Lalla Buhoree Lall's name. It then stated, that the question of law was one of greater difficulty, and one that had never previously been decided; and after referring to a case under sect. 36 of Act, No. XI. of 1859, and remarking that that section was, in substance, similar to sect. 260 of Act, No. VIII. of 1859, the judgment proceeded:—"Section 36 of Act, No. XI. of 1859, provides, that 'any suit brought to oust the certified Purchaser, on the ground that the purchase was made on behalf of another person, not the certified Purchaser, shall be dismissed with costs.' A question similar in many respects to the one now before us arose under that section, some time ago, before Mr. Justice Seton Karr and myself. The main difference in the position of the parties is, that in that case the certified Purchaser had, in the first instance, got possession, and was subsequently ousted by the Defendants, who pleaded that they were the real Purchasers, though the name of the certified Purchaser had been used. We decided (so far as this point was concerned) in favour of the certified Purchaser, being of opinion, that 'the fact that the Plaintiff is, by reason of what has occurred, obliged to come into Court to recover possession, does not, as it seems to us, alter the position of the parties so as in any way to deprive the Plaintiff of any benefit which he might have had under section 36, if this suit had been brought against him as Defendant to oust him, the certified Purchaser, on the ground that the purchase was made on behalf of another person, not the certified Purchaser.' *Jadub Ram Deb v. Ram Lochun Muduck* (5 W.R., 56). [502] The opinion thus expressed by us appears to me still to be right, and if it is, it is applicable equally to the present case, making every allowance for the difference existing in the circumstances under which the parties respectively appear in Court. It seems to me, that the object of the section 260, which, as has been decided, is to prevent disputes between a

certified Purchaser and a person claiming that the certified Purchaser purchased benamiee for him, would be defeated if the Defendant could make use of these facts by way of defence, which she could not make use of in order to prove her case, if she came before the Court as Plaintiff. In the view of the law which I take, it is clear, that the Plaintiffs, as the Purchasers of the equity of redemption, which was in Motee Soondery Dasse, are entitled to redeem the zur-i-peshgee mortgage and to recover possession, if it appears, upon taking the accounts, that the whole mortgage debt has been liquidated. With his declaration, we remand the case to the Lower Court to take the accounts. If, upon taking the accounts, a balance still appears to be due to the Defendants, the representatives of the Mortgagee, the Plaintiffs, will be entitled to possession, if they deposit the money in Court within one month from the date on which such balance is declared by the Lower Court. The costs of this appeal and those incurred in the Lower Court, heretofore, will depend upon the result of the remand. The Plaintiffs, however, will not in any event recover costs, unless, upon taking the accounts, it appears that the mortgage debt had been paid in full before the present suit was instituted" (see case 10, W.R. Civil Rulings, 168).

[503] The Appellant applied for a review of judgment, on the following grounds:—First, that the interpretation put by the High Court on sect. 260, of Act, No. VIII. of 1859, was erroneous, that section applying only to a suit of a Plaintiff, brought against the certified Purchaser, on the ground that the purchase was made benamiee for the Plaintiff. Second, and that section 260 did not preclude the Defendant from opposing the Plaintiff's claim on the ground, that he had no right to bring the action, he being a party having no beneficial interest whatever in the property; third, that the Plaintiff was bound to prove that he had a beneficial interest in the subject matter of the suit, and that the High Court in concurrence with the Lower Court, found that the Plaintiff was but a Benameedar for the Defendant; fourth, that the unreported decision of the Court, dated 19th August, 1864, was in favour of the Defendants' contention; and if the Court doubted the correctness of that ruling, as also of the other rulings quoted, the Court should have referred the case to a Full Bench; and lastly, that the Court ought not to have remanded the case to the Lower Court with the directions contained in its decretal Order, without disposing of the second and third issues raised in the Court below; and upon both of which issues the Principal Sudder Ameen found, that the suit of the Plaintiff could not be sustained.

The Justices Bayley and Macpherson made an Order on this petition referring the case to a Full Bench of the High Court, which Order, after referring to two former judgments of the 19th August, 1864, in special appeal, No. 231 of 1864, and of the 7th July, 1863, in regular appeal, No. 55 of 1862, [504] and stating that the same appeared to be in conflict with their judgment, sought to be reviewed, stated, as follows:—"The point referred to is this—A Purchaser of immovable property, sold in execution of a Decree, having obtained a certificate under sect. 259, of Act, No. VIII. of 1859, and having instituted, a suit to recover possession of the property purchased by ejecting the person who is in possession, is the latter (the Defendant in the suit) debarred, by the terms of sect. 260, from pleading, that although the Plaintiff is the certified Purchaser, he did not purchase in his own behalf, but merely on behalf of, and benamiee for, the Defendant, and is, therefore, not entitled to recover possession? If the Defendant is not barred we must grant a review of judgment. But if the Defendant is barred, the present application will be rejected by us."

The hearing of the case on review on the above point took place on the 9th of September, 1868, before the full Bench of the High Court, consisting of the Chief Justice, Sir Barnes Peacock, and the Justices, Bayley, Jackson, Macpherson, and Glover, when Mr. Justice Jackson differing from the other Judges of the Court, who were agreed, separate judgments were delivered by the Chief Justice (expressing the opinion of the majority) and by the dissentient Judge, Mr. Justice Jackson.

The judgment of the Chief Justice was in these terms:—"I am of opinion, that the Defendant is debarred by Act, No. VIII. of 1859 from setting up the defence mentioned in the question, unless the Defendant is in possession, under circumstances, which amounted to a transfer to him of the title which the Plaintiff derived from the purchase. I do not mean [505] to say, that he is debarred simply by sect. 260. He is, in my opinion, debarred by the general provisions of the Act, of which the provi-

sions of sect. 260 must be looked at, in arriving at a just conclusion as to what were the real intentions of the Legislature. Section 259 of Act, No VIII. of 1859, declares, that the certificate of purchase shall be deemed a valid transfer to the Purchaser of the right, title, and interest of the judgment-Debtor; the Act declares, that the Purchaser shall be put into possession of the property; and sections 261 and 266 inclusive, point out the mode in which possession is to be delivered. Section 260 enacts, that any suit brought against the certified Purchaser on the ground that, although the name of the Purchaser was used, the purchase was made on behalf of another person, shall be dismissed with costs. Sect. 260 seems to assume, that the certified Purchaser would have possession delivered to him, and provides that he is not to be turned out upon the ground that the purchase was benamée. It may be admitted, for the sake of argument, that the contention of the learned Advocate-General is correct, that there is no distinction in the Mofussil between legal and equitable estates. That, however, shows that, according to sect. 259, the certificate amounts to a valid transfer, both in law and in equity, of the right and interest of the judgment-Debtor to the person who is declared to be the Purchaser. It appears to me, that the object of section 260 was to prevent any inquiry between the Purchaser *de facto* and any person on whose behalf he is alleged to have purchased, as to whether, the purchase was made benamée or not. This is consistent with the case, *Mussamat Shorooty v. Gopeesoondery Dassie*, Marshall's Ben. App. Cases, p. 423, and with the cases of *Mussamat Chunder-[506]-monce Dabee v. Watson*, in the Sud. Dec. for 1858, p. 1733, and of *Mahomed Hafiz v. Moulree Abdool Alee*, Sud. Dec. for 1859, p. 287. With reference to the argument, that the Court would be assisting in carrying out a fraud if, in the case put by the question, it should refuse to admit the plea of the person in possession, I apprehend it is clear, that the Court which executed the Decree could not, at the instance of the real Purchaser, have refused to put the Benameedar into possession, under the provisions of sections 261 to 266, and that the real Purchaser could not have recovered that possession from him. If so, I see no greater objection to the Court putting him into possession under an execution in opposition to the wish of the real Purchaser. In many cases, as, for instance, under sections 264 and 265, the possession given to the certified Purchaser under an execution is not actual, but merely symbolical. In such cases, it may become necessary for the certified Purchaser to convert the symbolical possession into actual possession, by means of a suit. If the judgment-Debtor should, under an execution against himself, purchase, in the name of a third person, an estate belonging to himself in the possession of Ryots, the Court executing the Decree would, according to sect. 264, be bound to put the certified Purchaser into possession, by fixing a copy of the certificate of sale in some conspicuous place on the land, and proclaiming to the Ryots that the right, title and interest of the judgment-Debtor had been transferred to the certified Purchaser. In such a case, if the judgment-Debtor should induce the Ryots to continue to pay their rents to him, instead of paying them to the certified Purchaser, the possession delivered to the certified Purchaser under sect. 264, [507] by the Court which executed the Decree, would be fruitless if the certified Purchaser could not recover the rents from the Ryots or from the judgment-Debtor; so if a judgment-Debtor should, under execution against himself, purchase, in the name of another person, a debt due to himself from a third person, the Court, under sect. 265, would be bound to deliver the debt to the certified Purchaser, by a written order prohibiting the judgment-Debtor from receiving the debt, and his Debtor from making payment thereof to him. If, after such delivery to the certified Purchaser, the judgment-Debtor should induce his Debtor to pay the debt to him, the delivery of the debt to the certified Purchaser, under sect. 265, would be useless to him, if he could not sue the judgment-Debtor, or his Debtor, for the debt so purchased. If we were to hold that he could not sue, we should be converting the section into a mere nullity, and the order that the Creditor should not receive the debt into a command to be disobeyed at pleasure. The Act of Limitation of suits enacts, that no act for recovery of immoveable property shall be maintained unless the same is instituted within the period of twelve years from the time when the cause of action arose. The Act not only bars the real Owner of his remedy, but it confers a title on the opposite party. So, in the present case, it appears to me, that sections 259 and 260 confer a title upon the certified Purchaser, which en-

titles him to maintain a suit against any one who unlawfully dispossesses him, and that a dispossession of the Benameedar by the person who purchased benamee in his name, and who is precluded by sect. 260 from maintaining a suit against him to recover the purchased property, would be an unlaw-[508]-ful dispossession. If a person who has gained a title by limitation waives that title in favour of the real Owner, and gives up possession to him as the rightful Owner, such act would probably be held to amount to a waiver of the right which he had gained by limitation, and to confer it upon the real Owner. In like manner, if a Benameedar should acknowledge the purchase to have been made benamee, and waive the right conferred upon him by sections 259 and 260, and give up possession to the real Purchaser as the rightful Owner, such act would probably amount to a transfer of the title as well as of the possession to the real Purchaser. In the case of *Gunga Gobind v. Gobind Narain*, which is printed in the paper Book, and was tried on the 7th July, 1863, before Mr. Justice Jackson and Mr. Justice Roberts, the suit was brought by the real Purchaser, not against the certified Purchaser, but against a person to whom the certified Purchaser had conveyed the property benamee for the real Purchaser. Gobind Narain, the Defendant, to whom the certified Purchaser had conveyed the estate, allowed the real Purchaser to remain in possession nearly twelve years, and subsequently turned him out. The case was, therefore, in effect, one simply between a person for whose benefit an estate had been conveyed to another benamee, who after many years' possession by the person for whom he held had wrongfully dispossessed him. In the case of *Koonj Beharree Lall v. Sheikh Khyrath Ali* and others, special appeals Nos. 231 and 232 of 1864, heard on the 19th August, 1864, before Justices Trevor and Glover, the Plaintiff sued to recover possession upon the ground, that the Defendants were Mortgagees, and that after the expiry of the mort-[509]-gage they had dispossessed the Plaintiff of the property covered by the mortgage and other property held by him khas. The Defendants set up, that they had purchased at sales for arrears of revenue in the name of the Plaintiff, and had been in possession since as Proprietors. The Court said, if the Defendants' allegation be true, the Plaintiff is out of Court, and they remanded the case for trial as to which of the allegations was true. It must be remarked, that the allegation of the Defendants was that they, ever since the purchase in the name of the Plaintiff, had been in possession as Proprietors. The Defendants' allegation was sufficient to enable them to prove, that notwithstanding the estate had been purchased in the name of the Plaintiff, he had waived his right and made over the property to the Defendants as Proprietors. The case, *Sheetanath Ghose v. Madhub Narain Roy*, special appeal, No. 2090 of 1864 (1 W.R., 329), before Justices Kemp and Glover, turned upon the ground, that the benamee purchase by the judgment-Debtor in the name of a third party was fraudulent as against the Creditors of the real Purchaser. The case was not one between the Benameedar and the actual Purchaser. In the case out of which the question arose, the purchase was of the right of Mortgagor to redeem. I purposely abstain from using the words 'equity of redemption.' The Purchaser could not under that purchase obtain anything more than the symbolical possession of the right which he purchased. The possession of the Mortgagee and of his representatives was merely the possession of the land and of the rents thereof, and of the right of the Mortgagor. The suit is, in effect, to enforce the right of the Mortgagor and to redeem the mortgage, and if the suit cannot be maintained [510] on the ground that the purchase was benamee for the Mortgagee, the provisions of sections 259, 260, and 264 would be nugatory. If the real Purchaser is for wise purposes precluded, as in my opinion he is, by section 260, from recovering the property purchased, from the Benameedar, if the latter is put into actual possession, there can be no reason why the law should allow the real Purchaser by some device to obtain actual possession and leave the certified Purchaser to content himself with the symbolical possession in cases in which any symbolical possession can be given, or, in other words, to leave him a mere shadow instead of the substance. The case is sent back to the Court which referred it."

Mr. Justice Jackson's judgment was in these terms:—"In this case I have the misfortune to differ from his Lordship, the Chief Justice, and from my other Colleagues; but I apprehend, that the doubts expressed by the two learned Judges who have referred this case to the full Bench, fully justify me in stating the opinion I have formed, if indeed the importance and the nature of the case did not make it

imperative on me to express the opinion I have formed, although I have the misfortune to be alone in holding that opinion." The learned Judge then stated the question as referred for the opinion of the full Bench, and proceeded: "This question, I may observe, in the form in which it is put, does not appear to me to raise the whole of the issues involved in the present case. It might be answered generally as if the Defendant in possession was not a Mortgagee in possession, but had got otherwise into possession. I will not, however, shrink from the true import of the question, and I will only [511] observe that, although it refers specially to sect. 260, of Act, No. VIII. of 1859, yet from the course the argument has taken, it has been contended on behalf of the Plaintiffs that the Defendant is out of Court, rather under the provisions of all the sections from 259 to 269, than under section 260 alone. I understand the Plaintiff, as the case has been put for him, to rely on the express title he has acquired under section 259, and the symbolical possession which he has obtained under the subsequent sections, rather than on the *quasi* penal terms of section 260. There has been some discussion as to the character of section 260, Mr. Allan contending, that it was of a remedial nature. I confess, if any rule of construction is to be resorted to other than that founded on the very words of the Legislature, I should be inclined to treat the section rather of a penal than a remedial nature, and, therefore, one not to be construed over-strictly against the Defendant. I understand that from the fusion of law and equity which characterises the proceedings in our Civil Courts, the proceedings possess such a character of elasticity as to enable them to deal with all the rights and equities which arise in a suit. I, therefore, apprehend that every circumstance, and every plea, must be fully considered in order to do justice, unless the cognizance of any particular plea, and any particular circumstances, is expressly barred by legislative enactment. I would ask, is there anything in the case set up by the Defendant, before us, which would prevent the Court entertaining it in answer to the Plaintiff's case? I may possibly be told in answer that there is an imputation of fraud arising from the mere mention of the word 'benamsee.' I humbly [512] think, that a fallacy lurks in the supposition, that fraud necessarily attaches to the use of that word. The conditions of society in this Country, and the habits and feelings of Natives here, are so different from those of the people of European Countries, that I think, we ought to guard ourselves against imputing motives of fraud to what we find prevalent here, simply because it is not usual or recognized among ourselves. My own belief is, that the benamsee system is not essentially one of fraud. I believe, that benamsee arrangements are constantly resorted to by persons perfectly honest, perfectly solvent, and far from every expectation of insolvency. No doubt serious frauds are frequently carried out by the use of the benamsee system. It may possibly be, that the Legislature, at some future time or other, finding that frauds are perpetrated under that system of a serious character, may absolutely forbid benamsee transactions; and when the Legislature have so directed, the Courts will be bound to act accordingly. Up to this time the Legislature have not attached the taint of fraud to benamsee transactions. I think that there is, *à priori*, nothing to hinder us from inquiring into and dealing with the case set up by the Defendant. Of course the question remains, whether that case can be supported under sections 259 to 269. It appears to me, on reading the whole of those sections together, that sect. 260 seems to be, and is, out of place. It is a portion of substantive law inserted among various provisions of pure procedure. I have no knowledge of the secret history of the framing of this Code, nor have I the means of ascertaining what took place in the Council Chamber when the Bill was in Committee; but looking to the near [513] neighbourhood of Acts, No. VIII. and XI. of 1859, in the Statute Book, and the circumstance, that the two Acts were at the same time under consideration, it may have occurred to some one concerned in the framing of the Code that it was very desirable to introduce this section in Act, No. VIII. from the Sale law, where it had stood for many years previously. I am confirmed in this view by the fact, that no such provision appears in the Code of Procedure prepared by Her Majesty's Commissioners. See their 1st Report (1856) CLXXXIX. Now, it appears to me, that the provision corresponding with this section in the Sale law, viz., sect. 36, of Act, No. XI. of 1859, is very much in its place. It was enacted for a reason which is very well known, and taken in combination with the other

provisions of the Sale law, it affords ample security to Purchasers. Under Act, No. XI. of 1859, the thing sold is the land, and by sect. 29 the Collector is directed to 'order delivery of possession of the estate or share purchased, to be made by removing any person who may refuse to vacate the same,' and following that, sect. 36 says:—'Any suit brought to oust the certified Purchaser as aforesaid on the ground that the purchase was made on behalf of another person, not the certified Purchaser, or on behalf partly of himself and partly of another person, though by agreement the name of the certified Purchaser was used, shall be dismissed with costs.' Therefore, the value of sect. 36, taken in connection with sect. 29, is apparent. The Purchaser buys the land and is put into actual possession by the Collector, and any suit to oust him on the ground of benamee, will be dismissed with costs. [514] Now, it appears to me, that there has been a not altogether successful attempt to engraft that provision of the Sale law upon Act, No. VIII. of 1859, because as the things sold under that Act are of many kinds and scarcely in a case actual land, but only the right, title, and interest of the Defendant, the words 'suit to oust the Purchaser' would be inappropriate, therefore, the words used are 'any suit brought against the certified Purchaser on the ground, that the purchase was made on behalf of another person not the certified Purchaser, though by agreement the name of the certified Purchaser was used, shall be dismissed with costs.' I have endeavoured in vain to bring myself to place on those words any construction more extended than those which they naturally bear, viz.:—that any person who may have entrusted or authorized another to buy property for him at an execution sale not using his own name but that of the person employed shall not succeed in a suit against the furzee, to recover possession of the thing purchased; but that his suit will be dismissed with costs, and, therefore, in any case to which that provision distinctly applies, it must be put in force without qualification of any kind, and such a suit must be dismissed, but except in a case of this kind, I would in reading the Code put the section altogether aside. It contains two lines which are superfluous except as introductory of the rule taken from the Sale law. They are 'the certificate shall state the name of the person who at the time of sale is declared to be the actual Purchaser.' These words have no signification whatever apart from the provisions which follow; because when, under sect. 259, the Court grants a certificate to the [515] person who may have been declared the Purchaser at the sale, to the effect, that he has purchased the right, title, and interest of the Defendant in the property sold, he has already done what is further directed in sect. 260, for he has necessarily stated the name of the person who is the actual Purchaser. But now the declared Purchaser becomes the certified Purchaser, and this is the term used in the Sale Act, sect. 36. If sect. 260 be put out of the way as referring only to the class of suits expressly mentioned therein—Is there anything in the other sections relied upon, viz., sect. 259, and sect. 261 to sect. 269, which will prevent the Defendant being heard in this case? I confess I do not see anything. It appears to me, that a benamee purchase in this Country when the facts are proved, simply means that a particular thing has been purchased by a certain person with his money and for his own benefit, but that the name of another has been used. There is nothing in the nature of a trust or any other idea but what I have stated. It seems to me that a benamee purchase might be effected in the name, neither of the actual Purchaser nor of the Agent, but in a fictitious name, and that on proof of the facts the actual Purchaser would be entitled to all the benefits of his purchase, and protected in it as much as if he had bought in his own name. Is there anything to prevent the possession given by the Court under sects. 261, to 267, which has been given ostensibly to the furzee, from being dealt with as a possession given to the real Purchaser in that name; and when we find that possession has gone to the alleged real Purchaser, and not to the furzee, I think this must be held to be the case, viz.:—that the real [516] Purchaser has got the possession though he has taken it in the name of furzee. In the present case, there is no doubt some complication; because the Defendant, who is alleged to be the real Purchaser, was in possession of the land as Mortgagee, and I am not certain what the state of the facts may be, but it was and possibly may now be uncertain, whether his possession, since the purchase, was that of Mortgagee or Purchaser; and that, perhaps, may be an issue to be tried. But I take it, if the Defendant can make out that the purchase was made by his directions for his benefit, with his money, and that he has since held without question proprietary possession, he will be entitled

to retain that possession, although in making out the certificate of purchase the name of the Plaintiff may have been used instead of the Defendant. I cannot shut my eyes to the fact, that if we hold otherwise in this suit and in other suits which may resemble this, we shall be giving the direct assistance of the law and of the Courts to enable a Plaintiff in such cases to perpetrate a shameful fraud. I take it to be quite clear, that it is proved in the opinion of all the Court in this case, that the purchase was effected with the money of the Defendant; that the Plaintiff was at that time his servant, and acting under his instructions; and that in strict equity, as between the Plaintiff and the Defendant, the Plaintiff had not a shadow of right to this property. I think, therefore, that the Defendant is not debarred, either by the terms of sect 260, or otherwise, from raising the defence which he has raised; that that defence is a just and sufficient one; and that Plaintiff's suit ought to be dismissed with costs" (see 3 Ben. Law Rep. Full Bench, 15).

[517] On the 12th of November, 1868, an Order was made by the two Judges who had referred the case to the full Bench (in accordance with the opinion of the majority of such Bench), by which they rejected the application of the Appellant for a review of their previous judgment; and on the same date a formal Decree of the High Court was drawn up, in accordance with such Order.

From this decree the present appeal was brought.

Mr. Leith, and Mr. W. C. Mazumdar, for the Appellant.—We submit, that the construction put by the Principal Sudder Ameen on section 260 of Act, No. VIII. of 1859, and by Mr. Justice Jackson, is the correct one. That Act, is a Code of procedure only, and not one of substantive law; consequently, that section ought to have been construed with reference to procedure only, and not, as the majority of the Judges of the High Court have done, to contravene and override well-established principles of law and equity recognized by the Courts in India. The fallacy which pervades the reasoning of the judgment of the Chief Justice, in construing sections 259, 260, and 264, of the Act, which directs a Purchaser to be put into possession, is this, that the Chief Justice entirely overlooked the important fact, that the Appellant was not only in *bona fide* legal possession, ostensibly as usufructory Mortgagee, but also virtually as Proprietor under his purchase benamée by the first Respondent, and could not have been dispossessed by summary process or execution under the above sections of the Act by the first Respondent, who to obtain possession, must have brought a suit and proved a preferable title to the Appellant. Section 260 [518] of the Act is in its nature a penal enactment, and must, therefore, be strictly construed, *Shah Mukhun Lall v. Baboo Sree Kishen Singh* (12 Moore's Ind. App. Cases, 188); but it is to be observed, that the Act, No. VIII. of 1859, only requires the Court to dismiss any suit "brought against" the certified Purchaser, which enactment cannot apply to the present suit, as here, the certified Purchaser sues. Neither in that section, nor in any other part of the Act, is it declared or enacted, that an agreement to purchase benamée in the name of another shall be considered *per se* illegal, or null and void. Nor has it been declared, that in any suit brought by a certified Purchaser, being only the benamée or nominal Purchaser (as the Respondent in this case has been held by the Courts below to be), against the actual Purchaser in *bona fide* legal possession, the Defendant shall be debarred from exercising his undoubted right, under general principles of law, equity, and good conscience, to set up and prove as a defence his title as the actual Purchaser. It is established by numerous decisions of the Courts in India, *Mussamat Shorosutty Dassie v. Gopeesoodary Dassie* (Marshall's Ben. App. Reps., 423); *Mirza Khyrut Ali v. Mirza Syafallah Khan* (8 W.R. 130); *Sheetanath Ghose v. Madhub Narain Roy* (1 W.R., 329); and *Judab Ram Deb v. Ramlochan Muduck* (5 W.R., 56); *Mussamat Chundermonee Dabee v. Watson* (Sud. Dec. 1858, p. 1733); *Mahomed Hafiz v. Moulvee Abdool Ali* (Sud. Dec. 1859, p. 287); *Amanee Tewarree v. Rai Rughoob Buns Suhai* (3 Ben. Sud. Dew. Reps. 363); and by this Tribunal in *Gopeekrist Gosain v. Gungapersaud Gosain* (6 Moore's Ind. App. Cases, 53), that a benamée [519] purchase is not *malum in se*, but on the contrary is customary and legal, and that the person actually paying the purchase money is to be considered and treated as the beneficial Owner of the property though purchased in the name of another.

Mr. Doyne, for the Respondents.—Assuming, that the finding of the Principal Sudder Ameen as to the purchase having been in fact a purchase for Brij Lall

Opadhia, is correct, as contended by the Appellant, yet the intention of the Legislature in framing the 259th and 260th sections of the Civil Procedure Code, which is framed upon and is similar to the 36th section of the Revenue Sale law Act, No. XI. of 1859, was to prevent the fraud and confusion which arose from the practice of purchasing benamie at sales, and as the enactments are positive, that a Purchaser cannot be sued as having purchased benamie, it is clear, that a certified Purchaser's title cannot be challenged on that ground, if he sues for possession. Mr. Justice Jackson was wrong in laying down in his judgment (*ante* [14 Moo. Ind. App.], p. 512), that the Legislature had not forbidden benamie purchases, so far at least as sales in execution of Decrees were concerned. He also was incorrect in holding that sect. 36, of Act, No. XI. of 1859, did not apply, *Jadub Ram Deb v. Ram Lochun Muduck* (5 W.R., 56). Section 259 of Act, No. VIII. of 1859, declares in express terms, that the certificate shall be taken and deemed to be a valid transfer of the Defendant, and, therefore, to admit evidence to show that such right and title did not in fact pass to the Purchaser, could set aside the certificate and letter and spirit of that section. As pointed out in the judgment of the Chief Justice, if [520] such evidence were admissible, effect could not be given to the express provisions of sections 261 and 263; inasmuch as the person really entitled would be as much justified in coming forward at an earlier stage, and pending the proceedings in execution to call on the Court to give possession to him, and not to the certified Purchaser on the Objector showing that he had in fact found the money for the purchase. Another point is, whether under sect. 264, the Ryots might refuse to pay the rents to the certified Purchaser, alleging that the payment ought to be to the benamie Purchaser. If such a construction was admitted, contrary to the letter and spirit of the Act, the certified Purchaser could not sue them for rent.

Their Lordships reserved judgment, which was now delivered by

The Right Hon. Sir Montague Smith (March 2, 1872).—The facts which raise the question for decision in this appeal may be very shortly stated.

Brij Lal Opadhia was Mortgagee in possession of Talook Doondhur. Whilst he was so in possession the interest of the Mortgagor was offered for sale under a Decree obtained against him by a Creditor. Lalla Buhooree Lal became the ostensible Purchaser at such sale, and the certificate of sale was granted to him in his own name as the Purchaser.

Brij Lal Opadhia remained in possession until his death, and after it this suit was brought by Lalla Buhooree Lal against his heir (the present Appellant) for the redemption of the Talook and possession of it; alleging that the mortgage debt had been paid off by the receipt of the profits, and, if not, that he was ready to pay what might remain due.

[521] The defence was that the purchase was made by Lalla Buhooree Lal, in his own name, as a benamie Purchaser for Brij Lal Opadhia, and with his money; and that the attempt by Lalla Buhooree Lal to set up title in himself was a fraud.

It has been decided by the Courts in India, that this defence is true in fact, and it was admitted that it must be so treated in dealing with the question to be decided in the present appeal, which is, whether, having reference to certain sections of the Code of Procedure, the defence can in law be made available.

The point upon the construction of the Code is one of considerable difficulty, and was felt to be so by the Courts in India. The Principal Sudder Ameen decided in favour of the principal Defendant (the Appellant). His decision was reversed by a Division Bench of the High Court. However, the same Division Bench, in consequence of the doubts they entertained, upon a second hearing, referred the point by a short memorandum to the full Bench, who gave judgment for the Respondents; Mr. Justice Jackson dissenting from the decision.

It must be observed at the outset, that the suit to be dealt with is one in which the Plaintiffs (the present Respondents) seek to establish a right against the principal Defendant (the Appellant), and that they invoke the aid of the Court to give effect against equity and good conscience to a claim founded upon fraud.

It must be conceded, that it is only by force of positive statutory law that it can be obligatory upon the Courts to give their active assistance in such a case to the fraudulent Plaintiffs against the defrauded Defendants. But it is said, that this obligation is found in the Code of Civil Procedure.

[522] It is well known, that benamie purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and, therefore, they must still be recognized, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course.

The enactments relied on by the Plaintiffs are found in a Code professing to deal, not with rights, but with remedies, and procedure to enforce rights.

The preamble states the object of the Code to be "to simplify the procedure of the Courts of Civil Judicature." It is right to bear this object in mind in construing the sections on which the Plaintiffs rely.

The only express enactment on the subject occurs in section 260. That section, after directing that the certificate shall state the name of the person who is declared at the sale to be the actual Purchaser, says this:—"And any suit brought against the certified Purchaser on the ground that the purchase was made on behalf of another person, not the certified Purchaser, though by agreement the name of the Purchaser was used, shall be dismissed with costs."

This enactment is clear and definite; there is nothing from which it can be inferred, that more is meant than is expressed. It is confined to a suit brought against the certified Purchaser, and to a specific direction as to what shall be done with that suit, viz.:—that it shall be dismissed with costs.

The present suit, which is the converse of that pointed at in the section, is not within the words or scope of it, and if dealt with in the manner directed, would, of course, come to a disastrous end.

[523] It has, however, been contended in support of the opinion of the majority of the Judges of the High Court, that there may be inferred from this section, taken in connection with section 259, and the sections relating to the manner of giving possession, a general intention, having for its object to prevent any inquiry between the Purchaser *de facto* and the person for whom he is alleged to have purchased, upon the question, whether the purchase was benamie or not, and that effect should be given to that general intention.

Their Lordships consider it would not be safe to make such an inference, except it arose upon very clear implication, and that it would be especially unsafe so to construe the Act as by inference to import into it prohibitory enactments, which would exclude an inquiry into the truth in any suit between the parties; when the express enactment is narrowed and confined to a specific direction as to what shall be done in a particular suit, which is described and defined in precise terms. And it appears to their Lordships, that effect can reasonably be given to the provisions of the Code without making such implication.

Section 259, requiring the Court to grant a certificate to the person declared to be the Purchaser of land at the Sale, and directing that such certificate shall be taken and deemed to be a valid transfer of the Debtor's right and interest, does no more than create statutory evidence of the transfer, in place of the old mode of transfer by Bill of sale. Their Lordships consider, that no inference fairly arises from this clause, that it was intended to interfere with benamie transaction: for the language is adopted to meet [524] the case of ordinary Purchasers, and the same language might well have been used if benamie transactions had been wholly unknown.

The same observations apply to sections 261 to 266, which prescribe modes of giving possession of the various kinds of property. These provisions would naturally find a place in the Act in order to govern ordinary purchases, and no inference can, therefore, be drawn from them of an intention to prohibit benamie transactions.

It is evident from this analysis of the sections of the Code, that the inference sought to be made against benamie transactions rests entirely on the 260th clause, and that, if this clause were absent from the Code, there is absolutely nothing in the other sections from which such an inference could be drawn.

It was strongly pressed upon their Lordships that as, by the express terms of the 260th section, a suit brought against a Purchaser on the ground, that the pur-

chase was benamtee must be dismissed, that it would, in many cases, lead to inconsistency, if that ground could be set up as a defence against a suit brought by a Benameedar.

If this really were so, it would result from the attempt to deal with the subject of benamtee in a partial manner; and even in that case their Lordships would consider it fitting that the Legislature should declare its view, and supply a remedy rather than that the Courts should strain the existing Act. But it will probably be found, that the suggested inconsistencies will not be great, and even if the Respondents' view were adopted, they would not be wholly avoided.

[525] The object which the framers of the Code probably had in view was, to prevent judgment-Debtors becoming secret Purchasers at the judicial sales of their property, and to empower the Court selling under a Decree to give effect to its own sale, without contention on the ground of benamtee purchase, by placing the ostensible Purchaser in possession of what it had sold, and of insuring respect to that possession by enacting that any suit brought against him on the ground of benamtee shall be dismissed.

In the cases where actual possession can be given of the things sold by the Court, no difficulty can arise; for there the certified Purchaser, having both the certificate and possession, can hold the property by virtue of clause 260, against any suit brought against him; and if that possession should be interfered with, either by force or fraud, on the part of any person, even a benamtee claimant, it no doubt ought, without inquiry as to the benamtee claim, to be restored.

It has been suggested, that difficulties may arise in the case of possession given, under sect. 264, of lands in the occupancy of Ryots to a certified Purchaser, who had bought benamtee for the judgment-Debtor, to whom the Ryots may have been afterwards induced to pay their rents. It was said that, upon the strict construction of the Code, the Purchaser might be precluded from suing the Ryots for these rents. It is not necessary to decide these questions, but their Lordships do not consider this to be a necessary consequence of the construction; for, as regards the Ryots, the certified Purchaser, when put into possession, becomes their Landlord, both by title and possession, and it may well be that [526] they should not be allowed to set up the benamtee right of another against the person to whom they had thus become tenants.

So, in the case where debts due to the judgment-Debtor have been sold and delivered to the certified Purchaser, the Debtors may well be prevented from setting up the benamtee title of a third person in actions brought by the holder of the certificate of sale, for they are by sect. 265 prohibited from paying to any one except the certified Purchaser, and they could not, therefore, set up title in another. Besides, when suing them, the certified Purchaser is only reducing into possession the very thing he purchased.

In fact, the instances would probably be very few where any difficulty would arise. It would occur only in cases like the present, where the certified Purchaser, who is really a Benameedar, having been put into complete possession by the Court of the thing purchased at the judicial sale, attempts to bring a new suit against the real Purchaser, not to complete the title, or even the possession to the thing purchased, but to enforce a right attaching to it. In this case, the Purchaser has full possession of the thing he bought, so far as the selling Court can give it, and it cannot be taken from him; but when he seeks, as Mortgagor, in a suit altogether new, to redeem against the Mortgagee in possession under his mortgage title, then the express enactment contains no words to restrain the defence set up.

But difficulties would also arise from giving a wide construction to the Code, beyond the ordinary meaning of the words. It was declared by the High Court, in conformity with former decisions, that where [527] the real Owner has been permitted to have or retain possession by the ostensible Purchaser, the latter cannot insist on his certified title to recover. Now, if the Code is to be read as wholly prohibitory of benamtee judicial purchases, thus rendering them illegal, the defence in such cases ought to be disallowed; for if allowed to be set up, then effect must necessarily be given to that which, upon the hypothesis, is prohibited and illegal. The mere permission to hold possession cannot alone give or transfer a title from

the Benamedar to the real Owner. The title must depend upon the purchase having been made benamée, and if that be unlawful, then it ought not to be allowed to prevail in the cases in which the High Court agree that it should do so.

The authorities, therefore, which have held that, in the cases just referred to, the real Owner may set up his benamée right against the Benamedar, necessarily involve the opinion, that the Code has not made benamée purchases unlawful; and if that is so, there seems to be no sufficient reason for giving the provisions of the Code, in cases like the present, a larger operation than the language imports.

The High Court, in their judgment in this case, approve of the above authorities, but they say they may be explained on the ground that the Benamedar has, by consenting to the possession of the real Owner, waived his right to the benefit given to him by the Code; but the Code had certainly not for its object the desire to confer a benefit on fraudulent Benamedars. Its provisions must have been framed on grounds of public policy, to which the doctrine of waiver is not properly applicable. That policy, if it [528] was meant to be carried to the extent of making such transactions unlawful, might have been so declared and enacted, but the Code stops short of such an enactment. Their Lordships consider, that where the Legislature has stopped, the Courts must stop.

It was said that the certified Purchaser in a case like the present, would have the shadow only, and not the substance of the thing he bought, but this is exactly what in equity and good conscience he ought to have, if no positive law intervened. The question is, whether such positive law does intervene in this case.

For the reasons given, their Lordships do not feel justified in adopting a construction beyond what the language of the Code imports, when such a construction would, in effect, be to declare that to be unlawful which the Code itself has not declared to be so; and they are consequently of opinion, that there is no bar to preclude the inquiry in this suit, into the real title.

Their Lordships find that a cross appeal to Her Majesty in Council against the decision of the Courts below on the question of fact is pending. Without prejudice to such cross appeal, and to any Order to be made thereon, in case the same should be prosecuted, their Lordships will humbly advise Her Majesty to allow this appeal, to reverse the Decrees appealed from, and in lieu thereof, to order that the appeal to the High Court from the Decree of the Principal Sudder Ameen be dismissed with costs. The Appellant will have the costs of this appeal.

[529] SARODA PROSAUD MULLICK,—*Appellant*; LUCHMEEPUT SING DOOGUR, DHUNPUT SING DOOGUR, and JODOONATH SANNYAL,—*Respondents* * [Jan. 26, 27, 1872].

On appeal from the High Court of Judicature at Fort William in Bengal.

Exposition of the principles and practice provided by the Code of Civil Procedure, Act, No. VIII. of 1859, in the execution of Decrees by attachment and sale of property within, as well as without, the jurisdiction of the Court by which the Decree is passed.

Decree against A. in the Zillah Court of E. B. In consequence of the property of A. in that Zillah not realizing on sale the amount of the Decree, the Judge sent a certificate to the Judges of three other Zillah Courts M., H., and D., in which other property of A. was situate, which had been attached. The proceeds of sale of the property in Zillah H. were also insufficient, and in Zillah D. the property of A. was sold to the Manager of the Decree-holder, a Lunatic, who was ordered to find security for the proceeds of the sale before possession. Pending the completion of the security, another Decree-holder against A. obtained an attachment of A.'s property in Zillah D., and sold the property

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier. Assessor,—The Right Hon. Sir Lawrence Peel.

of A. brought for the first Decree-holder, and the Court awarded possession to the second Purchaser. In a suit on behalf of the first Decree-holder for possession under the first sale, Held,

First, that under the provisions of sects. 248 to 272 in the case of immovable property, the process of attachment and the Order for sale may be distinct and separate, and there may be a complete execution of a Decree under an attachment without any Order of sale.

Secondly, that there was no irregularity in the Judge of Zillah E. B. transmitting the record to three several Zillah Courts at the same time for execution, as the first process of execution, namely, by attachment, could effectually stay the execution sales in D. and H. until the result of the sale in M. was known;

Thirdly, that under the 286th sect. of Act, No. VIII. of 1859, the transmission of the record for execution by the Judge of Zillah E. B. could, in the discretion of the Judge, be sent to the Courts M., H., and D. concurrently for execution; and

Fourthly, that the delay in lodging the security did not vitiate the sale.

This appeal was brought from a Decree of a Division Bench of the High Court, which reversed the Decree of the Principal Sudder Ameen of Dinagepore, and dismissed the suit which had been [530] instituted by Mooktakashee Dabee, the then Manager of the estate of Sreenath Sannyal, a Lunatic, now represented by the Appellant as Manager.

Mooktakashee Dabee, the Wife of the Lunatic, and the Respondents were Purchasers at sales in execution of their respective Decrees of the right, title, and interest of the Respondent, Jodoonath Sannyal, in the lands situate in Zillah Dinagepore, which were the subject of the suit. The purchase of Mooktakashee Dabee by priority of date was not disputed, and the question which arose in the suit was, whether that purchase was a nullity under the provisions of the Civil Procedure Code Act, No. VIII. of 1859, sects. 235, 240, 256, 284, 285, 286, 287, and 288 (these sections are referred to in their Lordships' judgment, *post* [14 Moo. Ind. App.] pp. 538-40). The Principal Sudder Ameen (Mr. S. Wright) held that the sale was valid. On appeal to the High Court, a Division Bench composed of the Justices Kemp and Jackson at the first hearing held such sale to be a nullity, but afterwards, on review, the Judges differed in opinion, Mr. Justice Jackson being of opinion, that the Appellant's purchase was a valid purchase, and Mr. Justice Kemp, the Senior Judge, adhering to his former opinion that the sale was a nullity. A Decree was drawn up according to the opinion of the [531] Senior Judge, from which Decree the present appeal was preferred.

The facts, so far as is necessary to state them, were these:—

In the year 1862, Mooktakashee Dabee, the Wife and Manager of the Lunatic, with the Respondents, Jodoonath Sannyal and another, obtained Decrees in the Court of the Principal Sudder Ameen of East Burdwan for a share in certain zemindaries, and a sum of money exceeding two lacs of Rupees. When she sought to execute this Decree, a question was raised under the terms of the Decree as to her right to do so without being appointed Trustee by the Court and giving security. She accordingly applied to the Court which passed the Decree, and tendered security sufficient to cover the value of the lands decreed to her as Manager of her Husband, and stated her intention of tendering further security to cover the sum that might be realized by the execution sale of the properties of the judgment-Debtor, and prayed to be declared Trustee of the lands and to have possession. The Court appointed her Trustee, and directed her to give security for the money that would be realized by the sale of the properties of the Debtor. Execution was accordingly issued, and Mooktakashee Dabee from time to time, sold, under the Decree, properties of the Judgment-holder within the jurisdiction of the East Burdwan Court, and became Purchaser at the sales, setting off the purchase-money and giving security prior to taking possession. Having exhausted the effects of the Debtor in Zillah East Burdwan, she applied in March, 1864, to the Court of the Principal Sudder Ameen of [532] East Burdwan, for a certificate under the 284th and 285th sections of the Civil Procedure Act, for an attachment of the properties of the Debtor in Zillah, Moorshedabad, with a view to prevent alienations of other

properties in Zillahs, Hooghly and Dinagepore. The Principal Sudder Ameen of East Burdwan, after inquiring into the securities previously given, granted the certificate required by section 285, which was to the effect that, after realization of the amount of Rs. 2690, there remained an unsatisfied balance of Rs. 2,33,152, and ordered that a copy of the Decree and certificate of the Court, with specifications of the properties in Zillahs, Moorshedabad, Hooghly, and Dinagepore, should be sent to the Judges of each of those Districts, directing the Judge of Moorshedabad to proceed to attachment and sale of the properties within his jurisdiction, and the Judges of Hooghly and Dinagepore to attach the specified properties within their respective jurisdiction under section 235. The reason for not directing the sales immediately upon the attachment in the latter Districts, appeared to be that the Principal Sudder Ameen of East Burdwan desired first to see what would be the result of the sales in Moorshedabad before proceeding to sell the other properties of the Debtor. The proceeds of the sale of the Moorshedabad property was small. In consequence, Mooktakashee Dabee applied again to the East Burdwan Court, for the purpose of having the Decree sent to the Dinagepore Court, and completing the execution proceedings, and a certificate for sale having been sent, she became a Purchaser under such sale. It further appeared, that the balance [533] of the security required from her fell short of this last purchase. The Respondents then applied to have the property in Zillah Dinagepore sold in execution of a Decree they had obtained against the same Debtor, Jodoonath Sannyal; the same having been attached by them in August, 1865, and in January, 1866, the right, title, and interest of Jodoonath Sannyal in the last-mentioned Zillah, was sold to the Respondent and Mooktakashee Dabee, and notwithstanding the opposition of the Respondents they were put in possession. Mooktakashee Dabee then, as before stated, brought the present suit against the Respondents for possession, which was confined to the property and proceedings in the Dinagepore Zillah Court.

The Appellant was, after the institution of the present appeal, substituted, as Manager of the Lunatic estate, for Mooktakashee Dabee.

Mr. Cowie, and Mr. Doyne, for the Appellant.—There was a sufficient compliance with the provisions of sect. 285, and the other sections of the Act, No. VIII. of 1859, relating to the execution of Decrees out of the jurisdiction of the Court by which it was passed. It is nowhere provided in that Act, that an application for attachment in a case like the present should be made direct by the Decree-holder to the Court which is to execute the Decree, and it is a reasonable construction of the Act that such direction should proceed from the Court which transmits the copy of the Decree to a Court in another Zillah where the Debtor's property lies, for execution. Even if such were the intention of the Act, such an irregularity would not vitiate the sale. Sect. 256. The property sold does not pass by the certificate of sale alone. [534] Sections 257 and 259 of the Act show that the sale is absolute before the grant of the certificate, and that the certificate is but evidence of the sale of the interest of the judgment-Debtor.

Sir R. Palmer, Q.C., and Mr. Leith, for the Respondents.—The *onus* was on the Plaintiff, and she failed to prove her right as Purchaser to the lands in suit, as by reason of her personal default in giving security, and consequent failure to obtain the statutory certificate by way of conveyance, which, by sect. 259 of Act, No. VIII. of 1859, is a valid transfer of the right, title, and interest of the judgment-Debtor, while the title of the Respondents, who are in possession, was established by the statutory certificate conveying to them the lands, as the proceedings under which the sale in execution of the Plaintiff's Decree took place, at which she became the Purchaser of the lands, were invalid from natural vice and the sale null and void. The Attachment of the Debtor's lands in Dinagepore, at most, was only by way of injunction or sequestration. Attachment of property by a Court other than that which passed the Decree, vitiates the sale, *Shurutoollah Merdha v. Gooroo Churn Dass* (8 W.R. Civil Rulings, 310). No copy of the Decree in which the certificate issued was sent by the Judge of East Burdwan to the Judge of Dinagepore.

The consideration of their Lordships' judgment was reserved and now delivered by

The Right Hon. Sir Montague Smith (Feb. 3, 1872).—In this case Mooktakashee

Dabee, the Manager of the estate of her Husband—a Lunatic—(of which [535] the Appellant is now Manager) obtained a Decree in the Zillah Court of East Burdwan against Jodoonath Sannyal, for upwards of two lacs of rupees.

A small sum only having been realized in that Zillah, proceedings were taken to obtain execution of the Decree on properties of the Defendant, Jodoonath Sannyal, within the jurisdiction of the Zillah Courts of Moorshedabad, Hooghly, and Dinagore. It is with reference to what was done in Dinagore that the questions arise.

In March, 1864, a certificate and other papers were sent by the Judge of East Burdwan to the Judge of Dinagore, the terms of which will be hereafter adverted to. Some time afterwards, but the precise date is not given, the Judge of Dinagore attached the lands of the Defendant in his Zillah, which form the subject of the suit. On the 24th of June, 1865, another certificate was sent from the Judge of Burdwan, and on the 4th of September the lands of the Defendant were sold under the Decree to Mooktakashee Dabee, the Decree-holder, and by an Order of the Judge of Dinagore, of the 4th of December, 1865, the sale was confirmed and a writ of possession directed.

It appears that the Judge of Dinagore in pursuance of the Order of the Judge of Burdwan, required Mooktakashee Dabee to give security for the proceeds of the sale before he would allow actual possession to be given to her. Several months elapsed before she found security, and meanwhile the present Defendants, by Orders of the Zillah Judge of Dinagore, obtained attachment and sale of the same lands under a judgment obtained by them against the same Debtor, Jodoonath Sannyal; and on the 6th [536] January, 1866, the lands were sold in execution of their Decree, and purchased by themselves, and possession afterwards given to them.

Mooktakashee Dabee then brought this suit against the present Defendants (the Respondents), asserting her title under the first judgment sale. It is conceded that her title must prevail, unless the sale under her execution can be invalidated.

The ground on which the Zillah Judge directed the giving of possession under the second sale to the Respondents was, that Mooktakashee Dabee having failed to give security, the sale to her became null. It is plain that this ground is utterly untenable. The security was ordered for the protection of the Lunatic Plaintiff against misappropriation by his Manager. It was not a proceeding affecting the judgment-Debtor, and was entirely collateral to the course of the suit between the judgment-Creditor and judgment-Debtor. The omission to give this security could not in any way affect the title which had vested in the Plaintiff by the previous sale. This decision of the Zillah Judge had the effect of causing the omission by the Lunatic's Manager to do an act intended to secure the fruits of his judgment to him, to operate so as to deprive him altogether of them, and hand them over to the second judgment-Creditor. It is much to be lamented that such a misconception should have taken place.

Their Lordships also consider, that the Zillah Judge was in error in granting the Order for the second sale under the Respondent's attachment, and confirming the purchase by him, when the sale of the same lands had already taken place under Mooktakashee Dabee's attachment, and the purchase [537] by her under that sale had been confirmed and had not been set aside. Their Lordships cannot find that this course was in accordance with the Code of Procedure. The title had vested in Mooktakashee Dabee by the sale under her attachment, and until it was set aside there was nothing upon which the second sale could operate. This course inevitably created a conflict between the two Decree-holders who became Purchasers at the judicial sales, under their respective attachments, and led to the erroneous Order of the 19th of June, 1866, which ordered the possession to be given to the Respondent. Such a course also is in any case clearly contrary to the interests of Debtors as well as Creditors, as it is obvious that when property is offered at a second sale, with the cloud cast on the title by the subsisting first sale, it would be likely to go for an inadequate price.

In the present appeal, however, it was contended at their Lordships' Bar, by Sir Roundel Palmer, that the proceedings in the Court of Dinagore, which resulted in the sale to the Plaintiff, were without jurisdiction, and that the sale under them was invalid on the ground of a "radical vice" in the proceedings when the matter

was first transmitted by the East Burdwan Judge to Dinagopore in this:—that the lands of the judgment-Debtor were ordered to be attached, not as the first step in an execution which might terminate in a sale, but by way of sequestration or injunction only, and, therefore, that the proceedings were not an execution or a step in it within the meaning of the Civil Procedure Code.

It is plain, however, on reference to the Code, [538] that property may be attached without view to immediate sale. The group of clauses, sections 232 to 245, under the heading "Of the execution of Decrees for money by attachment of property," prescribe the manner of attaching the various kinds of property and dealings with them when attached. Section 243 shows how debts and immovable property are dealt with, and provides modes of satisfying the Decree by them, without sale. Another group of sections, 248 to 272, headed "Of sales in execution of Decrees," provide the procedure in case it becomes necessary to sell.

It is obvious from these sections that, in the case of lands, the process of attachment and the order for sale may be distinct and separate, and that there may be a complete execution of a Decree under an attachment without any order for sale.

Then procedure is provided for the execution of Decrees out of the jurisdiction of the Court in which they are made. Section 284 and following clauses empower the Judge on application unless there be any sufficient reason to the contrary, to transmit a copy of the Decree with a certificate that satisfaction of it has not been obtained in his jurisdiction, and a copy of any Order for execution of such Decree that may have been passed, "to any Court to which the applicant may wish the Decree to be executed." The Court to which they are sent is to file them, and section 287 enacts, that the copy of any Decree, or of any Order of execution, when filed in the Court to which it has been transmitted for execution, shall for such purpose have the same effect as a Decree or order for execution made by such Court.

The certificate or Order of the Judge of Burdwan [539] of the 19th of March, 1864, sent to the Judge of Dinagopore, contains, in substance, a recital or statement of the Decree of the East Burdwan Court, the amount recovered by execution, the balance due, and that the Decree-holder had given a list of properties in Zillahs, Moorshedabad, Hooghly, and Dinagopore, and then declares that "a certificate, etc., are sent" to Moorshedabad, under sections 284 and 285, requesting that properties in that District may be attached and brought to sale, and that certificates, etc., be sent, under section 235, for attachment, with a view to prevent alienations of properties, in Zillahs, Hooghly and Dinagopore. It ends thus, "afterwards, when proceedings for attachment and sale of the properties in Zillah Moorshedabad shall have been completed, the proper order will be passed on the Decree-holder's application."

The objection was, in effect, that this Order treated the attachment directed to be made in Dinagopore as an injunction or sequestration only. Their Lordships, however, think that this was not so, but that it was meant that the attachment should be a proceeding in execution of the Decree. The proceeding was, on the face of it, declared to be a direction to attach under section 235; and that section only authorizes the attachment as a step in execution. No doubt, every attachment involves an injunction, which is indeed one of its necessary effects. But when an act of a Court can be so construed as to have an operation consistently with law, it would be contrary to ordinary rules of construction to attach to it another signification which would altogether destroy its effect. Their Lordships, therefore, consider that what the Court intended to do was to [540] transmit the proceedings to the three Zillahs for execution, with a direction that the first process of execution, viz., by attachment, should take place in all, but that further proceedings under the attachments should not be taken in Hooghly and Dinagopore until the result of the completed execution in Moorshedabad was known.

It has been already pointed out that the procedure of the Code contemplates, in the case of lands, the issuing of separate Orders, subsequent to the attachment, for the sale or other disposition of them.

A more important point involved in the case is whether the transmission could be made to the three Zillah Courts concurrently, for the purpose of execution. On consideration of the Code their Lordships can find nothing to prevent this being done. On the contrary, the procedure is well adapted to allow of it, and of its

being done most beneficially for the Creditor, and without injustice to the Debtor. If it were not so, the Debtor might be able to get rid of his property before it could be attached. On the other hand, there is provision for the protection of the Debtor, for the issuing of the execution in more Zillahs than one is made subject to the control of the Judge, who may refuse to do so, where "he saw there was any sufficient reason to the contrary" (section 286). Again, after the attachments have been granted, if there should be any grounds of complaint, the Debtor and any parties interested may apply, under the provisions of the Code, to remove or stay proceedings under them.

It would, no doubt, in many cases, be a right exercise of the discretion of the Court not to act on the power, and to refuse to send a Decree for con-[541]-current execution into several places; and when it did act on it, it would be, in many cases, proper to impose terms on Decree-holders, that they should not proceed to sale under all the attachments at once.

This is really what is meant to be done here, although it was not done in a very good and satisfactory form.

The case is thus reduced to the objection, that a copy of the Decree was not transmitted to Dinagepore.

The High Court rest their first judgment on the ground that no copy of the Decree or of the certificate, that satisfaction had not been obtained, was sent. The latter document clearly was sent. In the judgment on review, Mr. Justice Jackson came to the conclusion that both were transmitted. Mr. Justice Kemp alone retained his former view.

Assuming that if no copy of the Decree was sent, the attachment made at Dinagepore would be without valid authority, which their Lordships do not find it necessary to determine, it lies on the Defendant to prove that it was not transmitted. The Judge at Dinagepore acted on the certificate by attaching the lands, and afterwards sold under that attachment. The maxim, therefore, *omnia presumuntur rite esse acta*, must prevail until the contrary is shown. It certainly is not shown by the document of the 19th of March, 1864, for it is there stated that "Certificates, etc." were sent; nor by the Memorandum of the attachment which refers to the rookabaree "and other papers" having arrived. On the contrary, it may be presumed from them that all necessary documents were transmitted. It is said, that it must be inferred from the Order which preceded the document of [542] the 19th of March, that it was not intended to send the copy of the Decree to Dinagepore. This, perhaps, may be inferred from that document taken alone, but it would not be safe to act on such an inference to annul the attachment and sale, especially when it is consistent with the language of the subsequent documents, that the copy was sent with the other papers on the 19th of March; or, at all events, before the attachment was made.

On the whole, their Lordships consider, that the appeal should be allowed; and will humbly advise Her Majesty that the Decree of the High Court should be reversed, that the Decree of the Principal Sudder Ameen should be executed, and that the Appellant should have the costs of the litigation in India and of this appeal.

[543] ANUND LOLL DOSS,—Appellant; JULLODHUR SHAW and Another,—
Respondents * [Jan. 31, 1872].

On appeal from the High Court of Judicature at Fort William, in Bengal.

A., a Mortgagee, obtained under Act, No. VIII. of 1859, an attachment against his Debtor's real estate. Before removal of the attachment or sale by A., the Debtor made a *bona fide* sale, for value, of the estate so attached, and out

* Present: Members of the Judicial Committee,—The Right Hon. Sir James William Colville, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier. Assessor,—The Right Hon. Sir Lawrence Peel.

of the proceeds satisfied A.'s judgment-debt. B., another Judgment creditor, also obtained an attachment against the same estate, which was subsisting at the time of the sale by the Debtor, and sold the estate, treating the former sale as null and void:—Held, that the first sale made was valid under sect. 240 of the Act, No. VIII. of 1859, as against the first attaching Judgment creditor, and not affected by the subsequent attachment and sale thereunder by B.

In this appeal the question was confined to the construction of sections 235, 240, and 271 of the Act, No. VIII. of 1859 (see, for these sections, judgment, *post* [14 Moo. Ind. App.], p. 549); the point at issue being, whether a sale admitted to be *bona fide* by a Debtor after attachment, with the consent of the Creditor and payment by the Debtor out of the proceeds of the sale to such Creditor was null and void under the section 240 as against a Purchaser under a judicial sale of the same property by a subsequent attaching Creditor.

The suit was brought by the Appellant against Radhamohun Shaw, deceased, and another, re-[544]-presented by the Respondents, seeking a declaration of his right to, and a decree for possession of, certain premises, situate in Shobabazar Street, in the Town of Calcutta.

By the plaint he claimed title to the premises as Purchaser of the right, title, and interest of one Russick Chunder Soor, at a Sheriff's sale, dated the 21st of February, 1867, under an attachment, dated the 22nd November, 1866, issued by one Nety Chunder Paul, and he sought a declaration, that a conveyance of the premises which had been executed in favour of the Defendants, on the 19th of November, 1866, by Russick Chunder Soor, was null and void, under sect. 240 of Act, No. VIII. of 1859, on the ground of the subsistence, at that date, of a prior attachment of the same premises, and which he contended ought to be considered as still in force, and in the plaint suggested a want of *bona fides* on the part of the Defendants, in regard to their conveyance, and the sale on which the same was founded.

The Judge of the High Court, Mr. Justice Norman, sitting in its ordinary original civil jurisdiction, decided the case in favour of the Defendants, and dismissed the suit with costs. In his judgment he observed, that the suit was a speculative one, and that the Plaintiff had come into Court on a technical ground, contending that while two attachments, one of the 29th September, and the other of the 19th November, 1866, were still in force, Russick Chunder Soor, the judgment-Debtor, had sold his land to the Defendants, and that such alienation was void under section 240 of Act, No. VIII. of 1859; and the Judge further observed that, in his original statement, the Plaintiff had never suggested that the [545] Defendants' purchase was not honest and *bona fide*. The Judge then proceeded to consider the point of law raised by the Plaintiff under that section: that although the sale took place on the 19th November, and a mortgage debt, and the then subsisting attachments had all been paid off out of the purchase-money, the Plaintiff had a right to contend, that the sale was null and void. This point of law, after a full consideration, the Judge decided in favour of the Defendants.

The question respecting the validity of the sale, submitted for the consideration of the High Court, on the Plaintiff's appeal from that judgment was, whether a private *bona fide* alienation for value of property attached in the manner pointed out by section 240, of Act, No. VIII. of 1859, was by virtue of that section null and void as against all the world, or only as against the attaching Creditor, or other person or persons who might acquire rights under or through such attachment, or to what other limited extent?

This point was argued before a full Bench, consisting of the Chief Justice, Sir Barnes Peacock, and the Justices Jackson, Macpherson, Markby, and Mitter. Mr. Justice Markby was of opinion, that the alienation was under the 240th section *per se* null and void, but the majority of the Court, the Chief Justice and the three other of the puisne Judges, decided that a private *bona fide* alienation of property, attached in execution of a Decree, was null and void only, as against the attaching Creditor, and those who claim through or by him; but not as against any other person who had attached the property.

The Chief Justice, delivering the judgment of the [546] Divisional Bench, stated

that the sale to the Defendants was completed on the 19th of November, 1866, and the conveyance then executed, and that the balance of the purchase-money (the whole amount of which was Rs. 15,312:8) was then paid, and that out of the purchase-money, and before the subsequent attachment was put in by Nety Chunder Paul, the two former execution or attaching Creditors had been paid the full amount of their Decrees under which attachments had issued. He then adverted to the before-mentioned mortgage, observing that it was proved that Russick Chunder Soor, on the 10th of March, 1866, had mortgaged the premises to Parbutty Chunder Soor, a near relative of his, for the sum of Rs. 7000 and interest, and that although it was contended in the course of argument the same was fictitious and fraudulent, yet that the point had not been raised on the pleadings, or by the issues, and so was not required to be determined, and the learned Judge proceeded in these terms:—"The Plaintiff originally rested his case upon the single ground that the sale to the Defendants was void under sect. 240 of Act, No. VIII. of 1859, the sale having taken place before the first two attachments were withdrawn. He was afterwards allowed to file a further written statement, in which he charged that the sale and conveyance to the Defendants were collusive and fraudulent, and the first issue was raised, whether Defendants were *bona fide* Purchasers for value. The learned Judge of the Court below has found, that issue in favour of the Defendants, and in my opinion he came to a right conclusion upon that point." The Chief Justice further held, that the Plaintiff had merely purchased the rights and interest [547] of the judgment-Debtor, at the Sheriff's sale, and that the Mortgagee, if the mortgage was a valid one (which he found to be the fact), had a right and interest superior to that of such judgment-Debtor, and that as the mortgage had been paid off by and out of the purchase-money of the Defendants, the Mortgagee's interest vested, in equity, in the latter, and had been subsequently duly conveyed to them; and that, even if the mortgage had been, as contended by the Plaintiff, fraudulent, the Chief Justice also held, that the Defendants were *bona fide* Purchasers for value, without notice of such fraud, and were, therefore, entitled to hold the premises purchased, and concluded as follows:—"The main question, however, is, whether the Defendants' purchase was null and void under section 240, of Act, No. VIII. of 1859. That question has been determined by a full Bench, and upon that point alone the Defendants are entitled to a decree."

From this Decree the present appeal was brought.

Sir R. Palmer, Q.C., and Mr. Doyne, for the Appellant.—As an attachment continued at the time of the sale to the Respondents, the sale was, under the terms of the Act, No. VIII. of 1859, sect. 240, according to its natural and literal construction, null and void. To adopt the construction put upon that section by the majority of the Judges of the High Court, would be to depart from the policy of the Act, which was to take from a Debtor, pending an attachment of his property, all right of alienation. Any other construction would open a door to fraudulent and [548] collusive devices. Sections 270, 271, and 272 expressly provide for the Priorities of several attaching Creditors, showing that the occurrence of a number of attachments had not escaped the attention of the Legislature, when framing the Act, No. VIII. of 1859.

Mr. Field, Q.C., and Mr. Leith, appeared for the Respondents, but were not called on.

Their Lordships' judgment was pronounced by

The Right Hon. Sir Robert Collier.—The facts under which this question arises may be thus shortly stated. A. obtains an execution against his Debtor, in the form of an attachment against the Debtor's real property. The Debtor, with the consent of A., makes a private sale of the property, and out of the proceeds satisfies the debt, but no application is made to the Court for the confirmation of the sale or for the removal of the attachment, and the attachment still remains, at all events, formally, in force. Subsequently B., another Creditor, obtains an attachment upon another judgment. He proceeds to a judicial sale, treating the former sale as void; and the question is, whether the Purchaser under the second sale has a good title, and is entitled to say, that the prior sale was to all intents and purposes void as against him?

Their Lordships adopt the view taken by the late Mr. Justice Norman in the first instance, and by the majority of the High Court, including the Chief Justice, upon appeal. The question turns mainly upon the interpretation of two sections of Act, No. VIII. of 1859, under the head "Execution of decrees for money by attachment of property," and [549] in construing these sections it should be borne in mind that we are not dealing with provisions prescribing the mode of administering property amongst Creditors generally, but with provisions prescribing the rights of particular Creditors who have obtained judgments and executions.

Now, the sections alluded to, are in these terms: Section 235, "Where the property shall consist of lands, houses, or other immovable property, the attachment shall be made by a written Order, prohibiting the Defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise."

Section 240 enacts, "After any attachment shall have been made by actual seizure, or by written Order as aforesaid, and in case of an attachment by written Order after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise, and any payment of the debt or debts or dividends or shares to the Defendant during the continuance of the attachment shall be null and void."

The question is, whether those words, "any private alienation of the property attached, whether by sale, gift, or otherwise, shall be null and void," are to be taken in the widest possible sense as null and void against all the world, including even the Vendor, or to be taken in the comparatively limited sense attached to them by the Courts in India? Their Lordships adopt the language of the Chief Justice, who, in the judgment of the Court, expresses his opinion, that the object was to make the sale null and void, so far as it might be [550] necessary to secure the execution of the decree, relates only to alienation which would affect the Creditor who obtained the attachment. That appears to their Lordships to be the true meaning of the section. It could scarcely be held, in fact it was scarcely maintained in argument, that a sale made to a *bona fide* Purchaser by the Vendor could be set aside by the Vendor himself; the words must, therefore, necessarily be read with some limitation. It appears to their Lordships, that their construction must be limited in the manner indicated by the Chief Justice, on the ground, that they were intended for the protection of the Creditor who had obtained an execution, and not for the protection of all persons who at any future time might possibly obtain executions.

Reference has been made to section 271, which is to this effect: "If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of Decrees against the same Defendant and not obtained satisfaction thereof." This section only applies where there has been a judicial sale, and appears to their Lordships to have little or no bearing on the question in the present case, which is, whether or not under the circumstances a private sale was valid.

Their Lordships understand that the Courts in India have generally proceeded upon the view taken by the Chief Justice and the majority of the Court, and they would be unwilling to interfere with an established [551] course of practice unless they came to a very clear opinion that it was wrong.

Under these circumstances, their Lordships will humbly advise Her Majesty that the Decree of the High Court should be affirmed, and this appeal dismissed, with costs.

[See *Dinendronath Sannyal v. Ramcoomar Ghose*, 1881, L.R. 8 Ind. App. 75.]

THE GOVERNMENT OF BOMBAY.—*Appellant*: DESAI KULLIANRAI HAKOOMUTRAI,—*Respondent* * [March 12, 13, 14, 1872].

On appeal from the High Court of Judicature at Bombay.

An annual allowance for Palkhi Huk (Palanquin allowance) to the holder of the hereditary office of Desai of Broach, held under a Jaghire grant, charged by former native Governments on the land revenues of that Pergunnah, is incident to the tenure of Desai, and is not resumable by Government.

Such money allowance paid by Government out of the land revenue of a particular Pergunnah to successive Desais, for upwards of thirty years, does not create a prescriptive title, as such money payment is not "immoveable property" within the meaning of Bom. Reg. of 1827, sect. 1, cl. 1 [14 Moo. Ind. App. 563].

The action out of which this appeal arose was brought by the Respondent against the Government of Bombay in the District Court of Surat, to establish his claim as of hereditary right to an annual payment of Rs. 1274 for a Palkhi Huk (Palanquin allowance), which was discontinued by the Government on the death of his Father, the Desai Hakoomutrai, in [552] 1863, on the ground that it was originally granted as a matter of favour, for the lifetime of the first Grantee, and was, therefore, liable to resumption at the discretion of the Government.

The Respondent claimed the right to the Palkhi allowance as an ancient hereditary assignment of revenue, appurtenant to his office as hereditary Desai of Broach, as well as to an Enam village to which he had right under a perpetual and hereditary tenure, and which Palkhi allowance was originally granted to his ancestors as holding the hereditary public office of Desai of Broach, by the Government of the Country for the time being, and by them enjoyed in succession as of right from time immemorial; and which assignment and allowance had been confirmed and continued to them, as of right, by successive native Governments; and that the allowance had been inherited by them in lineal succession for at least four generations; from one Bhikharidas, the great Grandfather of the Respondent's Father, Hakoomutrai, down to and including his Father, upon whose death payment was withheld from the Respondent, his Son and heir, and hereditary Desai, in direct succession to him by the Government.

The Government, however, refused to make the above allowance to the Respondent, or to recognize his hereditary right thereto, first on the ground, that the assessment of revenue forming the allowance, was not made for Desaiship service; secondly, that the Palkhi right was not of the nature of an ordinary Enam grant; and, thirdly, that the same was granted to the original holder personally, as a personal grant liable to cease on his death, and that to allow [553] or not to allow the continuance of a grant or right of this kind depended upon the pleasure of the Government, who, they contended, could stop the same on the grounds of the receiver of the allowance not being worthy to receive the same, or on any other ground, without assigning any reason.

The Decree of the District Judge of Surat, Mr. C. G. against Kembal, dated the 12th of June, 1867, decided the title of the Respondent to the Palkhi allowance, as an hereditary right. The judgment stated, that the Plaintiff (the Respondent) was a Desai of Broach, and as such enjoyed undisturbed possession to the present day of a grant of the Enam village, as a Jaghire of that, and the same was added, expressly for the expenses of keeping up a Palanquin, the allowance in dispute; and the judgment then decided, that an allowance of this nature could not have been in its origin more than a personal or life grant; and upon this ground decided against the claim of the Plaintiff, and the District Judge concluded his judgment by deciding, that in his opinion, the Plaintiff had failed to establish that the Grant was hereditary prior to the accession of British rule, and that, as to what followed after the year

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1803, there was no evidence that the Bombay Government, either directly or by implication ever consented to regard it as such; but that, on the contrary, the correspondence of the Government at those early times showed without a doubt that this was one of the allowances which they intended uniformly to consider life grants, to be resumed at pleasure.

On appeal to the High Court of Bombay, a Division Bench, comprised of the Judges Tucker and Gibbs, reversed this judgment and decreed in [554] favour of the Respondent's hereditary title, declaring that he was entitled to the Palkhi allowance from the date of his Father's death, and decreed the arrears with interest.

Mr. Justice Tucker, in delivering judgment, after stating, that the District Judge appeared to have rejected the Respondent's claim on the sole ground of inferences derived from the Reports of eminent Indian Statesmen, said:—"I think that this was not a proper way of dealing with a claim like the present one. The opinions of Indian Statesmen so learned and distinguished as the late Lord Teignmouth and the Hon. Mount-stuart Elphinstone with respect to the practice and policy of the Mogul Emperors and of other native Sovereigns who ruled in Hindoostan prior to the establishment of the British Empire in India, though entitled to great respect, are of no judicial authority, and in a Court of Justice should not have been allowed to prevail against the positive evidence of facts, and the legal presumptions which may be deduced from these facts;" and after observing that the Reports quoted by the District Judge admitted the existence of many exceptions to the theory adopted by him, proceeded as follows:—"As might have been inferred *a priori*, the acts of despotic and arbitrary Governments with respect to such Grants were not uniform. To this fact the Records of this Court and the reports of the High Courts in each of the Presidencies, and of the Sudder Dewanny Adawlut, to which they succeeded, bear abundant testimony, and it has frequently been declared from this Bench, with respect to Jaghire and other analogous grants, that no general rule can be laid down regarding them, and that the rights of persons to whom [555] such Grants have been made, and of their heirs and representatives, must be determined in each particular case by the language of the Deed by which the Grant was conferred, or in the absence of any such Deed, by the surrounding circumstances," and he decided, that the Respondent was entitled to succeed as, first, in the absence of the original Deed of Conveyance or Grant the long enjoyment of Plaintiff's ancestors during four generations successively, and for a period of more than a century, created a legitimate presumption that the allowance was conferred on the original Grantee and his heirs; and secondly, because the uninterrupted enjoyment of Plaintiff's Grandfather and Father under the Order made by the Government of Bombay on the 7th of February, 1808, which extended from that date to the commencement of 1856, gave to the Plaintiff a statutory and indefeasible title; and he held, on these grounds that the Decree of the District Judge ought to be reversed and the Respondent declared entitled to the Palkhi allowance, with interest to the date of payment.

Mr. Justice Gibbs, who concurred with Mr. Justice Tucker, by his judgment, after a careful examination of the evidence, declared that the Respondent had a good case on the merits, and had proved his claim, and then proceeded on the second point in these terms:—"There was an uninterrupted enjoyment of this allowance for more than forty-five years between the date of the confirmation of Government in 1808 and the death of Hakoomutrai in 1863 without any re-grant by Government; but, on the other hand, by a continuation of the Grant as of right to Hakoomutrai on his Father's death, and [556] I am, therefore, unable to arrive at any other conclusion than that Hakoomutrai, and that in consequence the Respondent has acquired a prescriptive title under Bom. Reg. V. of 1827, sect. 1."

From such Decree this appeal was brought.

Mr. Forsyth, Q.C., and Mr. H. C. Merivale, for the Bombay Government.—Admitting the original Sunnud by Damayee Guicowar to the Respondent's ancestor to be valid, and proved as evidence in the suit, yet the annual Palkhi Huk allowance there mentioned was only a personal grant, and if continued to his successor by the then ruling Power, was only one of favour, not of right. The English Government took Broach by conquest in 1803, but no new Grant was made by the British Government to the then Desai or to his successor. The condition under which the

original Grant was formerly allowed no longer then existed. Certainly, the Court below was wrong in holding, that the Palkhi allowance was of an hereditary nature, and that under Bom. Reg. V. of 1827, sect. 1, cl. 1, the Respondent had acquired a title by prescription. Such allowance was purely personal.

Sir R. Palmer, Q.C., and Mr. Leith, for the Respondent :—First, the Sunnuds relating to the Palkhi allowance are sufficiently proved; *Baboo Gopal Lall Thakoor v. Teluck Chunder Rai* (10 Moore's Ind. App. Cases, 192). Such an allowance is legal and alienable; *Sumbhoolall Gird-[557]-hurlall v. The Collector of Surat* (8 Moore's Ind. App. Cases, 1). Those Grants refer to such allowance having been previously granted by the native Governments, for the time being. The right was admitted by the British Government in the years 1808 and 1828, by continuing the allowance to the Respondent's ancestors, who successively, during four generations, and in a line of lineal descent for a period of more than one hundred years had, as hereditary Desais of Broach, received the allowance; therefore, the High Court was right in deciding in favour of the presumption contended for, that the original Grant of the allowance was in its nature an hereditary Grant.

Secondly, before the year 1861, when the Government first decided upon treating the Palkhi allowance as a life annuity merely, the same allowance had been enjoyed, without interruption, for a longer period than thirty years by the Respondent's Father, Hakoomutrai, and his ancestors in succession, as appurtenant to their hereditary office of Desai, and the Respondent acquired a statutory prescriptive title under Bom. Reg. V. of 1827, sect. 1, cl. 1.

Judgment having been reserved, was now delivered by

The Right Hon. Sir James Colville (April 20, 1872).—The question raised by this appeal was, whether the Respondent has an hereditary right to receive out of the public revenues of the Presidency of Bombay, an annual allowance of Rs. 1274 : 4 : 2, notwithstanding an Order of the Government, dated the 28th of November, 1861, which declared it to be [558] a mere personal allowance, and as such resumable; and that it was to cease on the death of the then recipient—the Respondent's Father.

The Respondent is Desai of the Pergunnah of Broach. His office, once important, is now a mere sinecure, its functions being exercised by other Officers. But such as it is, it is admitted to be held by him, together with an Enam village enjoyed with it, by hereditary right. The allowance in question is, however, not a necessary incident to the office of Desai, nor is it held by the same title as the village. His case as to it is, that upwards of a century ago the then native ruler of Guzerat conferred upon one of his ancestors, and predecessors in the office of Desai as a reward for distinguished service, the grant of a Palkhi or Palanquin, together with the allowance in question, the latter being the sum fixed for the Palkhi expenses, and charged on the land revenues of the Pergunnah of Broach. He alleges, that this Grant was confirmed by the different dynasties who have since ruled in Guzerat, and finally by the British Government in 1808; and he insists, that the allowance thus enjoyed is hereditary in his family, and now irrevocable by the Government.

The case made by the Government in answer to this Claim, is that the Palkhi right was not granted for Desaiship service; that it is not of the nature of an ordinary Enam: that it was granted to the original holder personally, and was liable to cease on his death; and that to allow, or not to allow, such a right depends on the pleasure of Government. The only issue settled in the cause was, whether the right claimed was perpetual, or whether [559] the Government was competent to make it cease whenever they pleased to do so.

The Zillah Judge, who tried the cause in the first instance, determined this issue in favour of Government, and dismissed the suit; his decision was reversed, and a Decree made in favour of the Respondent by a Division Bench of the High Court of Bombay; and the present appeal is against that Decree.

The grounds of the judgment of the High Court are thus summed up by Mr. Justice Tucker: "I consider, then, that the Plaintiff is entitled to succeed in this suit (1) because, in the absence of the original Deed of conveyance, or Grant, the long enjoyment of the Plaintiff's ancestors, during four generations successively, and for a period of more than a century, creates a legitimate presumption that the allowance was conferred on the original Grantee and his heirs: and (2) because the

uninterrupted enjoyment of the Plaintiff's Grandfather and father, under the Order made by the Government of Bombay on the 7th of February, 1808, which extended from that date to 1856, gave to the Plaintiff a statutory and indefeasible title."

Their Lordships propose to deal, in the first instance, with the second of these propositions; but, before doing so, they will shortly review the proceedings of the British Government with reference to the allowance claimed, because the effect of those proceedings has an important bearing upon both propositions.

The territory of which Broach forms part was annexed, with the rest of Guzerat, to the Mogul Empire, by Akbar in 1572, and, from that time to [560] 1685, was governed by a Nawab, or Soubahdar. The sovereignty over it then passed to the Mahrattas, and seems to have been exercised by the Guicowar until 1772. In that year Broach was taken by the British, and was held by the East India Company until 1783, when it was ceded to Scindia. That Mahratta power held it until 1803, when it finally became British territory, under one of the Treaties concluded with Dowlah Rao Scindia. The office of Desai appears to have been held by the Respondent's ancestors during all these changes of dynasty. His Grandfather, Dowlutrai, was found in possession of it by the British in 1803; and it would appear from the evidence, continued to receive the emoluments of office which he had previously received (including for some time the Palkhi allowance), but subject to the condition of submitting to the orders which the Government of Bombay might pass respecting any increase or reduction of them. On the 31st of May, 1807, the Revenue Commissioners at Broach made their Report to Governor Jonathan Duncan, upon several matters previously referred to them, which included the claims of the Desais in the territories in question. That document was not produced in the Court below, and the High Court has drawn various inferences, unfavourable to Government, from its non-production. It has, however, been brought before their Lordships in the supplemental record; and has been treated as part of the evidence in the cause.

One of the papers forming the Appendix to this report, No. 51, is entitled "Statement of the Income assigned to the Desais of the Broach Pergunnah, as taken from separate statements given in by each [561] under their respective signatures." From this it appears, that what Dowlutrai claimed was an Enam village, under a Grant to his ancestor, Khooshalrai, from the Guicowar, in A.H. 1140, corresponding with 1727-8; the Palkhi allowance in question; rights in certain Passaita land; and some other customary allowances or perquisites in money or in kind. The recommendations of the Commissioners in the body of the report were (par. 34), that the last-mentioned allowances and perquisites should be abolished or reduced; that the right of Desai Dowlutrai's family to the Enam village should be acknowledged; and that they should, for the present, be allowed to hold their Passaita land, subject to such arrangements as Government might think fit to adopt for restoring to the State all illegally alienated land.

Nothing was there expressly said about the Palkhi allowance; but it may be included in the general recommendation contained in these words:—"The amount of such of these (*i.e.*, those fees and emoluments) as Government may be of opinion they (the Desais) have a tolerably fair right to, from the length of time they may have enjoyed them, may be calculated from the accompanying statement, Nos. 51 and 52, and a per centage in proportion allowed to them on the Government Land Revenue, which should be made payable to them from the Collector's Office only, in lieu of all secret or avowed perquisites and emoluments whatever."

The action which the Government of Bombay took on this report, is shown by the 16th paragraph of a Letter, dated 7th of February, 1808, in these words:—

[562] "Proceeding next to the Desai's allowances, the village of Kallum, or (as written in the Sunnud) Kullub, is confirmed by Government, as you recommend, as on the same grounds the Palanquin establishment with Sepoys, and Peon's allowance to Dowlutrai, from the beginning of the current Mergsaul, but without arrears, for the time the same has been suspended.

"The article Sootlumra is to be resumed from him and the other Desais, on the like principle, as ordered in respect to Jee Baboo, and the article of Sadur, as applicable to all those Desai offices, is left to you to confirm or revoke, according to your sense of its justice and expediency."

We accordingly find that Dowlutrai, in his subsequent Kaboolyat, or acknowledgment of the 20th March, 1809, whilst he admits the receipt of an order for the payment of the money appertaining to the customary allowance (dustoor) and Passaita land, and agrees to treat those allowances as subject to the future orders of Government, ceases to make mention of the Palkhi allowance, obviously treating that as unconditionally confirmed to him.

That it was regularly paid to him up to the time of his death is shown by the revenue accounts of the Collector of Broach, which have been produced, in which, at least after April, 1809, it is treated as one of the general charges on the revenue.

Dowlutrai died in 1828. He was succeeded in the office of Desai by his Son, Hakoomutrai, who thereupon applied for the Palkhi allowance to the Collector of Broach. It was paid to him by that Officer without any fresh or distinct Grant or order of the Government, the payment continuing as before to be [563] entered in the Collectorate accounts as a general or permanent charge on the revenues of the District. This state of things went on without question until the year 1856. In that year the right of Hakoomutrai to this allowance was first questioned. He was required to explain how he was in receipt of it, and made, on the 28th of December, 1856, the statement respecting his right. No final Order, however, seems to have been passed by Government on this matter until the 28th of November, 1861, when, on the Report of the Revenue Commissioners, dated the 3rd of October in that year, it was resolved, as follows:—"The allowance is clearly a personal allowance, and should, as recommended by Mr. Peile, be transferred to the head of 'Life pensions.' It should cease on the death of the present incumbent, Hakoomutrai."

Hakoomutrai died some time in the year 1863. The payment of the allowance then ceased, and in December, 1864, the Respondent commenced this suit to establish his hereditary right to it.

Their Lordships are unable to concur with the Judges of the High Court in the conclusion that, upon the facts thus stated, the Respondent had, under the provisions of the Bombay Regulation V. of 1827, cl. I., sect. 1, acquired a title by prescription, which enabled him successfully to maintain his suit, whatever might have been the original title of his ancestors to this Palkhi allowance. They are by no means satisfied that the allowance, though payable out of the Government revenue of a particular Pergunnah, can properly be said to be "immovable property," within the meaning of the clause in question. It did not constitute a charge which [564] could be enforced against the land, or, since the year 1808, against the revenues of the land prior to the claim of Government. The utmost right of Dowlutrai after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury.

Nor, again, are their Lordships satisfied that there has in this case been such a possession or enjoyment of the allowance under a claim of hereditary right for thirty years without interruption, as would bring the right, if in the nature of immovable property, within the operation of that Regulation. The question between the Government and the Respondent is, whether the allowance was enjoyed by hereditary right, or by virtue of a grant for life, express or implied, to each successive taker. So long as Dowlutrai lived, his enjoyment of the allowance would be as consistent with the one contention as with the other.

A Jaghiredar for life cannot convert his life tenure into a perpetual tenure by living for more than thirty years. The period of thirty years, therefore, would only begin to run from 1828, when Hakoomutrai began to receive the allowance without a fresh grant; and, as it may be assumed, under a claim of hereditary right. But it seems to their Lordships that the interruption to this enjoyment may fairly be taken to have begun in 1856.

The right of Hakoomutrai was then called in question; and there was the commencement of an investigation of his title which appears to have lasted until the final Order of Government in November, 1861. There was, on the part of Government, no [565] admission, express or implied, of his hereditary right after 1856. And for these reasons they have come to the conclusion, that the Regulation affords no bar to the trial of the question between the Government of Bombay and the Respondent upon its merits.

Again, both the learned Judges of the High Court appear to have acted on a presumption, that the title of the Respondent to an hereditary grant was founded, not on the documents produced, but on some lost or missing Sunnud which contained words of inheritance. In making this presumption they drew certain inferences against the Government, and in favour of the Plaintiff, from the non-production of the Report of the Revenue Commissioners at Broach of the 31st of May, 1807. That document is, however, now before their Lordships; the appeal has been argued as if it were part of the evidence in the cause, and the inferences to be drawn from it must be drawn from its actual, and not from its supposed, contents.

Their Lordships will now consider what is the effect of the evidence in support of the Plaintiff's title.

The first trace of the allowance in question is to be found in the Perwannah which, if not a Grant, recites a Grant by the Nawab Hyder Joolce Khan to Khooshalrai Desai, in recompense of his extraordinary services as Desai, fixes the allowance for the sustentation of that dignity at Rs. 1972 (being Rs. 1200 for the Palkhi, and Rs. 772 for the servants), and directs that sum to be paid to him annually. The only date on this document is "the 13th Shaban, in the 9th year of the reign," a date which it would be difficult to fix. But as the Grant purports to have been made by the Nawab, and there is no mention of the Guicowar, it may be presumed that this [566] Perwannah was issued before the year 1685, when the actual sovereignty over the territories in which Pergunnah Broach is situated, passed into the hands of the Mahrattas.

This Grant, however, whatever its nature, appears to have been afterwards superseded; for the earliest Mahratta document produced by the Respondent in support of his title, and said to bear a date corresponding with the year 1753-54, is in favour of Bhikaridas, the Son of Koosahlrai, and imports the grant to him by the Guicowar of a Palkhi, with an allowance of only Rs. 1100 for keeping it up. This document seems to have been intended to operate both as a Sunnud or Grant, and as a Perwannah or Order addressed to the Officers who were to pay the allowance; for it is stated that, across the Hindee Perwannah, to the Officers, there is written a memorandum in Persian to the effect, "a Sunnud for a Palkhi in the name of Bhikaridas Desai." Bhikaridas was succeeded by Jamiyatrai. Several Perwannahs issued by the Guicowar during the life of this Desai are produced, but none of them show how his receipt of the allowance began. Those of 1760-61 and 1762-63 refer to interruptions of his existing right, not to the commencement of it. That of 1772-73, contains proofs of an augmentation of the previously existing allowance by the wages of seven Sepais thereby assigned to him. Jamiyatrai died in 1774-75, and thereupon the Guicowar of the day issued what is termed "a consolatory Letter," in the shape of a Perwannah, to the revenue Officer at Broach, which contains this passage:—

"Jamiyatrai Desai is dead. Giving consolation to his Son, Dowlutrai Desai, in many ways, you are [567] from time to time, to get the business and affairs of the mehal transacted by his hands, as has been done; and you are to pay, from time to time, his Palkhi and Sebandi allowances as they now exist." The whole of this document, including the expression that "they" (Dowlutrai and his ancestors) "had from ancient times belonged to the Sirkar," implies the existence of at least a customary right of succession to the allowance with the office of Desai from Father to Son, though perhaps a right capable of being interrupted or destroyed, like other rights under a despotic Government, by the will of the Sovereign.

This is the latest document issued by the Guicowar; and indeed the date as given in the record is later than the taking of the City of Broach by the British. The authority however of the Guicowar, may at that time have continued to exist in the surrounding District.

The next document is the Perwannah of Scindia, issued on the application of Dowlutrai in April, 1786. It recites the application of Dowlutrai, which appears to have been in the nature of a claim by hereditary right, since it refers to the Grant to his Grandfather, Bhikaridas, as the foundation of his title, making no mention of any intermediate Grant to his Father, Jamiyatrai. The allowance was then fixed by Scindia at Rs. 1352, and directed to be continued to Dowlutrai as Desai. And a further direction was given to take a copy of the document and to return the

original (called a Sunnud) to the Desai for his use. This is the last of the native documents, Dowlutrai being still alive and in the enjoyment of the allowance when the Territory of Broach was ceded to the British Government in 1803.

[568] Reviewing these native documents, their Lordships are unable to find any which import, by express words of inheritance, that the Palkhi privilege with its allowance was to be enjoyed from generation to generation by the original Grantee and his heirs. And it is now clear, that the Report of 1807 does not, as the Judges thought it might, disclose any evidence from which the existence of a Sunnud in those terms may be inferred. Their Lordships are disposed to infer from the terms of Scindia's Perwannah, and the earliest of the Guicowar's Perwannahs, that there was no Sunnud other than those documents importing the grant of the allowance to Bhikaridas; and the confirmation of the allowance to Dowlutrai. On the other hand, the documents do not appear to support the Appellant's contention that the allowance was merely personal to each taker; and the subject of a separate grant to each in succession.

There is no trace of such a Grant in favour of Jamiyatrai; when Dowlutrai succeeded to Jamiyatrai he was treated as succeeding to the allowance by the same title to which he succeeded to the Desaiship; the confirmation of Scindia is founded on an original Grant to Bhikaridas; and the whole tenor of the documents is in favour of the conclusion that, after the allowance was granted, it was treated and considered as part of the emoluments of the hereditary office of Desai.

Their Lordships are not disposed to treat the proceedings of the British Government in 1808 as amounting to a new and enlarged grant. Nor do they consider that the accounts, or the acts of the Government Officers on the death of Dowlutrai, though they afford evidence that Government up to [569] 1856, considered the allowance to be a permanent alienation of revenue in favour of this family, are conclusive against the Government's present claim to a right of resumption.

They think that the reasonable construction of the proceedings in 1807 and 1808 was, that the Government of that day intended to confirm, and did confirm, the title of Dowlutrai, whatever it might be, without enlargement, but also without diminution. But the inference which their Lordships draw from the Report and the Letter of Government thereon is, that the Government of that day was dealing, and intended to deal, not with the mere rights and allowances of the individual Dowlutrai, but with the emoluments of the hereditary Desaiship held by his family. And it is on the special ground that, under the native Rulers, this allowance was treated as permanently annexed to the office, and was confirmed in 1808 by the British Government as appurtenant to the office, and not upon the grounds assigned by the High Court (from some of which, as they have already intimated, they dissent), that their Lordships have come to the conclusion that they ought humbly to advise Her Majesty to affirm the Decree under appeal, and to dismiss this appeal with costs.

[See *Maharana Fettehsangji Jaswatsangji v. Dessai Kallianraji Hekoomutrai*, 1873, L.R. 1 Ind. App. 49.]

[570] RAMALAKSHMI AMMAL,—Appellant; SIVANANTHA PERUMAL SETHURAYAR,—Respondent * [March 14 and 15, 1872].

On appeal from the High Court of Judicature at Madras.

A., who had a first or royal Wife living, who died without issue, intermarried on the same day with B. and C. Both Wives had male issue, C.'s Son being born first. Held, that C.'s Son was entitled to succeed to an impartible zemin-

* Present: Members of the Judicial Committee.—The Right Hon. Sir James William Colvile, the Right Hon. Sir Montague Edward Smith, and the Right Hon. Sir Robert Porrett Collier.

dary in preference to B.'s Son, as by Hindoo Law priority of birth was not affected by the prior marriage with B., the then senior Wife.

If a party rely upon a special custom of a family to take the succession to the zemindary out of the ordinary Hindoo Law, such custom must be proved to be ancient and continuous [14 Moo. Ind. App. 585, 586].

A letter of the Collector containing a summary of the statements by Zemindars for information of the Board of Revenue in a dispute, as to the right of inheritance to a zemindary in the same District, is not admissible as evidence [14 Moo. Ind. App. 588].

The object of this suit was to establish the title of the Respondent to succeed to an impartible zemindary, called Urkadu, as the heir of the Appellant's late Husband, Zemindar Kottalinga Sethurayar.

The Respondent claimed to be heir, as the Son eldest in age of the Zemindar's Sons, and also as being the Son of the second Wife. The Appellant insisted, that she was the second Wife, and that the Respondent's Mother was the third Wife of the Zemindar, and that her Son, as being the Son of the senior sur-[571]-viving Wife, though born after the Son of the third Wife, was entitled to succeed to the zemindary, in preference to the Respondent.

Kottalinga Sethurayar was a Zemindar Polygar in the Zillah of Tinnevely, Madras. He belonged to the caste called Maravars among whom polygamy prevails.

Both sides admitted first, that the Sons of the first or royal Wife succeeded to the zemindary in priority to Sons of any other Wife, and without reference to the age of her Sons, and secondly, the fact, that the first Wife had died without issue.

The facts were these:—

Kottalinga Sethurayar married three Wives. Kanthimathiammal, the first or royal Wife, died in his lifetime, without issue. The Appellant and the Respondent's Mother were the other two Wives, and were married to him on the same day, and the first question in the appeal was one of fact, whether the Appellant or the Respondent's Mother was the first married to the late Zemindar. Both Wives were of the same class.

The Respondent was born in the year 1838; the Appellant's eldest Son, Murthu Ramalinga Sethurayar, was not born till 1849.

The second question in the appeal was, whether, assuming the Appellant to have been the Zemindar's senior surviving Wife, her Son, though younger in age, was or not entitled to succeed to the zemindary in preference to the Respondent as the Son of the junior Wife.

It appeared from the documents put in evidence, that previously to the suit in which the above questions arose, regarding the succession to the zemindaries [572] of the Maravars in the District of Tinnevely, a similar dispute had arisen respecting the zemindary of Purayar, in the same District of Tinnevely. In that case, the deceased Zemindar left two Sons, one aged two years, by his second Wife, and the other aged eight years, by his third Wife, and the law Officers of the then Sudder Dewanny Court gave their opinion, that by the Hindoo law, the elder in age of the two Sons would be his Father's heir; but the Government entertaining an opinion that this was not the rule of succession in the District, directed the opinions of the Zemindars in the District to be taken as to the rule of succession among the Polygars there. The opinions of twenty Zemindars in the District were accordingly taken, and that of the great majority was, that the Son of the senior Wife for the time being, though younger in age, was to be preferred to the elder Son of a junior Wife. The Government acted on this opinion, and the Son of the senior Wife succeeded to the zemindary. It further appeared, that some time in the year 1849, the late Zemindar Kottalinga Sethurayar was requested by the Collector of Tinnevely to state for his information the rule of succession which prevailed in his zemindary of Urkadu; and on the 17th of July, 1849, and before the birth of the Appellant's Son, that he had addressed an Arzi to the Collector, in which he stated, that when a Zemindar of his caste had Sons by different Wives, the Son of the first Wife always succeeded to the zemindary, and that in the event of there being no Son by the first Wife, the first-born Son amongst the Sons of the other Wives had a right to succeed to the zemindary, and that in [573] such case the succession did not depend upon the order in which the Wives

were married. This Arzi was said to have been stolen from the Record Office and another substituted, and was not in evidence.

The Respondent in the Courts below relied on two Arzis addressed to the Collector of Tinnevely by the Zemindar, dated respectively the 18th of August, 1853, and 28th of November, 1853, as showing the Zemindar at that date recognized the Respondent as the heir to the zemindary.

In the year 1861, the Appellant instituted a suit, No. 3, of 1861, on behalf of herself and her eldest Son, Murthu Ramalinga Sethurayar, in the Civil Court of Tinnevely, against the late Zemindar Kottalinga Sethurayar, the Respondent and another, in order to obtain a declaratory Decree of the Court establishing the right of the Appellant's Son to succeed on the death of his Father, the first Defendant, to the zemindary.

The suit was heard before the Judge of the Civil Court of Tinnevely, who by his judgment, dated the 21st of February, 1862, decreed that the Son of the Appellant, was the lawful heir of the Zemindar, and was entitled on his decease to the zemindary.

The Zemindar Kottalinga Sethurayar died on the 25th of August, 1862, pending an appeal from this decree, which was reversed.

The Respondent filed his plaint in 1863, in the Civil Court of Tinnevely, against the Appellant, the three minor Sons of the Appellant, and others, claiming the zemindary as the eldest Son and heir of the late Zemindar, and also claiming other real and personal estates of the late Zemindar, which are not material to the question in this appeal.

[574] By the statement, or answer of the Appellant, in her own right and as Guardian of her eldest Son, she insisted, that the Respondent was the Son of the late Zemindar's third Wife; that it was arranged that the Appellant should be married as second Wife, the first Wife being then living, in order that her Son might get the Puttam (right of succession), and that first Defendant as eldest Son of the Appellant, as second Wife standing next in rank to the first Wife, was the sole heir to the zemindary of Urkadu, according to the invariable and long standing usage of the zemindary. The answer then referred to the Decree in the suit, No. 3, of 1861, and alleged, that all zemindaries in the District had the same usage, and that there was the same family usage in the zemindary in question, and submitted, that the eldest Son treated of in Hindoo law was the eldest Son of the senior Wife, and that it did not, therefore, apply to the Respondent.

Among the evidence was a Letter of the Collector of the District to the Revenue Board, containing the substance of the declarations of the Zemindars of the District before mentioned in respect to succession of the Maravars in the District of Tinnevely. Evidence as to the priority of the respective marriages was gone into, and on the balance of the evidence on both sides, and the probabilities of the case, it established, that the Appellant was married to the Zemindar before the Respondent's Mother, though on the same day.

The suit came on to be heard before Mr. W. Hodgson, the acting Judge of the Civil Court of Tinnevely, on the 29th of August, 1864, who gave the following judgment:—The Court being of opinion, [575] that the first Defendant (the Appellant's Son) has established his right and title to succession to the zemindary of Urkadu, as the eldest Son of the Appellant, the second and senior Wife of his Father, the late Zemindar, dismisses the Plaintiff's (Respondent's) claim, so far as it relates to the succession to the zemindary. And a joint judgment delivered by the Court composed by Messrs. Hodgson and Goldre, on the same day established the right of the Appellant's Son to succeed to the zemindary.

The Respondent appealed from this Decree of the Civil Court, to the High Court at Madras, the Respondent relying, among others, as reasons of appeal:—

First, that the case was governed by the general Hindoo law, which recognized no priority of a Son arising out of priority of marriage, save in the instance of the first Wife.

Secondly, that the burthen of proving the special custom relied on by the Appellant was on her, and that she had not established it, as the evidence was untrustworthy; that the declarations of the Zemindars were not evidence, and that the course adopted by Government in the Purayar case, even if proved, could not affect the question, the family in question being of a different caste.

The appeal came on to be heard before the Chief Justice, Sir Colley H. Scotland, and Mr. Justice Holloway, and that Court by its judgment of the 12th of February, 1866, reversed the Decree of the Civil Court. The material part of the judgment of the Court was in these terms:—

“There is no doubt, that the Plaintiff is the first-born Son of the late Zemindar, and there is no dispute as to the relationship in which the parties [576] stand to each other and to the Zemindar, except in regard to the priority in point of time of the marriage of the Plaintiff's Mother, and that issue it will only be necessary to allude to, after we have expressed the decision at which we have arrived upon the two main questions in the case. First, then, has it been shown that by established custom, where there are several Wives, and the first Wife has no male issue, the right of succession passes to the eldest Sons of the other Wives, according to the priority of their Mothers' marriages, and not to the first-born of all the Sons? It is not pretended, that such a custom has at any time received judicial sanction, and what the law requires before an alleged custom can receive the recognition of the Court, and so acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has by common consent been submitted to as the established governing rule of the particular family, class, or District of Country, and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty. Applying that rule of law here, we are of opinion, that the evidence wholly fails to support the custom set up. The loose statements made by the Witnesses on both sides of what they had generally heard and understood to be the custom are of no avail, and beyond these statements the only evidence in the suit is that given by the late Zemindar himself, and one or two Witnesses for the Defendants, as to two instances of succession to the zemindary, when there were Sons by several Wives, according to priority of marriage. This, at best, would have been slight evidence, but the circumstances here throw such discredit on the [577] late Zemindar's testimony as to make the evidence wholly unreliable. It appears that in the year 1849 the Zemindar, in an Arzi to the Collector, and in the Mahazarnama, which he, with other Zemindars, then gave, stated that the right of succession, on failure of male issue by the first Wife, passed to the first-born of the Sons by all other Wives. Again in 1853, after the birth of the first Defendant, the Zemindar in his communications with the Collector treats the Plaintiff as his heir, and called him his ‘pattathu kumaran.’ Further, we find that when he was, in 1861, charged with being concerned in substituting, amongst the records of the Collector's office, a spurious Arzi, stating that the Son of the Wife first married had the right to succeed, he not only denied the charge, but repeated his first statement as to the rule of succession. Soon after this, the Plaintiff and his Father, the Zemindar, became at enmity with each other, and a suit was brought by the present first and fourth Defendants against the Plaintiff and the Zemindar (collusively there can be little doubt as between the then Plaintiff and the Zemindar), in which the statements now relied upon, were made by the Zemindar as a Witness for the Plaintiff. It is impossible, under the circumstances, to place any reliance upon these statements, or the other evidence offered to support them. Then, with reference to the opinions of nineteen Zemindars of the District, upon which the Lower Court altogether rests its decision in favour of the custom; they are not the statements of Witnesses, but opinions obtained for the information of the Board of Revenue, upon the occasion of a dispute about the succession to another zemindary, the precise particulars of which we know [578] nothing of in this case. They cannot, therefore, properly be regarded as any evidence in this case; but, even if evidence, they are merely individual opinions expressed in general terms, in which the Zemindars vary from each other, and from the opinions expressed at the same time by the Plaintiff's Father, and no effect can be given them, in support of the alleged special custom. We are thus brought to consider the second question, whether by Hindoo law, independently of particular custom, the Plaintiff is rightful heir to the zemindary, and in determining it we are relieved from considering any qualification that the law may attach to the difference of caste among the Wives, as in this case there is no difference of caste. Heirship by right of primogeniture rests upon an exceptional rule of the general law of inheritance, applicable to zemindaries and other estates, which are considered in the nature of Principalities, and impartible. As respects all other

property, except under certain strictly limited Grants from the Government, and in the case of some offices, the law at the present day does not recognize a right by succession, in one of several Sons, or one of the other male members of an undivided family, to the exclusion of the others, beyond the preferential claim of the eldest to manage the property. Now, no Work of authority or decision directly relating to the descent of property, which at the present day is governed by the rule of primogeniture, was cited at the Bar, nor have we found any bearing materially upon the present question. We must, therefore, decide it upon principle, and by analogy to the existing general law of inheritance, and upon what we find laid down in early times, when primo-[579]-geniture by the general law conferred some special proprietary rights and privileges which no longer exist. Upon general principle, where the Wives are, as in this case, of the same caste and rank, there is no sound ground of distinction, on which the birth-right of the first-born of all the Sons can be denied. Whether the Plaintiff's Mother was second or third Wife of the late Zemindar, she was, equally with the fourth Defendant, his lawful Wife, and by the birth of the Plaintiff, his Father first acquired all the benefits, temporal and spiritual, which are ascribed to the birth of a Son, and the performance by him of the appointed exequial rights (Menu ch. IX. sects. 106, 107; Colb. Dig., B. V., ch. 1, sect. 10). Then applying the general law of succession, which governs partible property, it favours strongly the Plaintiff's rights. All illegitimate Sons of the same rank are upon an equality, though the offspring of several Wives, and though the number of Sons by each differs. The Sons severally take *per capita*, and their rights in the distribution of property are not affected in any way by the order of their Mothers' marriages (Strange's "Hindoo Law," Vol. I. p. 205). Seniority too, by birth, independently of the Order of marriages, gives the preferable claim to the management of the joint property. In the case of a plurality of Wives of unobjectionable caste, priority of marriage seems to be regarded by the law, only for the purpose of regulating the order of precedence amongst the Wives themselves, and the right of each to succeed as heir to the Husband, in default of Sons. But the Plaintiff's right derives still further support from the text of Menu, to which we were referred in the course of the argument. Although the passages relate directly [580] to rights and privileges of the first-born upon partition, which are no longer admitted, still they are not the less of force here, and in other cases to which, at the present day, the rule of primogeniture applies, so far as they show to which of the Sons of several Wives, rights of primogeniture passed. In Menu, ch. IX., after treating of the then privileged position of the first-born Son, and his rights upon partition, it is observed in section 122, with reference to the birth of a Son by a first married Wife, after the birth of a Son by a subsequently married Wife of a lower class, 'it may be a doubt in that case, how the division shall be made.' But in the next section it is declared, that the Son of the first married Wife is entitled to the preference, and after him, 'those who were born first, but are inferior on account of their Mothers who were married last.' Then in section 125, it is laid down that, 'as between Sons born of Wives equal in their class, and without any other distinction, there can be no seniority in right of the Mother, but the seniority ordained by law, is according to the birth.' The effect of these sections, we think, clearly is (at least as between the Sons of Wives of equal caste, other than the Wife first married) that the first-born of all the Sons possessed the right of primogeniture, and this view is in accordance with the other texts, and the commentary in Dig., Colb., B. V., ch. I., to which reference was also made in the argument. Upon the whole it appears to us, that as regards the rights of Sons by different Wives to inherit, whether in coparcenary or as sole heir (except perhaps the Son of the first Wife), the priority in the point of time of their Mothers' marriages has never been regarded when the Wives were equal in caste [581] and rank, and that the rule of primogeniture was and is, the same in the case of Sons by several Wives of equal caste and rank as in the case of Sons by one Wife. For these reasons, we are of opinion, that by the general law of inheritance, the Plaintiff is heir to the zemindary by right of primogeniture. It is unnecessary to decide, whether a distinction exists in favour of the younger Son of a first Wife, as the former Pundits of this Court appear to have thought; and we desire to be understood, as not expressing any opinion upon the point, one way or the other. Our decision also leaves untouched the

question, how far a difference of caste between the Wives and the Husband would affect the right of the first-born Son; but we may refer to some observations upon this subject to be found in the judgment of the Chief Justice, in the recent case of *Pandaiga Telavar v. Puli Telavar* (1 Mad. High Court Reports, 483). Our decision being in favour of the Plaintiff's right by birth, upon the general law, it is not necessary to decide the other question raised, whether the late Zemindar's marriage with the Plaintiff's Mother was celebrated before or after his marriage with the fourth Defendant, it being the case of both parties that the marriages took place at different times of the same day. But we think it proper to observe, that the Court at present sees no sufficient ground for saying, that the right conclusion had been arrived at by the Lower Court."

The appeal was brought from this Decree.

Sir R. Palmer, Q.C., and Mr. F. H. Bowring, for the Appellant.—First, on the question of fact, it is established by the evidence, that in point of time the marriage of [582] the Appellant was first, and she was the second Wife and the Respondent's Mother, the third Wife of the late Zemindar, therefore, as held by the Court of first instance, the Appellant's Son, though younger in age than the Respondent, was, as issue male of the senior Wife, entitled to succeed to the zemindary in priority to the Respondent. They cited Menu (by Grady), ch. IX. sects. 105, 6, 7, 122, 123, 125; Jagannatha's Dig., by Colb., B. V., ch. 1, sect. 1, art. II., c. vii., ix., x., xii., xiii., xiv., xvii., xxvi., xxxvii., xxxviii., xl., xliii., xlv., liv., lv., lvi., and lvii., Strange's "Hindu Law," Vol. I., p. 56 [2 Ed.], Strange's "Man. of Hindu Law," sect. 149.

Secondly, the general Hindoo law of succession and inheritance has no application to the Maravars of Tinnevely. The Appellant's Husband, being Zemindar of an impartible Raj, the succession was regulated by family custom and usage, to the eldest Son of the senior Wife.

Thirdly, even if the ordinary Hindoo law prevails, the eldest Son, to whom preference is given, means the Son of the first or royal Wife only, which question does not occur here, as she died without issue. It might be, if the second Wife was of superior caste.

Lastly, there has been, however, a denial of justice, as the High Court improperly rejected as evidence the Collector's summary of the opinions of the Zemindars as to the right of succession in zemindaries in the District of Tinnevely, and without any further inquiry, or directing any issue as to the custom of the District and succession in this particular family, assumed that the general Hindoo law applied, and decided the case in the Respondent's favour on a misconception of Hindoo Law.

[583] Mr. Leith, and Mr. S. G. Grady, for the Respondent.—As the Plaintiff relies upon a special custom of the family and usage in the Country where this zemindary is situate, to take the case out of the ordinary rule of succession by Hindoo law, the *onus probandi* was on her, and, we submit, she failed to establish the special custom. The High Court properly rejected the Collector's Letter containing a summary of the declarations of the Zemindars, made for information of the Government as to the custom in their zemindaries, as not being evidence in this suit; but even if the family custom in this zemindary was established, yet we contend, that the weight of evidence is against her contention, that she was the second or senior Wife of the Respondent's Father.

Next, we submit, that the High Court was right in deciding the question of succession and heirship by the general Hindoo law, and holding that the Hindoo law does not recognize priority of right in any Son as heir in respect of the priority of marriage of his Mother, save in the single instance of the first or royal Wife. No authority has been cited in support of the Appellant's contention, as none is to be found. According to Hindoo law in respect to a Raj, where there are Sons by different Wives, the eldest of the Sons, irrespective of the priority in point of time of the marriages, when the Wives are of the same caste and rank, as occurs in the present case, is entitled to succeed as heir to his Father by right of primogeniture. *Bhujangra'v bin D. Ghorpade v. Malojira'v bin D. Ghorpade* (5 Bom. H.C. Reps. 161); *Sivanomanga Perumal v. Muttu Ramlinga Sethorai* (3 Mad. Rep., A. I. 75). The [584] theory of Hindoo law is, that where the Wives are of the same class, they are, with respect to the first born Son's succession, to be considered as one Wife.

It is a necessary consequence, as the first Son has to perform his Father's funeral obsequies, and liable to his debts, Strange's "Man. of Hindoo Law," sect. 185, Colb. Dig., Vol. II., p. 192 [3rd Ed., Madras].

Their Lordships' judgment was delivered by

The Right Hon. Sir Montague Smith (April 20, 1872).—This is an appeal from the High Court of Madras in a suit raising the question of the right of succession to an impartible zemindary called Urkadu in Tinnevely. The litigants are two Sons by different Wives of Kolalinga Sethurayar, the late Zemindar.

Kolalinga Sethurayar, who was a Hindoo, married three Wives. The first, Kanthunathi Ammal, had no child. His other Wives were Ramalakshmi Ammal, the Mother of Muttee Ramalinga Sethurayar (the Appellant) and Vellaithai Perumal Ammal, the Mother of Sivanantia Perumal Sethurayar (the Respondent).

Although the Mother, Ramalakshmi Ammal, is Appellant as Guardian of her Son, it will be convenient to speak of him as the Appellant, and of the other Claimant as the Respondent.

The marriages of the two Mothers took place on the same day in June 1836, but at different hours, and the priority in time of these marriages was a subject of contest in the suit.

The Courts in India have held, that the marriage of the Appellant's Mother was first solemnized, and that she, therefore, in order of time, was the second Wife, and the Respondent's Mother the third Wife of the Zemindar.

[585] In the view their Lordships take of this case, it is not necessary to consider the correctness of this finding, and they, therefore, adopt it in dealing with the present appeal.

It appears that at the date of the marriages the Appellant's Mother was a child only ten years old, whilst the Mother of the Respondent was a girl of sixteen. The Respondent, as might naturally be expected from the relative ages of the Mothers, was born many years before the Appellant, and he seeks to recover the zemindary in this suit as the first-born Son of the Zemindar. The Appellant resists his claim on the ground that he, as the Son by the earlier marriage, is the rightful heir. The question is thus raised, whether the Son of the second Wife, although born after the Son of the third Wife, is entitled to inherit; in other words, whether the priority in birth of the Sons, or the priority in the marriages of their Mothers, both being of the same caste, is to prevail in determining the succession to an impartible zemindary in this District of Madras.

It appears from the pleadings and issues, that the Respondent, the first-born Son, relies on the general Hindoo law of succession, and on the custom of the family, which he affirms to be in accordance with it.

The Appellant alleges, that by the custom of the District he is entitled to the succession, and he also denies that the general Hindoo law is in favour of the Respondent's claim.

Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular Districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be [586] ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

In the present case their Lordships agree in opinion with the High Court, that the Appellant has failed to prove the special custom which he undertook to establish.

It appears from the record that, in 1861, during the life of their Father, the late Zemindar, the Appellant brought a suit in the Civil Court of Tinnevely against the present Respondent, to have his right to the succession declared. He founded his claim on the usage in his Father's zemindary and "other zemindaries." The present Respondent then relied, as he still does, on the general Hindoo law, and the usage of the family. The Civil Judge was of opinion, that the evidence to support a family usage was insufficient for the purpose, but he thought there was sufficient proof of a usage prevailing amongst the Zemindars of the District that

the Son of the senior Wife was to succeed. The decision of this Judge in favour of the present Appellant appears to have been reversed on appeal, on the ground that the suit was not maintainable during the life of the Father : but it has been necessary to advert to the suit because the evidence taken in it has by consent been brought into the present suit, and is the only evidence in it.

This evidence consisted, so far as proof of the family usage went, principally of the testimony of the late Zemindar himself, who was a party to the declaratory suit, and, evidently, he is not a trustworthy Witness, [587] for whilst in that suit he espoused the cause of the present Appellant, and gave evidence of the family usage in his favour, he had some years before, and after both Sons were born, given equally strong evidence of a custom the other way in support of the claim of the present Respondent. It is obvious that the Zemindar's testimony was influenced by his partiality for one Son or the other at the time of giving it, and is thus entirely untrustworthy. The other evidence is conflicting and wholly insufficient to establish any family custom. Indeed in the present suit both the Courts in India have so regarded it.

Then with respect to the usage of the District set up by the Appellant, the only evidence, apart from the conflicting testimony just referred to, which appears on the Record, is a statement of certain declarations alleged to have been made by some Zemindars under the following circumstances. In the year 1849 the Board of Revenue, acting as the Court of Wards, desiring to know which of the two minor Sons of the Zemindar of Parayur was to succeed him, requested the Collector of Tinnevely and Madura to ascertain the rule of succession "as regards Sons by different Wives," and it appears from the Collector's Letter to the Secretary of the Board, that the opinions of twenty Zemindars and Poligars were collected, copies of which he sent, giving also at the same time, an abstract of them in his Letter. It seems that the Court of Wards acted upon the opinions thus obtained.

The only evidence offered of these opinions was the above Letter and abstract of the Collector, and objections were made to its reception in proof of the custom.

Considerable, and perhaps undue, laxity in admitting documents has been sometimes allowed by the [588] Indian Courts ; but their Lordships consider that whilst it may not be desirable, in all cases, to apply strict and technical rules to the admissibility of evidence in the Courts in India, the substantial principles on which the authenticity and value of all evidence rest, should be observed. One of these principles is, that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained before secondary and inferior evidence is received. There seems to be no reason in this case why the Zemindars or some of them might not have been called as Witnesses, when, of course, they would have been subject to cross-examination : but not only were none examined, but even their written opinions, as they gave them, were not produced. Their Lordships consider, agreeing with the High Court, that the only evidence offered, viz., the Collector's Letter and summary, was not properly admissible, and if received, could not be safely relied on as affording clear and unambiguous proof of the existence of an ancient and invariable custom in the district.

The summary of the Collector (if it may be looked at) discloses that the Zemindars were not unanimous in their view of the custom ; and it further appears, that their opinions were given with reference to the succession to a zemindary in a family of a different caste. The late Zemindar, who was one of those vouched, differed from the majority, and declared that the eldest Son, although by the junior Wife, would succeed. It is true that, for the reasons already given, much reliance cannot be placed on his statement, but, so far as it may be of any value, it negatives the alleged custom, at all events as one prevailing in his own caste and zemindary.

[589] It was insisted by the learned Counsel for the Appellant that the fact that the priority of the marriages of the second and third Wives was made a question in the declaratory suit and in this suit, and strongly contested, indicated an impression on the minds of the litigants that a custom existed to the effect alleged by the Appellants, for if there were no such custom, the contest as to the priority of the marriages was immaterial. At first sight this seemed to be so. But the inference from it is greatly weakened, if not destroyed, by the consideration that in the

declaratory suit brought in the Zemindar's lifetime, and to which he was a party, the Zemindar himself, contrary to his former view, set up the custom which would give the succession to the Appellant, whom he was then supporting, in opposition to the Respondent, his eldest Son. When the Father, from whatever motive, put forward this view of the custom, it was natural that the fact of the priority of the marriages should be made a question in the suit, as well as the nature of the Custom.

The attempt on both sides to prove a special custom having failed, it remains to consider what is the general Hindoo law applicable to this disputed succession.

The case stands in this respect in the same category as that in the appeal relating to the zemindary of Shivagunga, which was decided by this Board in 1863 (*Katama Natchiar v. The Rajah of Shivagunga*, 9 Moore's Ind. App. Cases, 543). Their Lordships, in giving judgment in that appeal, say: "The zemindary is admitted to be in the nature of a Principality—impartible, and capable of enjoyment by only one member of a family at [590] a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings) the rule of succession to it is now admitted to be that of the general Hindoo law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject" (*Katama Natchiar v. The Rajah of Shivagunga*, 9 Moore's Ind. App. Cases, 592). Such, also, must be the rule of succession to be applied in the case now under appeal.

The High Court, in their judgment in the present case, declare that "no work of authority or decision" had been cited or found directly giving the rule of descent. That this should be so may, perhaps, be explained by the fact, that succession by primogeniture is the rare exception to the ordinary rule in Hindoo families, taking place only upon the descent of some impartible subject, as a Raj or office, and that in most cases of the kind there has probably been found some local or family usage regulating such descent.

If, however, it really be that the rule of succession is not directly declared in Books of authority, or in decided cases, then it must be deduced from those rules which are settled, and the principles on which they are founded.

The learned Counsel on both sides referred to various texts with this view; and it appears to their Lordships that many of these supply authority from which the law may, with reasonable certainty, be inferred and declared.

One great rule of religion binding upon every Hindoo, is the duty of having a Son, not only for the [591] sake of the spiritual benefits he obtains for himself by his birth, but because he thereby discharges the pious debt he owes to his ancestors. And, as a consequence naturally flowing from this law, the first-born Son is, throughout the Books of authority, treated as pre-eminent amongst his Brothers, and held to be entitled to many special privileges.

It will be found, from numerous authorities and instances, that, although the Father's property, by the general rule, descends upon all his Sons, yet, whenever it becomes necessary to make a distinction, precedence is given to the first-born.

Thus, Menu, after laying down the cardinal rule of succession that Brothers divided the paternal property among them, adds "The eldest Brother may take entire possession of the patrimony; and the others may live under him, as they lived under their Father, unless they choose to be separated" (ch. IX., sect. 105).

"By the eldest, at the moment of his birth, the Father having begotten a Son, discharges his debt to his own progenitors; the eldest Son, therefore, ought, before partition, to manage the whole patrimony" (ch. IX., sect. 106).

"That Son alone, by whose birth alone he discharges his debt, and through whom he attains immortality, was begotten from a sense of duty" (ch. IX., sect. 107). See also sects. 137, 138.

Many of the precepts of Menu have been undoubtedly altered and modified by the modern law and usage; but his authority may properly be referred to when it is necessary to resort to first principles in order to ascertain and declare the law. The general doctrines above alluded to are also found in other old authorities, and are treated as part of the [592] foundation of the Hindoo law of succession by modern Writers and compilers. (See 1 Strange's "Hindu Law," p. 192, Colb. Dig., B. V.)

It is true that these doctrines occur in passages treating of divisible inheritances; but the presumption from them is irresistible, that in the case of an inheritance which is from its nature indivisible, and can, therefore, go to one only of several Sons, the first-born by reason of his general pre-eminence, should be preferred to his younger Brother.

It was not disputed that this would be so in the case of several Sons by the same Mother; but it was contended that, where there were Sons by different Wives, the priority of marriage and not of birth was to be regarded. No authority whatever was cited to support this contention, certainly none as regards the Sons by any Wives after the first. On the contrary, there is a good deal of authority pointing to the conclusion that there is no distinction, except seniority of birth, amongst the Sons of Wives of the same caste and class.

Thus Menu says, "a younger Son being born of a first married Wife after an elder Son had been born of a Wife last married, but of a lower class, it may be a doubt in that case, how the division shall be made." (Ch. IX., sect. 122.)

The doubt thus suggested whether, even in the case of a Wife of a lower class, there would be inequality of division amongst the Sons, raises a strong presumption that there would be none where the Mothers were of the same class. But the matter does not rest on presumption, for the 125th section runs thus:—

"As between Sons, born of Wives equal in their class, and without any other distinction, there can be [593] no seniority in right of the Mother; but the seniority ordained by law, is according to birth."

It is true the Writer is, in this section, treating of partible successions, but he is at the same time proclaiming the privileges to which the eldest Son is entitled, and one of them he had just declared in a preceding section (119) thus:—

"Let them never divide the value of a single Goat or Sheep;—a single Goat or Sheep, remaining after an equal distribution, belongs to the first-born."

Now, when it is said, that the single Goat or Sheep is to belong to one Son, it is apparently for the same reason that a zemindary so descends, viz., that the subject is in its nature impartible; and, therefore, the rule that is laid down with reference to one impartible subject, viz., that "it belongs to the first-born," appears by reasonable and just implication to be the rule applicable to all such subjects. And which of several Sons is to be deemed the first-born is declared by section 125 above cited, "there can be no seniority in right of the Mother, but the seniority ordained by law, is according to birth."

It appears to their Lordships, that the rules just cited approach very nearly to a distinct declaration of the general Hindoo law upon the question, when regarded apart from any special custom prevailing in a particular District or family.

Great reliance was placed, during the argument, on the admission supposed to have been made, that the Son of the first Wife would succeed before an elder Brother by a subsequent Wife, and it was contended that, by analogy, the Son of the second Wife must be entitled to the like precedence over the Son of the third. There are, undoubtedly, authorities [594] which show, that the first Wife occupies a position of honour, and precedence above all others, but it is not necessary for their Lordships to decide, whether the admission made in this case is in accordance with general Hindoo law; for supposing the law to be so, no just analogy can be established between the *status* of the first Wife and that of any subsequent Wife. Her title to special rank and privileges rests upon grounds peculiar to the first Wife, and which can have no application to others. (See Strange's "Hindu Law," Vol. I., pp. 55, 56 [2nd Ed.]) The reasons upon which she alone of all Wives is entitled to peculiar honour and privileges, rather point to the conclusion, that the Wives subsequently married, if of the same caste and class, are on an equal footing.

It is right to observe that, if the decision had to rest only upon reasons of policy and convenience, these reasons would seem greatly to preponderate in favour of the right of the first-born Son. The inheritances of Hindoos which descend on a single heir, are almost entirely confined to zemindaries in the nature of a Raj, and to offices (see "Norton's Leading Cases," Part I., p. 278), and it is obviously in accordance with reason and convenience, that such successions should devolve upon the Son who would, in natural course, first reach manhood, and be capable of discharging the duties attaching to inheritances of this kind. But their Lordships

do not find it necessary to place their decision on these grounds; they are of opinion, that upon the principles of law deducible from the authorities, the judgment of the High Court is correct, and ought to be upheld.

It appears that the decision under appeal has been followed by the High Court of Bombay. *Bhujangrao* [595] *bin D. Ghorpade v. Malojira bin D. Ghorpade* (5 Bom. High Court Reports, 161).

Their Lordships are glad that they are able to come to a conclusion which will not disturb the rule of succession declared by the concurrent judgments of the High Court in two Presidencies: and they will, in this case, humbly advise Her Majesty to affirm the judgment of the High Court of Madras and to dismiss this appeal with costs.

[See *Sheo Singh Rai v. Mussumut Dakho*, 1878, L.R. 5 Ind. App. 108; *Pedda Ramappa Nayanivaru v. Bangari Seshamma Nayanivaru*, 1880, L.R. 8 Ind. App. 1; *Sundaralingasawmi Kamaya Naik v. Ramasawmi Kamaya Naik*, 1899, L.R. 26 Ind. App. 57; *Jaydish Bahadur v. Sheo Partab Singh*, 1901, L.R. 28 Ind. App. 107.]

SHAM CHAND BYSACK,—*Appellant*: KISHEN PROSAUD SURMA alias RAJAH BABOO,—*Respondent* * [March 16, 23, 26, 1872].

On appeal from the Sudder Dewanny Adawlut at Calcutta.

Two riparian proprietors of land on opposite sides of a River, respectively claimed churs which had been diluviated for a great many years, and afterwards re-formed by a change of the course of the River, as belonging to their respective estates. After a police inquiry, the Magistrate, in 1836, put A. in possession. B., the other riparian proprietor, took no steps till the year 1847 to obtain possession of the churs. Held (1), that the long delay in bringing a suit raised a presumption against B's title, and (2), that he had failed to identify the churs as having been formerly part of his lands or an accretion thereto.

This suit (being one of three suits based on similar grounds of action) was instituted by the Appellant against the Respondent, to recover possession of a chur (alluvial land), as appurtenant to a Talook, called Meer Syud Mahomed, in which Talook the Appellant had as proprietor a share. He claimed the [596] lands on the ground, that the same were a re-formation, and had reappeared on the original sites of the northern portion of a chur named Goag and of the whole of chur Bhedur, as formerly appertaining to that Talook, both of which churs he alleged had been covered with water, and for a time had disappeared by the action of the united streams of the two Rivers Dhuneesurree and Booreegunga; and that his predecessors had been dispossessed of the lands of the two churs, after their re-formation and reappearance, by the Darogah of the adjoining Thanna on the 21st of May, 1835, acting under the Order of the Revenue Commissioner of the District, and at the instance of Gopal Pershad, the Father of the Respondent, who had been put in possession under a Magistrate's Order.

The appeal was brought from a Decree of the late Sudder Dewanny Adawlut, dated the 31st January, 1861, which reversed a Decree of the Principal Sudder Ameen of Zillah Dacca, dated the 8th of March, 1858, raised three questions—first, whether the lands formed part of the two churs, Bhedur and Goag, and appertained to the Appellant's Talook, called Meer Syud Mahomed, as contended by him; or whether the lands formed part of the Respondent's Talook, Bucktbully, as insisted by him; secondly, whether the High Court were right in deciding the case was one falling within sect. 4, cl. 1, of Ben. Reg., XI. of 1825, as both the Appellant and the Respondent had treated the case as one of reappearance or reformation of land

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on its original site or sites, after having been submerged for a time by the waters of the two above-mentioned Rivers; and thirdly, whether the Appellant had established by evidence, that the re-for-[597]-mation of the lands had taken place on the original sites of the churs, Bhedur and Goag.

By the decree of the Principal Sudder Ameen of Zillah Dacca (Moulay Mahomed Nazim Khan, Bahadoor), he held that a Khal or channel called the Coomaria-bhanga Khal was the boundary between the Appellant's churs, Bhedur and Goag on the south, and the Respondent's Talook Bucktully on the north; and that the Appellant had proved that his predecessors had held possession of the lands in dispute up to the year 1836, when they were dispossessed by the Order of the Magistrate, and decreed the Appellant possession of the churs.

On appeal, the Sudder Dewanny Court, composed of Messrs. Trevor, Loch, and Steer, found that the lands were an accretion and increment to the lands of the Respondent; and held that the Appellant had failed to prove that the lands were an increment to the estate in his possession, and that the Appellant's claim was, under the provision of sect. 4, cl. 1, of Ben. Reg., XI. of 1825, untenable; and reversed the decision of the Lower Court; dismissing the suit with costs.

The appeal was from this Decree.

As the Respondent did not appear, the appeal was heard *ex parte*.

Mr. Leith, for the Appellant, contended, first, that the Court below was wrong in treating the case as one of gradual accretion within the provisions of cl. 1, sect. 4, of Ben. Reg., XI, of 1825; and secondly, that the Appellant's Witnesses had established his title to the churs as re-formed land, and was entitled under cl. 5 of sect. 4 of that [598] Regulation. He cited and commented on the cases, *Mussamat Imam Bandi v. Hurgovind Ghose* (4 Moore's Ind. App. Cases, 403); *Sree Eckowrie Sing v. Heeradoll Seal* (12 Moore's Ind. App. Cases, 136); and *Lopez v. Muddun Mohun Thakoor* (13 Moore's Ind. App. Cases, 467); *Kattemonnee Dossee v. Rance Monumhinee Dabee* (3 W.R. 51).

The Right Hon. Sir Robert Collier.—This is a dispute between two riparian proprietors, holding estates respectively on the opposite sides of an Indian River, concerning certain churs formed in the course of that River, each landed proprietor maintaining that he was entitled to those churs, as appertaining to his estate.

The case of the Plaintiff was, in substance, that he was the Owner of a Talook called Meer Syud Mahomed, together with certain other persons of the surname of Chowdry; that his ancestors, by reason of their possession of this Talook, were entitled to two churs in the channel formed by the junction of the two Rivers, the Booreegunga and the Dhuneesurree; that those churs, one named Goag, otherwise Kodalia, and the other Bhedur, were, what is called diluviated, that is, covered by water, some fifty or more years ago. Chur Goag was said to be diluviated in a great measure, though not wholly (indeed, it has never been quite diluviated), as long ago as the year 1814. The other chur, Bhedur, was diluviated sometime about the year 1817 or 1818. The case of the Plaintiff was, that those churs had gradually reappeared, chiefly owing to a change in the course of the River; in fact, that they had re-formed upon their [599] original sites not many years after they were diluviated; and he gave evidence of measuring, from time to time, those churs as they reappeared and of exercising acts of ownership upon them. Among other acts of ownership, he gave evidence of a Lease granted by the Chowdrys, who were co-shareholders with him in the Talook, Meer Syud Mahomed, to a person of the name of Dowcett, in 1829, for a term of five years, and that Dowcett cultivated Indigo upon a portion of the *locus in quo*. It is to be observed, however, that there is evidence on the other side, of Dowcett having taken the precaution of also obtaining a Lease from the proprietor on the opposite bank.

According to the Plaintiff's evidence, he was in as complete possession as the subject-matter admitted of, at all events up to the year 1832, when this litigation with the riparian proprietor on the other side of the River, who owned Talook Bucktully, commenced.

It is not necessary to refer to the proceedings which took place before the Magistrates from the year 1832 to 1835, further than to state their result, which appears to have been this:—The Plaintiff, or rather those under whom he now

claims, were put into possession of chur Goag, or, at all events, a portion of chur Goag, and they have remained in possession of that portion from that time to this. But, in the year 1835, an Order was made by the Magistrate for putting the Defendant's Father, Gopal Pershad, in possession of chur Bhedur. Actual possession would appear to have been delivered in 1836, and Gopal Pershad and his Son, the present Respondent, have remained in possession of chur Bhedur from that day to this.

[600] The Plaintiff having been dispossessed, as he alleges, in the year 1836, of chur Bhedur, did not institute this suit for the purpose of recovering that possession until the year 1847. He does indeed make some attempt to explain this delay by stating, that in the interim, a resumption suit was instituted in respect to these lands. As to the proceedings in that suit, it is not necessary for the present case to refer to more than this, that the proprietor of Talook Bucktbully, on the opposite side of the River, appears to have instituted a proceeding against the Government, with a view of obtaining possession of the lands in dispute, and some more, upon payment of the Government revenue. As to a portion he succeeded; that he now occupies, and in respect of that portion there is no dispute. As to the lands now in question, he failed: and undoubtedly the Collector did find, that the Plaintiff was entitled to those lands. That decision, however, was subsequently set aside on the ground, that the Collector had no jurisdiction to make it, his jurisdiction being confined to determining the questions which arose between the Owner of Bucktbully and the Government, and not extending to deciding on the conflicting claims of other Landowners.

It appears also, that in the interim between 1836 and the institution of this suit, there was some family suit with respect to this property. Their Lordships, however, are of opinion, that no sufficient explanation had been given for the very long delay on the part of the Plaintiff in instituting this suit. If some presumption usually arises against those who slumber on their rights, it is the stronger when applied to rights of this description, the subject-matter of which is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time. [601] The hardship may be great of calling upon persons who have been long in undisturbed possession of such property for strict proof of their title after landmarks may have been washed away or Witnesses may have died; indeed in this case it would appear that Gopal Pershad, the then Owner, died before the institution of this suit, and possibly Gopal Pershad's evidence might have been of an important character, which his Son could not supply.

But the delay in the institution of this suit is not the only delay with which the Appellant is chargeable, for the Decree in this suit was pronounced so long ago as the year 1861; the appeal was brought in 1862; and in 1863 the record was lodged. Some years afterwards, in the year 1868, the Appellant filed a supplemental record, but he did not lodge a case until the year 1871, so that there has been a delay of nearly ten years wholly unexplained in the prosecution of this appeal.

The case stands thus: the Appellant seeks to oust from possession persons who have enjoyed this property from the year 1835 to the present time, and for nearly twenty years of that delay he is responsible. Under these circumstances, their Lordships certainly require to be satisfied by clear proof of the grounds which he alleges for disturbing a possession of such long continuance.

This suit began in the year 1847, and it lasted to the year 1861. It is not necessary to refer at length to its history. It may be enough to say, that at an early stage, in the year 1848, a local investigation was held by an Ameen of the name of Monier, which appears to have resulted in favour of the Plaintiff. Subsequently to that there was a hearing in 1850, [602] before the Principal Sudder Ameen, who decided against the Plaintiff, upon the ground of the Act of Limitations. The case on appeal was sent back to be re-heard, in order that the grounds of that judgment might be more clearly stated. It was again heard in 1852, and again decided against the Plaintiff, on the plea of the Act of Limitations; the Principal Sudder Ameen at the same time expressing a somewhat strong opinion against the Plaintiff's case generally. Subsequently the case was again sent back to be re-heard upon the merits; and previous to its re-hearing upon the merits, another local investigation was ordered before the Moonsiff of Naraingunge, which took place on the 30th of

January, 1858, whereupon the report of the Moonsiff was against the Plaintiff. The Principal Sudder Ameen, on the hearing of the cause, set aside the Moonsiff's report, which he considered unsatisfactory, and decided substantially all the issues in favour of the Plaintiff. The case then came on for appeal before the High Court, and it is against this judgment that the present appeal is lodged.

It has been contended, that the Sudder Court mistook the law as applicable to this case, and that their decision is in contravention of two cases, *Mussamat Imam Bandi v. Hurgovind Ghose* (4 Moore's Ind. App. Cases, 403), and *Sree Eekoorie Sing v. Heeraloll Seal* (12 Moore's Ind. App. Cases, 136), in which their Lordships have laid down the principles applicable to cases of this description. If their Lordships could see clearly, that the High Court had acted in contravention of the principles laid down in those cases, they would have thought it their duty to set aside the decision appealed from; but it appears to their Lordships impossible to suppose that the High Court could not have been acquainted with the first of those cases, reported so long ago, in 4th of Moore's Indian Appeals; and on looking at the judgment, although there are some expressions in it which may give some colour to the contention of the Appellant, it does not appear to their Lordships that the High Court have, in the reasons of their decision, acted in contravention of either of the above decisions. It appears to their Lordships, that the judgment must be taken to have proceeded mainly upon the ground, that the Plaintiff had not succeeded in proving that the spot which he claimed was identical with that of the chur which he alleged to have been diluviated.

Whether the second clause of the fourth section of Ben. Reg., XI. of 1825, applies, or whether the fifth clause of the same section applies, which is in general terms and to this effect, that in all cases not previously provided for, and in all cases of claims and disputes respecting land gained by alluvion or by dereliction of a River or the Sea, which are not specifically provided for by the rules of that Regulation, the Courts of justice, in deciding upon such claims and disputes, is to be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case; or if not, by general principles of equity or justice; in either case, it is equally essential for the maintenance of the Plaintiff's case that he should establish the identity of the land which he has lost.

Their Lordships think, that on the face of the judgment it appears, that this consideration must have been present to the High Court, and they read their finding, "that there were not any marks by [604] which the lands can be identified as having at any time formed part of the estate of the Plaintiff," not as intimating (as it has been contended) that proof was necessary of the existence of some specific landmarks; but as a general finding on the part of the Court that the lands had not been identified; and if so, undoubtedly there was an end of the Plaintiff's main case. But, further, it would appear from the judgment, that the Plaintiff, possibly feeling that, in the opinion of the Court, he had not established the identity of these lands as re-formed lands, contended that he was entitled to them as accretions to that land which was undoubtedly in his possession; for, in the judgment of the Court it is said: "But he [the Plaintiff] urges, that being in possession of part of the chur as the Goag under a decree of a competent Court, which has become final, the rest of the chur lands must be considered an increment to that village." The Court disposed of that argument by stating their opinion that, if the lands in question had formed to the south of the portion which was in possession of the Plaintiff, then there might have been good grounds for this contention, but not so as they were alleged to have formed to the north. They thus disposed of the question of accretion, which certainly seems to have been raised, and, to a certain extent, dwelt upon, by the Plaintiff.

Under these circumstances, their Lordships, whatever might have been their view, if this matter had come before them as a Court of first instance, see no sufficient grounds for disturbing the finding of the High Court, which was to the effect, that the Plaintiff has failed to prove his case, that he has not proved the lands which have re-formed, if lands have re-[605]-formed in the bed of the River, to have been the same as those which belonged to his predecessors and had been diluviated; and that he has failed also to prove his title upon the ground of the *locus in quo* being an accretion to any lands of which he is possessed.

On these grounds their Lordships will humbly advise Her Majesty that this appeal be dismissed.

THE GENERAL MANAGER OF THE RAJ DURBHUNGA, under the Court of Wards,—*Appellant*: MAHARAJAH COOMAR RAMAPUT SING,—*Respondent* * [March 20 and 21, 1872].

On appeal from the High Court of Judicature at Fort William in Bengal.

In a suit by A. against B. for arrears of rent, a Decree was obtained by A. against B.'s Widow; B. having died pending the suit. Under this Decree execution was obtained, and the interest of the Widow was sold under Act, No. XI. of 1859. The amended Certificate stated, that the estate was sold by virtue of the Decree. Held, reversing the Decree of the High Court, and following *Johan Chunder Mitter v. Buksh Ali Soudagur* (Marshall's Ben. App. Cases, 614), that the sale was not of the Widow's personal interest, but as the representative of her Husband's estate.

The facts which gave rise to this appeal were these:—

[606] The Respondent and Appellant had both obtained separate Decrees in respect of arrears of rent due to them respectively by one Gourpershad, deceased. They had both taken out execution of their Decrees after his death, and the Appellant had, at a execution sale, purchased the lands in dispute, against which the Respondent in this suit sought to execute his Decree, notwithstanding the sale to the Appellant, on the ground that the Appellant had acquired, by his purchase, not the interest of the heir, Hurpersad, the Son of Gourpershad, but only the interest of his Widow, Choocharoo Kooer, which really was nothing, and that, therefore, Respondent was entitled to sell, in execution of his Decree, the interest of the heir.

It appeared, that on the 11th of November, 1858, the Respondent obtained a Decree against Gourpershad for Rs. 14,636 for arrears of rent, which Decree was affirmed by the Sudder Dewanny Court in 1861. Gourpershad died about that time.

In the year 1862, the then Manager of the Durbhunga Raj brought a suit under Act, No. X. of 1859, against Choocharoo Kooer, as the Mother and Guardian of Hurpersad, then a Minor, to recover Rs. 11,820. 15a. 7p. for arrears of rent due from the deceased Gourpershad in respect of lands held by him of the Durbhunga Raj.

Choocharoo Kooer by her answer alleged, that Hurpersad had no interest in his Father's estate, as he had been adopted into another family, whose estate he had come into possession of, and that she was in possession of her Husband's estate.

An issue having been raised on this point, the Collector held, that Hurpersad was exempted from liability as he had been adopted in another family, [607] and finding the amount of rent to have been due from Gourpershad to the Plaintiff (to whose position and rights the Appellant succeeded) decreed him the sum of Rs. 12,868. 1a. 10p.

The Respondent having sought execution of his Decree against the Widow and Son of Gourpershad, Hurpersad objected to his being made personally liable, on the ground that no estate of his Father had come to him, and that all had come to the possession of Choocharoo Kooer, and the Principal Sudder Ameen of Tirhoot, on the 16th of May, 1863, sustained that objection.

As neither of the Decree-holders could obtain satisfaction of their Decrees, the then Manager of the Durbhunga Raj, on the 13th of April, 1865, instituted a suit in the Court of the Principal Sudder Ameen of Tirhoot against Hurpersad, as Son and heir, and Choocharoo Kooer, as Widow of the deceased Gourpershad, and another, to establish his right to execute his rent Decree against the properties men-

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tioned in the plaint; and the Plaintiff sought to have it established that the properties against which he sought to execute his rent Decree formed part of the estate of Gourpershad, and were liable to satisfy that Decree.

The Principal Sudder Ameen found that the properties in question had in fact come to Gourpershad by inheritance, and after his death had devolved from him on Hurpersad; that Choocharoo Kooer, by Mithila law, had no interest in them, and ordered that the estates in suit, being considered as left by Gourpershad, the judgment-Debtor, be put to sale according to the last Order contained in the decision, under Act, No. X. of 1859, dated the 24th November, 1862, in [608] satisfaction of the Decree obtained by the Plaintiff. This Decree was affirmed by the High Court (see 7 W.R. p. 500).

On the 19th of June, 1867, the Appellant applied to the Collector for execution of his Decree of the 24th of November, 1862, against the properties which had been decided by the Principal Sudder Ameen, in his judgment, to have formed part of the estate of Gourpershad; and the Collector attached and notified the sale of the properties in execution of the Appellant's rent Decree, and on the 27th of November, 1867, the same having been put up to public sale by the Collector, were knocked down to the Appellant as the highest bidder, and Certificates were, on the 10th of January, 1868, given to him as Purchaser.

These Certificates certified the purchase by the Appellant of the various Mohals by name, and stated that—"In this Mouzah, the right and interest of Mussunat Choocharoo Kooer, Defendant, judgment-Debtor, has been sold by auction, in satisfaction of the Decretal amount under Act, No. X. of 1859, due to the Court of Wards on behalf of the Durbhunga estate, Plaintiff Decree-holder."

On the 13th May, 1868, on application of the Appellant, the following addition was made to the Certificates—"Be it known that the estate mentioned in this Certificate has been sold by auction, by virtue of the Decree passed by the Principal Sudder Ameen of this District, dated the 23rd of January, 1866."

The Respondent took no steps to obtain execution of his Decree after his unsuccessful attempt in May, 1863, until the middle of the year 1867. He then applied for execution against Hurpersad, and against [609] the estates which had been declared by the Principal Sudder Ameen and High Court, to be liable to sale in satisfaction of the Decree obtained by the Manager of the Durbhunga Raj.

To this the Appellant objected, and in the end the Principal Sudder Ameen, on the 18th of May, 1868, allowed the Appellant's objection, and held that as the Appellant had previously attached and brought to sale, and purchased those estates in execution of his Decree, they could not be again attached in execution of the Respondent's Decree.

Upon this the Respondent instituted the present suit, on the 7th of August, 1868, against the Appellant and Hurpersad, to have his right declared to sell the interest of Hurpersad, to whom, he contended, the lands had come, as being Son and heir of Gourpershad, and alleged that the Appellant had at the sale purchased nothing but the interest of the Widow, Choocharoo Kooer, who had no right therein.

The Appellant, in answer, contended that, by the sale to him, in execution of his rent Decree, and in pursuance of the Decree of the Principal Sudder Ameen and the High Court, the interest which had been of Gourpershad had come to him.

On the 9th of December, 1868, Baboo Bhooputty Roy, the Subordinate Judge of Tirhoot, dismissed the Plaintiff's suit with costs. He held that the proceedings against Choocharoo Kooer were taken against her in her representative capacity only, and so bound her Husband's estate, and that the effect of the Decrees obtained by the Durbhunga Raj from the Principal Sudder Ameen and the High Court, was not to make Hurpersad personally liable, but to declare that his [610] Father's properties which had come to his possession were liable for that Father's debts, and, as to the contention, that the Appellant had ultimately sought execution against Choocharoo Kooer alone, the decision was governed by the case of *Johan Chunder Mitter v. Buksh Ali Soudagur* (Marshall's Ben. App. Cases, 614), and that the sale was to be considered as of her interest, not personally, but as the representative of her Husband's estate.

From this judgment the Respondent appealed to the High Court, and a Division Bench of that Court, composed of the Justices Kemp and Glover, on the 28th of May,

1869, reversed the judgment of the subordinate Judge, and declared the Respondent entitled, in execution of his Decree, to sell the rights and interests of Hurpersad, as representative of the estate of Gourpershad, the original judgment-Debtor, unless his Decree was satisfied prior to the sale. The Court held, that the effect of the Decree obtained by the Durbhunga Raj Manager was to establish that Hurpersad was his Father's heir, and that consequently the Plaintiff was entitled to execute his Decree against the property in his possession, unless it had passed out of his possession by the previous execution. That, as the Appellant had executed his Decree, not against Hurpersad, but against Choocharoo Kooer personally, and not in her representative character, he had in fact taken nothing by his purchase, and the Court was of opinion, that the case above referred to did not apply, as there the debt which formed the subject of the Decree against the Widow of the deceased Obligor was his debt, though the Decree was obtained against the Widow during [611] the minority of her Son, while in the present case, the Decretal Order did not show that the debt was Gourpershad's, on the contrary, that the Decree was against Choocharoo Kooer alone, and that there was nothing to show that the Decree was against her in her representative character.

The appeal was from this Decree.

Sir R. Panner, Q.C., and Mr. Doyne, for the Appellant.—This Decree cannot be maintained. It is contrary to the decision of the High Court in the case of *Johan Chunder Mitter v. Buksh Ali Soudagar* (Marshall's Ben. App. Cases, 614), which is a true exposition of the principle relating to a Widow's interest, which decision has been followed by the Courts in India, and is on all fours with the facts in this case. The debt which formed the subject of the Appellant's rent Decree, was the debt of Gourpershad, and the Decree against his Widow, was in her capacity as representative of the estate, and not against her personally, as she was not liable for her Husband's debts. No question has been raised as to the justness of the Decree, and the vexatious opposition to its enforcement was wholly unjustifiable. The execution was in pursuance of the Decree. Under the sale the estate and interest which had been Gourpershad's passed to the Appellant as Purchaser.

Mr. Leith, for the Respondent.—The Appellant in execution of his money Decree specifically advertised and put up for sale the right and interest of Choocharoo Kooer in her Husband's [612] estate, and nothing more, and having as judgment Creditor become Purchaser at the sale he cannot claim under his purchase anything more than was sold to him, and only such was conveyed to him by the Certificates of the Collector. The Court was right in holding the Appellant strictly to the terms of his purchase. Such sale confined the amount of the purchase-money to the interest of the Widow. If the interest of the heir, Hurpersad, had been also sold, a sum might have been obtained sufficient to have paid the judgment debts of the Respondent as well as of the Appellant. The Respondent as a judgment Creditor of Gourpershad, having previously obtained an Order for Sale, is entitled to the benefit of his attachment and sale of the right and interest of Hurpersad to realize the amount of his Decree.

Without calling for a reply, their Lordships delivered judgment by

The Right Hon. Sir James Colville.—These proceedings certainly illustrate what was said by Mr. Doyne, and what has been often stated before, that the difficulties of a litigant in India begin when he has obtained a Decree. When, however, the actual question which is at issue between the Appellant and the Respondent on this appeal is eliminated from the rest of the record, it does not appear to their Lordships to present any very great difficulty.

The Appellant and the Respondent had each, it must be assumed, a good claim against the estate of the deceased, Gourpershad. The Respondent had obtained a decree according to the practice then [613] existing in the Civil Court in the lifetime of Gourpershad. The Appellant, pursuing his remedy for rent under Act, No. X. of 1859, in the Collector's Court, had obtained a decree for the arrears of rent in respect of which he sued against Choocharoo Kooer, as the widow of Gourpershad and the Guardian of her infant son Hurpersad. It was a suit brought against those who were supposed to be the representatives of the Debtor, Gourpershad. In that suit the case set up by the Defendants was, that the infant was not the heir of his

Father; that he had been adopted into another family, and that consequently the Widow was the sole heiress and representative. The Decree was against the Widow in that capacity. It declared that the Son was not liable, and ended with a declaration, which clearly pointed to the realization of the demand out of the estates of the deceased, Gourpershad, and showed that the decree was made against the person supposed to be the heir and representative of Gourpershad. Other difficulties being interposed in the way of executing that Decree, the Respondent thought it necessary to go to the Zillah Court in order to get rid of certain Deeds as well as of the alleged kritima adoption of Hurpersad, the Son, and he succeeded in obtaining a Decree, which was afterwards affirmed by the High Court, the result of which may be taken to be to affirm that Hurpersad was the heir of his natural Father. The execution of the Collector's Decree had in the meantime been suspended. When the Decree of the Civil Court became final, and intimation was sent to the Collector that the stop Order which had been put upon the execution should be removed, and that the execution might go on. Execution of that decree [614] was accordingly had under the conjoint provisions of Act, No. X. and Act, No. XI. of 1859, and perhaps, it is owing to the operation of those Acts, and in particular to the fact, that the execution took place under Act, No. XI. of 1859, by putting up the property for sale in the same way that an estate would be sold for arrears of revenue, and not proceeding under the Civil Code Act, No. VIII. of 1859, that some of the confusion and difficulties which have taken place in this case have arisen. However that may be, the estates in question were sold under the Collector's Order, and purchased by the judgment Creditor. That took place in November, 1867. In the meantime certain proceedings had taken place in the suit of the Respondent. The Respondent had originally applied for execution of his Decree obtained in the lifetime of Gourpershad against the Widow and the infant Son. He was met by the same allegation that had been made in the Appellant's suit, that Hurpersad had no interest in his Father's estate, and a miscellaneous order was made, which held that Hurpersad was not liable for his Father's debt, and treated the Widow as the sole representative. Afterwards the Respondent attempted to get the benefit of the Decree which had been obtained by the Appellant, and to proceed against Hurpersad, and on that occasion the Appellant intervened as an Objector. The Judge disallowed the objection, but, at the same time, held that the former execution proceedings were invalid, and directed them to be struck off the file. The Respondent then commenced other proceedings against Hurpersad, and although there was no formal discharge of the miscellaneous Order, the Judge appears to have con-[615]-sidered that as swept away with the former execution proceedings and no longer operative, and directed a sale in execution, which, if there were nothing else in the way of it, would probably have been regular against Hurpersad as the heir of his Father. However, when the Respondent was proceeding to carry out that Order, the Appellant came in and objected that the estates had already been sold under his Decree, and had been purchased by him, and that in fact they could not be any longer sold as the estates of Hurpersad. That objection prevailed, and the result was that the Respondent's only remedy was to bring a regular suit out of which this appeal has arisen.

From the above statement it is clear, that unless there be some fatal irregularity in the mode in which the Decree of the Appellant was obtained or drawn up, or some fatal irregularity in the mode in which that Decree has been prosecuted, the estates have been regularly sold, and that the suit of the Respondent, seeking to set aside the Order for sale and to get the benefit of his own execution as against Hurpersad as the heir of his Father, must fail.

Their Lordships are of opinion, that no case has been made upon which they can say, that there has been that irregularity in the proceedings before the Collector and the sale which took place which would justify them in setting aside the sale, and upon that point they must differ from the Judges of the High Court. The proceedings took place under Act, No. XI. of 1859, and that Act appears to contemplate that the estate should be put up for sale, and that the person whose interest should be nominally sold should be the registered proprietor. In this [616] case, so far as the proceedings show, it appears that the Widow was the registered Proprietor. But the case does not rest there, because in the certificate of sale there is a distinct reference to the Decree obtained by the Appellant from the Zillah Court, and, there-

fore, the whole proceeding, if fairly looked at, amounts to this,—that the estate of Gourpershad was sold under that Decree in execution for his debt, and that the interest of his Widow, the registered proprietor and ostensible Owner of the estate, and also the interest of his Son, if he had any interest, was bound by that Decree. If that be so, the question arises, whether the Respondent, the Plaintiff in the suit below, has any ground upon which he can come in and impeach the sale? It appears to their Lordships that he can claim only what interest remained in Hurpersad, and that substantially the proceedings would be a bar to any claim on the part of Hurpersad. It is unnecessary to consider, whether in any question between the Respondent and Hurpersad, who in this suit came in and continued to dispute his heirship, the Decree in the suit which had been obtained by the Appellant would be any binding adjudication between the Respondent and Hurpersad. It appears to their Lordships clearly to be a mere Decree *inter partes*, and that there is no ground for giving it the effect of a Decree *in rem*, which is the effect which a passage in the judgment of the High Court appears to attribute to it. But without going into that, it seems sufficient to their Lordships for the determination of this appeal to say, that there was in their judgment no substantial irregularity in the sale before the Collector, and that, therefore, that as between the Appellant [617] and Respondent, the Appellant is entitled to and cannot be deprived of the benefit which has resulted to him from his greater diligence in enforcing his demand.

Their Lordships also desire to add, that they are unable to see any substantial distinction between this case and that of *Johan Chunder Mitter v. Buksh Ali Soudagur* (Marshall's Ben. App. Cases, 614). They entirely agree in the principles expressed by Chief Justice Peacock in that case, and think that they govern the present case.

The result, therefore, must be that their Lordships will humbly recommend to Her Majesty that this appeal be allowed, the judgment of the High Court reversed, and the judgment of the Lower Court affirmed. The costs of the appeal will, of course, follow the result, and the Appellant will be entitled to the costs of the appeal in the Court below.

[See *Baijun Doobey v. Brij Bhookun Lall Awusti*, 1875, L.R. 2 Ind. App. 281.]

APPENDIX

ORDER IN COUNCIL FOR MORE EFFECTUAL PROSECUTION OF APPEALS BEFORE HER MAJESTY IN COUNCIL.

At the Court at Windsor Castle, the 26th day of June, 1873.

Present: THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

Whereas in many appeals now pending before Her Majesty in Council no effectual steps have been taken by the parties or their Agents to set down their cases for hearing, although more than twelve months have elapsed since the arrival and registration of the transcript of appeal in this Country, and it is expedient to make further provision in that behalf, HER MAJESTY, by and with the advice of Her Privy Council, and upon a recommendation of the Lords of the Judicial Committee of the Privy Council, is pleased to order, and it is hereby ordered, that the Solicitors or Agents for the party Appellant in all such appeals now pending before Her Majesty in Council are hereby required to take effectual steps to set down their cases for hearing within six months [10] from the date of this Order, and in all other appeals to Her Majesty in Council within a period not exceeding twelve months from the date of the arrival and registration of the transcript in this Country.

And HER MAJESTY is further pleased to order, and it is hereby ordered, that it shall be the duty of the Registrar of the Privy Council to report to the Lords of the Judicial Committee the names of the parties and dates of the Decrees in appeals in which no effectual steps have been taken within the aforesaid periods of time to

set down the case for hearing; and the Lords of the Judicial Committee of the Privy Council shall be at liberty to call upon the Appellant or his Agent in such cases to show cause why the said appeal or appeals should not be dismissed for non-prosecution, and (if they shall so think fit) to recommend to Her Majesty the dismissal of any such appeal, or to give such directions therein as the justice of the case may require.

And HER MAJESTY is further pleased to order that nothing in the present Order shall prevent the dismissal of an appeal under the 5th of the Rules approved by Her Majesty on the 13th of June, 1853, in cases to which that Rule is applicable.

Whereof the Governors of Her Majesty's Plantations and Dominions abroad, and the Judges or Officers of Her Majesty's Courts of Justice from which an appeal lies to Her Majesty in Council, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

ARTHUR HELPS.

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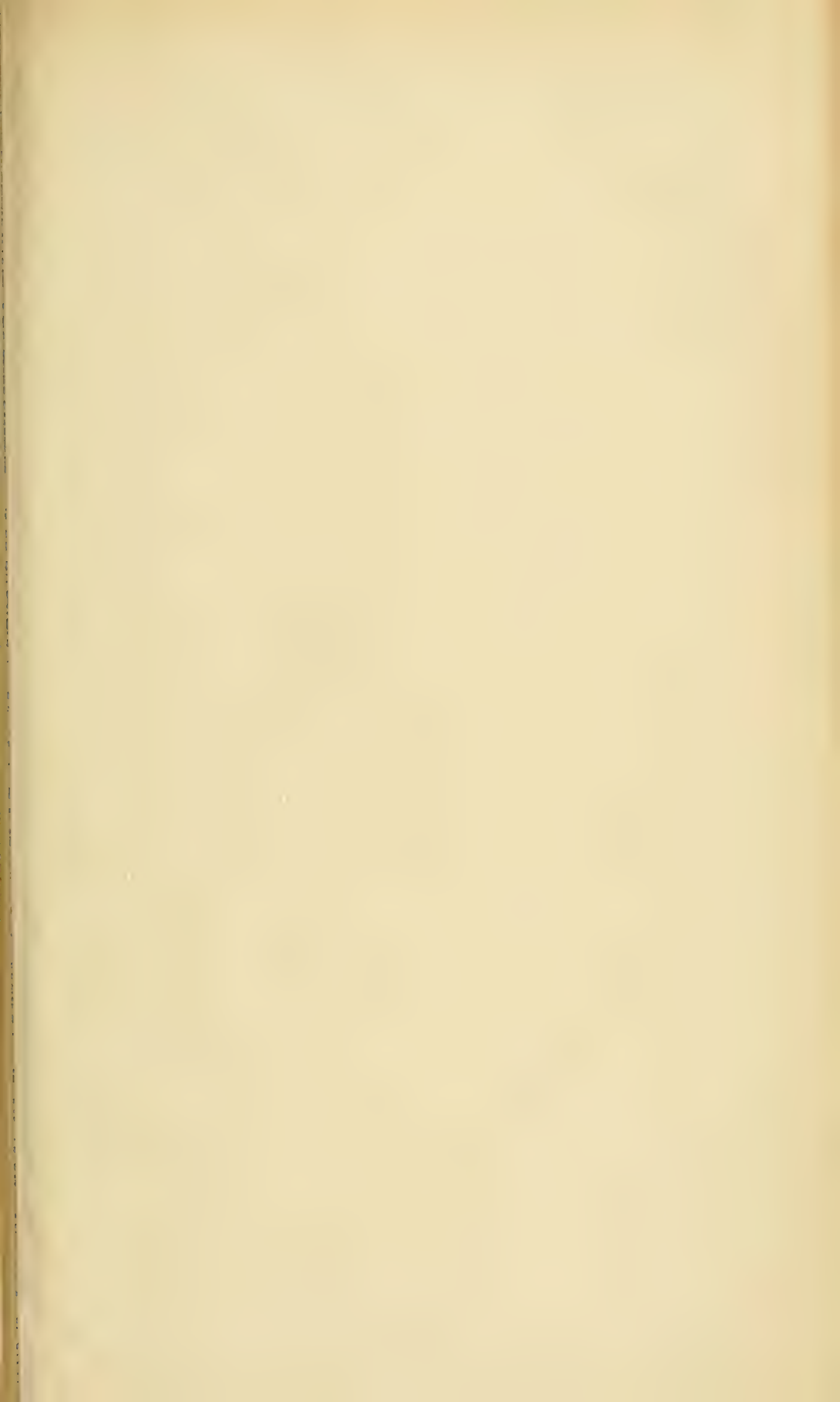
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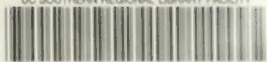
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